STATE OF WISCONSIN

IN SUPREME COURT

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

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER STATE OF WISCONSIN

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

BRIEF OF PLAINTIFF-APPELLANT-PETITIONER STATE OF WISCONSIN

ISSUES PRESENTED FOR REVIEW

1. Does ***State v. Dubose***, 2005 WI 126, ___ Wis. 2d ___, 699 N.W.2d 582, control the admissibility of eyewitness identifications resulting from procedures other than "inherently suggestive" showups?

   - The court of appeals answered "Yes."
   - This court should answer "No."

2. Does ***Dubose*** silently overrule this court's decision in ***State v. Marshall***, 92 Wis. 2d 101, 284 N.W.2d 592 (1979), in which this court explicitly held that ***Stovall v. Denno***, 388 U.S. 293 (1967), does not apply to eyewitness identifications that result when "the confrontation is not part of a police procedure directed toward obtaining additional evidence, but occurs as a result of mere chance or for some other reason not related to the identification of the defendant"?

   - The court of appeals implicitly answered "Yes."
   - This court should answer "No."

3. Did the court of appeals, contrary to Wis. Stat. § (Rule) 902.01(2), take judicial notice of facts derived from social-science research "subject to reasonable dispute"?

   - The court of appeals implicitly answered "No."
   - This court should answer "Yes."

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Oral argument. The State believes the court will find oral argument helpful as a way to explore the issues beyond the parties' presentations in their briefs.

Publication. The court's opinion, in developing Wisconsin law, will merit publication.

STANDARD OF REVIEW

> On review of a motion to suppress, this court employs a two-step analysis. First, we review the circuit court's findings of fact. We will uphold these findings unless they are against the great weight and clear preponderance of the evidence. "In reviewing an order suppressing evidence, appellate courts will uphold findings of evidentiary or historical fact unless they are clearly erroneous." Next, we must review independently the application of relevant constitutional principles to those facts. Such a review presents a question of law, which we review de novo, but with the benefit of analyses of the circuit court and court of appeals.

Dubose, 699 N.W.2d 582, ¶ 16 (citations omitted).

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

On June 25, 2002, at 2:53 p.m., as Muskego Police Detective Lieutenant Steven Kukowski (13:3) drove southbound on Racine Avenue in the City of Muskego (13:3-4, 9), he noticed a red pickup truck and a white van[2] speeding northbound (13:4). He

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[1] Because the circuit court declared a mistrial after jury selection but before the jury heard any evidence (7:1, 4, Pet-Ap. 130-31), this statement of facts and procedural history adapts the court of appeals' statement of facts, ***State v. Hibl***, 2005 WI App 228, ¶¶ 2-7, ___ Wis. 2d ___, 706 N.W.2d 134, Pet-Ap. 102-03, and draws on the allegations in the criminal complaint (2), on testimony at the preliminary examination (13), and on testimony at the suppression hearing (15; 16).

[2] Detective Kukowski testified the van had some writing on it and "described to the investigating officers that I thought there was some green aspect to it" (13:13-14; *see also* 13:18-19).

watched the two vehicles jockey for position as they traveled toward a portion of the road that narrows from two northbound lanes to one (13:5, 10, 11). He estimated the two vehicles' speeds at fifty miles per hour (13:5-6, 15, 17) in a thirty-five-mile-per-hour zone (13:5-6, 13). After the vehicles passed him, Detective Kukowski continued to watch them in his rearview mirror, observing the van pull ahead of the pickup truck (13:6, 17). The pickup truck then pulled into the southbound lane (13:6-7, 20, 21), apparently attempting to pass the van. At this point, although Detective Kukowski did not see the actual collision, he suddenly noticed dust and vehicle parts in the air and saw the pickup truck spinning (13:7). He no longer saw the white van (13:8).

Muskego Police Officer Robert Tromp (13:22) investigated the collision (13:23-24). He identified the two vehicles in the crash as "a red Chevy S10 pickup and a red Chevy Tracker SUV type vehicle" (13:24). Officer Tromp testified at the preliminary hearing that the driver of the pickup truck died on the morning of June 26, 2002 (13:25). Officer Tromp also testified that he interviewed a witness to the crash, but he could not remember the witness's name (13:27).

Alan Russell Stuller, a hydraulics specialist (14:5), witnessed the collision (14:20). As he drove southbound on Racine Avenue (14:8) at a speed of "35 to 40 miles an hour" (14:8; *see also* 14:20), he saw "a white construction van" and "a S-10 pickup truck" going northbound on Racine Avenue, "coming towards me" (14:9). He also saw "a brown police car in front of me" (14:11).

Stuller saw the pickup truck "kind of darting back and forth behind the van" (14:11). Stuller

said the vehicles caught his attention "because they were really — they were speeding" (14:11-12). He estimated the two vehicles' speeds at "about 60 miles an hour" (14:12; *see also* 14:19-20). Stuller said that after the van and truck passed him (14:11), "I looked up in my mirror, and as soon as they went by, the pickup truck pulled into oncoming traffic and struck the car directly behind me" (14:12; *see also* 14:16, 19). He said he first noticed the car behind him as the pickup truck passed: "as soon as it pulled out into the lane, I could see the other car behind me; but it wasn't for a little ways, but I could tell they were going to collide" (14:12).

Stuller said that before passing the white van, he saw the van's driver from a distance of "[p]robably 50 feet" (14:13). He described the driver as a white male (14:13-14). Stuller said that as the van passed him, he "looked directly at" the driver of the white van for a period of "[m]aybe three to five seconds" (14:19). Stuller did not remember what clothing the driver wore (14:14) and could not form an opinion as to the driver's height or weight (14:15). Stuller did not remember whether the driver wore glasses (14:15).

Upon witnessing the collision, Stuller "made a U-turn" (14:21), "stop[ped] in front of the accident scene" (14:22), and got out of his truck (14:22). He remained at the scene "[u]ntil just before, like, medical treatment arrived; maybe — maybe 15 minutes at the most" (14:23). After the collision, Stuller did not see the white van anywhere (14:21-22).

Muskego Police Detective Lieutenant Paul Geiszler took a brief statement from Stuller at the scene (14:23) and asked him to go to the police station to give a more complete statement (14:25).

Stuller complied (14:25). For about an hour, Detective Geiszler asked Stuller questions, and Stuller answered (14:26). At that time, Stuller identified the van driver as a white male but could not further describe him (14:24; *see also* 14:41-42). In addition, Stuller prepared and signed a written statement for Detective Geiszler (14:26-27).[3] The statement did not indicate that Stuller could identify the driver of the white van (15:19-20; *see also* 15:21-22).

Stuller did not view either a photo array or a physical line-up at any time after he provided his statement (14:28; *see also* 15:11-12, 19-20). Although Stuller had seen some articles about the crash, he did not read them (14:29). He said he didn't think the articles included any photographs (14:29).

Two days later (June 27), Scott Anderson, of Anderson Flooring, Inc., informed the police that one of his employees, Brian Hibl, reported witnessing the accident (2:4). Muskego Police Detective James Kaebisch (13:28) interviewed Hibl that day and took three statements from him (13:29, 32, 34). In the first statement, Hibl denied involvement in the collision (13:36). In the second statement, some portions changed from the first (13:38).

In the third statement, Hibl told Detective Kaebisch that on June 25, he had driven a white

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[3] At the suppression hearing, Hibl's lawyer introduced Stuller's statement as an exhibit (8; 14:26). The appellate record, however, does not include the statement.

cargo van northbound on Racine Avenue at approximately the same time the accident occurred (13:30-31). Detective Kaebisch reported that at one point Hibl admitted he saw the crash and might have contributed to its occurrence (2:5). Hibl told Detective Kaebisch that he had accelerated at a high rate of speed — about sixty miles per hour — going north on Racine Avenue and had increased his speed as a red pickup truck attempted to pass him (2:5). Hibl also admitted not telling the truth in his first two statements (2:5).

The State charged Hibl with three counts of reckless driving (2:1-2): one count of causing great bodily harm to another by the negligent operation of a vehicle, a violation of Wis. Stat. § 346.62(4),[4] and two counts of causing bodily harm to another by the negligent operation of a vehicle, both violations of section 346.62(3).

About three weeks to a month before the trial date on November 18, 2003 (14:29; *see also* 14:31),[5] Stuller received a subpoena to appear as a witness. Stuller said he did not become aware of a pending criminal case or of the charges against Hibl until he received the subpoena (14:29; *see also* 14:31). Between the date of the collision and

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[4] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2003-04 edition.

[5] Stuller identified Hibl in a courtroom corridor on November 18, the scheduled first day of the trial (14:33-41). Consequently, Stuller's identification occurred 511 days (one year, four months, twenty-four days) after June 25, 2002, the date on which the collision occurred and Stuller first saw Hibl.

his receipt of the subpoena, Stuller did not have any contact with anyone from the Muskego Police Department or with anyone from the Waukesha County District Attorney's office (14:30). He had not seen Hibl's name until he saw it in the case caption on the subpoena (14:31), the first point at which he knew the State had charged Hibl (14:31).

After receiving the subpoena, Stuller did not have any contact with anyone from the Muskego Police Department until a brief conversation with an officer in the waiting room outside the courtroom on the scheduled first day of the trial (14:31-32). The conversation concerned the fact that both Stuller and the officer "lived in Muskego, and that was pretty much it" (14:36). They did not discuss anything about the case (14:37).

Between receipt of the subpoena and the trial date, Stuller had one contact with the district attorney's office: a telephone call from the prosecutor to advise that he and Stuller would meet at the courthouse on the first day of the trial and review Stuller's statements before the trial began (14:32-33; *see also* 15:21-22).

On the day of trial, Stuller arrived at the Waukesha County Courthouse (14:33-34), a facility he had never previously visited (14:34). He arrived by himself, unaccompanied by anyone from the Muskego Police Department or the Waukesha County District Attorney's office (14:34). He "sat down in the chair right outside [the courtroom] in the waiting room" (14:35; *see also* 14:38-39) to "wait[ ] for somebody to let know that I was here" (14:35). He did not look into the courtroom and did not speak to any court personnel (14:36). While waiting, he spoke briefly with a Muskego police officer, but not about the case (14:36-37).

Stuller first spoke with someone about his potential testimony when the prosecutor came out of the courtroom and met him in the waiting room (14:37, 40). They walked into the hallway to review the written statement Stuller had provided Detective Geiszler (14:37-39). Stuller did not see anyone else leave the courtroom itself before he and the prosecutor went into the hallway (14:40), where, according to Stuller, "[t]here was a lot of people. I mean, there was probably 10 — 10 people in the hallway. There was people sitting on the benches" (14:41).

After talking with the prosecutor for about two or three minutes in the hallway (14:40), Stuller "just turned to [his] left and . . . saw the defendant, Mr. Hibl[,] . . . . [p]robably about ten feet away" (14:40), walking with someone else in the hallway (14:41). Stuller told the prosecutor, "That's him" (14:42). Stuller "knew he recognized [Hibl]" from "[h]is face in general. . . . It just — it — he stood out from everybody else in the hallway" (14:41). Before this encounter, Stuller had not expected to see "the same person that [he] had seen in the white construction van on June 25th, 2002" (14:36). In the suppression order, the circuit court held that "[t]here is *no* evidence that the police or District Attorney's office intentionally or unintentionally suggested the identification of [Hibl] to Mr. Stuller" (11:2, Pet-Ap. 122 (emphasis added)).

After Stuller identified Hibl in the hallway, the prosecutor contacted Detective Kaebisch, the lead investigator and court officer for the case (15:5), about the identification (15:14). They conversed in "a conference room or interview room" (15:14), at which time "he [the prosecutor] told me [Detective

Kaebisch] I probably would be getting a statement from Stuller, because he had just identified the defendant, Hibl, as being the driver of the suspect vehicle, the third vehicle we were looking for" (15:14). Before this meeting, Detective Kaebisch had not known anything about Stuller (15:13), including his status as a witness in the case (15:13).

After this meeting with the prosecutor, Detective Kaebisch met Stuller and interviewed him (15:14). Detective Kaebisch said he "took [Stuller] into the interview room and asked him to tell me exactly what happened" (15:15).

> Q. [by defense counsel] Was anybody else with you?
>
> A. [by Detective Kaebisch] No.
>
> Q. What did Mr. Stuller tell you?
>
> A. He told me that he and Mr. Szczupakiewicz [the prosecutor] were talking.
>
> Q. Did he tell you where they were?
>
> A. I think it was in the hallway.
>
> Q. All right.
>
> A. And at that time, he said that they were discussing the case and his testimony, and at that time he, I guess, looked up and saw the defendant, Mr. Hibl, coming out of the courtroom, at which time he made a statement "there he is," something to that effect, and told Mr. Szczupakiewicz that he was the driver of the suspect vehicle we were looking for, that he saw that day, of the third vehicle.

(15:15.) Stuller gave Detective Kaebisch a written statement (15:16), and Detective Kaebisch pre-

pared a narrative report as well (15:16-17).[6] Detective Kaebisch also interviewed the prosecutor, who told the detective "[b]asically, the same thing" (15:16) about the circumstances of Stuller's identification of Hibl. The prosecutor later told the court that

> I telephoned Mr. Stuller and spoke with him about his testimony. He never gave me any indication that he was able to identify Mr. Hibl as the driver of the vehicle, and I don't recall whether or not we even discussed his ability to make any identification of him. So, that was it. Basically, the nature of our conversation related to other things about Mr. Stuller's testimony.

(15:22.)

Following jury selection and a brief recess before opening statements (7:1, ¶ 4, Pet-Ap. 130), defense counsel "was approached by the prosecutor . . . and advised that a witness, Alan R. Stuller, had advised him that [Stuller] had identified [Hibl] as the person driving the non contact van which was allegedly involved in the collision which is the basis of the prosecution herein" (7:1, 4, ¶ 5, Pet-Ap. 130-31).[7] Based on this information, defense counsel "moved for a mistrial and the State joined in said Motion and the court granted said Motion" (7:4, ¶ 6, Pet-Ap. 131).[8]

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[6] The appellate record does not contain either of these exhibits (9; 15:16, 17).

[7] The pages of the suppression order and defense counsel's affidavit do not appear in the correct order in the appellate record.

[8] The court granted a mistrial before the State presented any evidence (7:1, 4, Pet-Ap. 130-31; *see also* Pet-Ap. 136 (entry for 11/18/2003)). Consequently, Stuller never tes-

(footnote continues on next page)

Hibl filed a motion to suppress the pretrial identification made by Stuller (7, Pet-Ap. 124-29). The circuit court held evidentiary hearings on June 4 and August 9, 2004 (14; 15), later granting Hibl's suppression motion (11, Pet-Ap. 121-23).

On November 4, 2004, the State filed its notice of appeal.[9]

On March 4, 2005, with the filing of a notice by the prosecutor that he would not file a reply brief, the parties completed their appellate briefing.

On July 14, 2005, this court issued its decision in ***Dubose***, 699 N.W.2d 582.

On September 28, 2005, the court of appeals issued its decision in this case. ***State v. Hibl***, 2005 WI App 228, ___ Wis. 2d ___, 706 N.W.2d 134, Pet-Ap. 101-120. The court of appeals, over Judge Brown's dissent, concluded that ***Dubose*** fundamentally changed the legal rules for assessing the validity of all eyewitness identifications, not just those arising from on-the-street showups. The majority opinion did not cite, analyze, or in any way acknowledge the existence of this court's precedents dealing with spontaneous identifications:

(footnote continues from previous page)

tified and, therefore, never identified Hibl during the trial. So, the circuit court clearly erred when it wrote that Stuller identified Hibl "in the courtroom during the trial" (11:1, Pet-Ap. 121). The court of appeals repeated this factual error. ***Hibl***, 706 N.W.2d 134, ¶¶ 6-7, Pet-Ap. 103.

[9] Pursuant to Wis. Stat. § 978.05(5), the attorney general authorized the Waukesha County District Attorney's office to handle the appeal in the court of appeals.

State v. Marshall, 92 Wis. 2d 101, 117-18, 284 N.W.2d 592 (1979), *abrogated on other grounds by State v. Dean*, 103 Wis. 2d 228, 307 N.W.2d 628 (1981), *superseded in part by statute*, 1995 Wis. Act 440;[10] ***Jones v. State***, 63 Wis. 2d 97, 216 N.W.2d 224 (1974); and ***State v. Brown***, 50 Wis. 2d 565, 185 N.W.2d 323 (1971), *overruled on other grounds by State v. Walker*, 154 Wis. 2d 158, 453 N.W.2d 127 (1990).[11]

The State's petition for review followed.

ARGUMENT

I. A NOTE ON FACTUAL ERRORS IN THE CIRCUIT COURT'S DECISION.

In addition to the error about an in-court identification by Stuller (see note 8, above), the circuit court's decision contains three other errors of fact.

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[10] In ***State v. Dean***, 103 Wis. 2d 228, 307 N.W.2d 628 (1981), this court barred polygraph evidence unless the parties had entered into a *Stanislawski* stipulation on or before September 1, 1981. ***Id.*** at 279. ***Dean*** thus abrogated the portion of ***State v. Marshall***, 92 Wis. 2d 101, 284 N.W.2d 592 (1979), that dealt with *Stanislawski* stipulations. ***Id.*** at 110-11. The legislature later created an exception to ***Dean***. *See* 1995 Wis. Act 440, § 84 (codified at Wis. Stat. § 942.06(1)); *id.* § 86 (codified at Wis. Stat. § 942.06(2m)).

[11] On Brown's appeal, this court held that "an identification otherwise valid does not come under the exclusionary rule because the arrest was illegal." ***State v. Brown***, 50 Wis. 2d 565, 570, 185 N.W.2d 323 (1971). In ***State v. Walker***, 154 Wis. 2d 158, 453 N.W.2d 127 (1990), this court overruled ***Brown*** "insofar as [it] hold[s] that lineup identification may not be suppressed as the fruit of an unlawful arrest." ***Id.*** at 186.

First, the court cites "Aff. 40-41" (11:2, Pet-Ap. 122) in support of two facts: the number of people in the hallway when Stuller made his identification, and Stuller's alleged knowledge that "he would see the alleged defendant" that day. An affidavit of that length does not exist in this case. Here, the court meant to cite the June 4, 2004 transcript of the suppression hearing (14:40-41), not a nonexistent affidavit. This portion of the transcript, however, does not contain any reference to whether Stuller knew he would see Hibl that day. The only reference to Stuller's expectations occurs elsewhere in the transcript, at which point Stuller said he had *not* necessarily expected to see "the same person that [he] had seen in the white construction van on June 25th, 2002" (14:36).

Second, after the erroneous citation to a nonexistent affidavit, the circuit court cites the same source for the proposition that "[j]ust prior to identifying the defendant, Mr. Stuller spoke with the police officer assigned to the case and to the Assistant District Attorney assigned to the case. (Id. 14-15.)" (11:2, Pet-Ap. 122). This record cite actually refers to the August 9, 2004 transcript of the suppression hearing (15:14-15). As those transcript pages make clear, Stuller spoke with Detective Kaebisch *after* the spontaneous identification occurred, not before. Stuller spoke with Detective Kaebisch because the prosecutor advised Detective Kaebisch about the identification and told the detective he should get a statement from Stuller (15:14).

Third, the circuit court cites the same pages (15:14-15) for the notion that while conversing in the hallway, Stuller and the prosecutor "anticipat[ed] the alleged defendant in court in a few

minutes" (11:2, Pet-Ap. 122). Again, those pages of the transcript do not even hint that Stuller or the prosecutor anticipated Hibl's appearance either in the courtroom or in the hallway. Rather, this portion of the transcript contains Detective Kaebisch's account of the post-identification interview of Stuller, none of which deals with any alleged anticipation of Hibl's presence.

Moreover, even if the prosecutor had some anticipation of this sort, neither those pages in the transcript nor any other part of the record indicates in any way that Stuller did. Stuller had not looked in the courtroom or spoken with any court personnel (14:36) before making the spontaneous identification. Consequently, while standing in the hallway, Stuller could not have known whether Hibl had already entered the courtroom and, therefore, could not have had any anticipation regarding Hibl's presence or absence in the hallway, the courtroom, or anywhere else in the courthouse. And regardless of Stuller's anticipation (or lack of it), the circuit court held that "[t]here is *no* evidence that the police or District Attorney's office intentionally or unintentionally suggested the identification of [Hibl] to Mr. Stuller" (11:2, Pet-Ap. 122 (emphasis added)).

II. THE CASE-LAW CONTEXT FOR THE COURT OF APPEALS' DECISION IN *HIBL*.

The court of appeals' majority and dissenting opinions in ***Hibl*** feature four principal cases decided by this court:

- ***Dubose***, 699 N.W.2d 582
- ***Marshall***, 92 Wis. 2d 101
- ***Jones***, 63 Wis. 2d 97

- ***Brown***, 50 Wis. 2d 565

This section summarizes those cases as background for the State's argument.

A. *State v. Brown*, 50 Wis. 2d 565, 185 N.W.2d 323 (1971).

Brown arose from a conviction for armed robbery. Two witnesses — Paul Agnello (the owner of the business Brown robbed) and Beatrice Golimowski (an employee of the business) — identified Brown.

> At the Safety Building Mrs. Golimowski saw Brown as he emerged from an elevator while he was being brought from the police quarters to the district attorney's office; she identified him. Paul Agnello identified Brown later in the district attorney's office while he was reiterating a confession to the district attorney.

Brown, 50 Wis. 2d at 567-68. In a pretrial motion, Brown moved to suppress the identifications. ***Id.*** at 568. The circuit court deferred a decision until trial. At trial, when the State called Agnello and Golimowski to testify, Brown renewed his motion. "The trial judge allowed Agnello and Golimowski to identify Brown in court subject to his objection. At the conclusion of the state's case, Brown again moved to suppress the identification evidence. The court found the identifications were not the fruit of an illegal arrest and denied the motion." ***Id.*** at 568.[12]

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[12] *See supra* note 11.

In this court, Brown contended "his identification at the police station was the result of a confrontation which was so unnecessarily suggestive as to be illegal." ***Id.*** at 570. This court suppressed Agnello's identification, ***id.*** ("[w]e think this identification of Brown by Agnello, made while Brown was confessing to the district attorney, was the result of an inherently and obviously suggestive situation"), but permitted Golimowski's:

> Mrs. Golimowski's first identification of Brown was as he left an elevator in the Safety Building. Prior to that she correctly observed that Brown was not in a lineup; she did not know that Brown had confessed. Her confrontation with Brown was not in any way suggestive or planned. She saw Brown merely as a man being transported by the police.

Id.

Thus, this court held in ***Brown*** that a serendipitous encounter between a defendant and an eyewitness in a police station does not occur under suggestive conditions and does not taint a subsequent in-court identification.

B. *Jones v. State*, 63 Wis. 2d 97, 216 N.W.2d 224 (1974).

Jones originated in the armed robbery of a Milwaukee cab driver. Timothy Ellis, the cab driver, gave police a description of the robber and the location at which Ellis had dropped another passenger and picked up the robber. ***Jones***, 63 Wis. 2d at 100. Detectives located and arrested Jones and took him to the Safety Building. ***Id.*** at 101.

> Sometime later, a lineup was conducted in the Safety Building in which Jones appeared along with three or four other black males. Ellis sat some 15 to

> 20 feet from the lineup but was unable to identify any of the lineup participants as the man who robbed him because he did not have his glasses with him and could not distinguish one form from another. Ellis was told to return to the detective bureau around 8:30 or 9:00, later in the morning. When he arrived that morning, he was not referred to the bureau of identification but was taken by a detective to the anteroom corridor outside the district attorney's office. There he sat with the detective. Shortly thereafter, Jones appeared in the corridor accompanied by another detective and two officers on his way to the district attorney's office. Ellis, upon seeing Jones, voluntarily identified Jones to the detective sitting with him as the man who had robbed him the preceding evening; later in the district attorney's office, Ellis repeated the identification and Jones was then charged with armed robbery.
>
> While Ellis was sitting in the district attorney's office, there was present another cab driver, Jose A. Pierce, who had been similarly robbed the preceding evening and who had positively identified Jones at a showup conducted earlier that morning in the detective assembly as the man who had robbed him. There is a dispute in the record whether at this point Ellis talked to Pierce. At the *Wade* hearing, Ellis said he did not; Jones testified he saw Pierce and Ellis talking together. This issue was for the fact finder to resolve, which he did against Jones.
>
> . . . There is nothing in the record to indicate, if it is material, that the police staged this informal confrontation outside the district attorney's office. The parties all treat this as an informal confrontation or one out-of-a-crowd identification, and this court will so consider it.

Id. at 101-02.

Jones challenged the "informal confrontation" in the anteroom of the district attorney's office as "unduly suggestive" and as tainting a subsequent in-court identification. ***Id.*** at 105.

> Jones argue[d] that the informal confrontation in the district attorney's outer lobby was unnecessarily suggestive because: (1) It was a one-to-one confrontation such as condemned in *Stovall v. Denno,* [388 U.S. 293 (1967)], because the accused did not mingle in the room with the other people but was escorted through the room to the district attorney's office in handcuffs by a detective; (2) the district attorney's office's lobby or outer office was suggestive of guilt and a more accusatorial setting than a formal lineup in a police department; (3) there was no compelling reason for this type of confrontation because a formal confrontation was available and in fact had been used earlier in the morning when the other cab driver identified him; (4) there may have been other evidence indicating his guilt, such as the presence of the first cab driver in the room and the fact that he was a suspect; (5) the police were sure of his guilt; (6) the emotional state of the witness, Ellis, may have been such as to preclude objective identification; and (7) the limited observation of Jones by Ellis.

Id. at 106-07. This court rejected each of Jones's objections. On the point relevant to the spontaneous identification in this case, the court wrote:

> We do not consider this informal confrontation as a one-to-one confrontation, nor are the facts clear that Ellis saw the handcuffs upon Jones. Ellis testified he did not; but even if he did, that fact alone would not be sufficient suggestiveness.
>
> The identification of Jones by Ellis in the district attorney's outer office or lobby was not prompted by the police; Ellis was not told why he was taken to the district attorney's office; he did not expect a confrontation. So far as the record shows, Ellis, upon seeing Jones, spontaneously identified Jones. This was a natural reaction under the circumstances.

Id. at 107. This court upheld the admission of the identification resulting from the out-of-court "informal confrontation." ***Id.*** at 108.

As ***Jones*** shows, an unplanned encounter between a defendant and an eyewitness, even in the anteroom of a district attorney's office, does not occur in unduly suggestive circumstances and does not amount to a one-on-one confrontation, at least when the confrontation occurs in a location occupied by other people as well.

C. *State v. Marshall*, 92 Wis. 2d 101, 284 N.W.2d 592 (1979).

Marshall originated in a conviction for first-degree intentional homicide, party to a crime, for the murder of Thomas West. ***Marshall***, 92 Wis. 2d at 106, 107. Roosevelt Cummings (the State's principal witness because another witness, Jerry Lee Robinson, proved both unreliable and unwilling to testify, ***id.*** at 108) identified Marshall.

> Cummings occupied the cottage directly to the rear of the building in which West's and Robinson's apartments were located. On the night of the murder he had been watching television when he was interrupted by a knock at his front door. He answered the door and was asked by a person whom he had not seen before if a Tom Slick lived there. Realizing that this person was looking for Thomas West, Cummings directed him to the forward building and told him he would find the man he was looking for there.

Id. Cummings watched as the person spoke with a passenger in a nearby car and then continued toward West's residence, followed by two men from the car. ***Id.*** at 108-09. "Shortly thereafter, Cummings heard loud voices and arguing coming from West's apartment," and gunshots a few minutes later. ***Id.*** at 109

> Although Cummings was later shown a picture of the defendant by the police, along with a number of other pictures, he failed to identify him as the man

> who had come to his door looking for West on the night of the murder. In fact, on the same day as the murder, Cummings had picked out a photograph of one David Darnell Hardy as resembling the man who had asked him the whereabouts of Tom Slick. On August 18, 1975, however, as Cummings was sitting in the rear of the courtroom, he saw the defendant sitting a few rows in front of him and immediately recognized him as the man he had seen that night. He reported this to a police officer, and several days later a line-up was held at which Cummings again identified the defendant as the man who had come to his door the night of the murder.
>
> As a result of his identification of the defendant and Robinson's refusal to testify, Cummings became the State's key witness at defendant's trial. On the basis of his testimony the jury found the defendant guilty as charged.

Id. at 108-09.

Marshall challenged Cummings's identification, arguing that the identification "was the equivalent of an on the scene 'show-up' identification and that it was unduly and impermissibly prejudicial and suggestive." ***Id.*** at 116. This court rejected Marshall's contention. The court declared that

> where a defendant has been subjected to a confrontation with a supposed witness to a crime and that confrontation is "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deprive him of due process, testimony concerning that identification should be excluded. Whether identification following such a confrontation actually offends due process is to be determined by "the totality of the circumstances surrounding it."

Id. at 116-17 (quoting *Stovall*). The court then summarized the procedure for making this determination:

> Subsequent cases have made clear that, in making the determination of whether the identification evidence must be excluded, the court must first decide if the confrontation procedure was characterized by unnecessary suggestiveness, and then, if it was, the court must further decide whether, despite the unnecessary suggestiveness of the confrontation procedure, the totality of the circumstances show that the identification was nevertheless reliable. Only where unnecessarily suggestive confrontation procedures have been used and, under the totality of circumstances the identification appears not to be reliable, is it to be excluded. ". . . reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations." *Manson v. Brathwaite,* 432 U.S. 98, 114 (1977). *See also Simos v. State,* 83 Wis.2d 251, 265 N.W.2d 278 (1978).
>
> ***Before this analysis is applied, however, it must first be determined whether the confrontation was deliberately contrived by the police for purposes of obtaining an eyewitness identification of the defendant.*** *Stovall, Biggers* and *Brathwaite, supra,* all involved planned confrontations between a suspect and a supposed witness to a crime orchestrated by the police for the sole purpose of having the witness identify the suspect as the perpetrator of that crime. It was the improper use of this particular police practice that was the focus of the United States Supreme Court's decisions in those cases. ***Where the confrontation is not part of a police procedure directed toward obtaining additional evidence, but occurs as a result of mere chance or for some other reason not related to the identification of the defendant, the rule announced in those cases does not apply.***

Id. at 117-18 (footnote omitted) (italicized boldface emphasis added). The court next summarized its decisions in ***Jones***, 63 Wis. 2d 97, and ***Brown***, 50 Wis. 2d 565, describing the circumstances in those cases as "more suggestive than those present here," ***id.*** at 118, and then contrasted unplanned

identifications with those resulting from planned confrontations:

> The record before us clearly shows that Cummings' identification of the defendant was not prearranged and was as much a surprise to the State as it was to the defendant. There is no evidence that Cummings appeared in court on the date of defendant's hearing for any reason other than in answer to his subpoena. He had been subpoenaed to testify at defendant's trial which was originally scheduled to begin on that day. Although he had not identified the defendant before this time, he was still a material witness for the State and could at least partially corroborate Robinson's story.
>
> Even if this had been a confrontation planned by the police, however, defendant would still not be entitled to relief on this issue. For in our view there was nothing about the circumstances under which Cummings observed the defendant that was "so unnecessarily suggestive and conducive to irreparable mistaken identification" that he was denied due process of law. *Stovall v. Denno*, 388 U.S. at 302. . . .
>
> This situation is significantly different from the "show-up" confrontations condemned by the United States Supreme Court in *Stovall v. Denno*, 388 U.S. at 302, and in *Foster v. California*, 394 U.S. 440 (1969). In a "show-up," a lone suspect is presented to a witness who is then asked, "Is this the one?" The mere fact that the police themselves suspect this person and that he alone is presented to the witness strongly suggests that he in fact is the guilty party. An identification made under those circumstances is obviously a less reliable test of the witness' recollection than one resulting from a line-up or some other procedure. No "show-up" procedure, however, was used here. In fact no identification procedure was being used at all when Cummings first recognized the defendant. . . .

Id. at 118-20.

Marshall thus treated showup identifications and unplanned identifications as fundamentally different. Unless "the confrontation [between the defendant and the witness] was deliberately contrived by the police for purposes of obtaining an eyewitness identification of the defendant," ***id.*** at 117, "the rule announced in [*Stovall*, *Biggers*, and *Brathwaite*] does not apply," ***id.*** at 118.

D. *State v. Dubose*, 2005 WI 126, ___ Wis. 2d ___, 699 N.W.2d 582.

Dubose arose from an armed robbery of Timothy Hiltsley. While visiting Hiltsley's apartment with another man and Ryan Boyd (a friend of Hiltsley), ***Dubose***, 699 N.W.2d 582, ¶ 3, "Dubose allegedly held a gun to Hiltsley's right temple and demanded money. After Hiltsley emptied his wallet, and gave the men his money, the two men, both African-Americans, left his apartment." ***Id.*** ¶ 4. Within minutes, a neighbor called the police and described one of the men as "wearing a large hooded flannel shirt." ***Id.*** ¶ 5. Hiltsley gave one of the responding officers a brief description of the suspects. ***Id.*** Eventually, a police canine unit tracked down Dubose within a block of the crime. ***Id.*** ¶ 7. The police arrested and searched Dubose, but did not find any weapons, money, or contraband on him. ***Id.*** ¶ 8. "Dubose was then placed in the back of a squad car and driven to an area near Hiltsley's residence." ***Id.***

> At this location, the officers conducted a showup procedure, giving Hiltsley the opportunity to identify one of the alleged suspects. The officers placed Hiltsley in the backseat of a second squad car, which was parked so that its rear window was three feet apart from the rear window of the squad car containing Dubose. The dome light was turned on in the car

> containing Dubose. The officers told Hiltsley that Dubose was possibly one of the men who had robbed him at gunpoint, and asked Hiltsley if he could identify the man in the other squad car. Hiltsley told the police that he was 98 percent certain that Dubose, who sat alone in the back seat of the other squad car, was the man who held him at gunpoint. Hiltsley also told the police that he recognized him due to his small, slender build and hairstyle.
>
> The squad cars separated and took both Hiltsley and Dubose to the police station. Approximately 10 to 15 minutes after the first showup, the police conducted a second showup. There, Hiltsley identified Dubose, alone in a room, through a two-way mirror. Hiltsley told police that Dubose was the same man he observed at the previous showup, and that he believed Dubose was the man who robbed him. A short time after the second showup, the police showed Hiltsley a mug shot of Dubose, and he identified him for a third time.

Id. ¶¶ 9-10. The circuit court denied Dubose's motion to suppress the showup identification as unnecessarily suggestive and as the fruits of an unlawful arrest. ***Id.*** ¶ 11. At trial, Hiltsley identified Dubose in the courtroom. ***Id.*** The jury convicted Dubose, ***id.***, and the court of appeals affirmed, specifically rejecting Dubose's objections to the identifications, ***id.*** ¶¶ 13-14.

This court reversed and established a new standard for showup identifications. Specifically relying on ***Stovall*** "as [its] guide," ***id.*** ¶ 33, the court announced:

> [W]e now adopt a different test in Wisconsin regarding the admissibility of showup identifications. We conclude that evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible 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. A lineup or 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. In a showup, however, the only option for the witness is to decide whether to identify the suspect.

Id. (citations omitted) (footnotes omitted). In abandoning ***Neil v. Biggers***, 409 U.S. 188 (1972), and ***Manson v. Brathwaite***, 432 U.S. 98 (1977), and returning to ***Stovall***, 388 U.S. 293, as the standard for assessing out-of-court showup identifications, the court declared this change a requirement of Article I, Section 8 of the Wisconsin Constitution:

> Based on our reading of that clause, and keeping in mind the principles discussed herein, the approach outlined in *Biggers* and *Brathwaite* does not satisfy this requirement. We conclude instead that Article I, Section 8 necessitates the application of the approach we are now adopting, which is a return to the principles enunciated by the United States Supreme Court's decisions in *Stovall, Wade*, and *Gilbert*.

Id. ¶ 39 (footnote omitted). Under these standards, the court found Dubose's showup both unnecessary and unnecessarily suggestive.

III. In Affirming The Suppression Of An Identification Resulting From A Spontaneous Encounter Between An Eyewitness And A Suspect, The Court Of Appeals Erroneously Selected, Interpreted, And Applied *Dubose*.

The court of appeals erred in two interrelated ways: first, by selecting ***Dubose***, 699 N.W.2d 582,

as the relevant precedent, and, second, by misinterpreting the scope of ***Dubose*** and therefore misapplying the case.

A. The Court Of Appeals Erred By Selecting *Dubose* Instead Of *Marshall* As The Controlling Precedent.

The court of appeals erred when it relied on ***Dubose*** as the applicable precedent. As Judge Brown vigorously asserted in his dissent, the court of appeals should have relied on ***Marshall***, 92 Wis. 2d 101.

The court of appeals' error originates in its apparent assumption that because the circuit court relied on ***Wolverton***, 193 Wis. 2d 234, and because this court's decision in ***Dubose*** abrogated ***Wolverton***, the proper rule of decision must reside in ***Dubose***. ***Hibl***, 706 N.W.2d 134, ¶¶ 9-10, Pet-Ap. 104-05. In moving directly from the circuit court's reliance on ***Wolverton*** to its own reliance on ***Dubose***, however, the court of appeals missed a critical step: recognizing that the circuit court should not have relied on ***Wolverton*** in the first instance, even absent the existence of ***Dubose***.

In ***Wright v. State***, 46 Wis. 2d 75, 86 & n.12, 175 N.W.2d 646 (1970), this court applied ***Stovall***, 388 U.S. 293, to assess the fairness of two lineups. Later, in ***Fells v. State***, 65 Wis. 2d 525, 223 N.W.2d 507 (1974), this court adopted and applied the ***Biggers*** test for the admissibility of pretrial identifications. ***Id.*** at 536-39. The court followed suit in ***Wolverton*** (a showup case), adding ***Brathwaite*** to the mix, ***Wolverton***, 193 Wis. 2d at 264-65, while rejecting ***Stovall***, *see* ***Dubose***, 699 N.W.2d 582, ¶ 27 (characterizing *Wolverton* as

upholding admissibility of showup identification under *Biggers* and *Brathwaite* rather than *Stovall*). *See also* ***id.*** ¶ 16 ("With guidance from the United States Supreme Court, this court has adopted the test set forth in *Biggers* and *Brathwaite* in an attempt to minimize the misidentification of defendants in Wisconsin" (citing *Wolverton* and *Fells*)). In ***Dubose***, this court repudiated ***Biggers*** and ***Brathwaite***, returning to ***Stovall*** for appropriate guidance. ***Id.*** ¶ 33.

Meanwhile, in 1979, in ***Marshall***, this court squarely faced the issue of whether ***Stovall***, ***Biggers***, and ***Brathwaite*** apply to unplanned or spontaneous identifications. This court gave an unequivocal answer: "Where the confrontation is not part of a police procedure directed toward obtaining additional evidence, but occurs as a result of mere chance or for some other reason not related to the identification of the defendant, the rule announced in those cases does not apply." ***Marshall***, 92 Wis. 2d at 118. Moreover, this court explicitly distinguished showups from spontaneous identifications. ***Id.*** at 119-20 ("This situation is significantly different from the 'show-up' confrontations condemned by the United States Supreme Court in *Stovall* . . . and in *Foster*").

Dubose does not even hint — much less declare — that it intended to overrule a precedent explicitly holding that the cases at issue in ***Dubose*** do not even apply to a case like Hibl's. In ***Dubose***, this court repeatedly referred to the inherent suggestiveness of showups as the impetus for the shift from the ***Biggers/Brathwaite*** standard to ***Stovall***'s. Indeed, the court of appeals' own quotations from and references to ***Dubose*** recite this court's repeated references to showups as

the context for the change in standards. ***Hibl***, 706 N.W.2d 134, ¶ 10, Pet-Ap. 104-05.

Nothing else in ***Dubose*** leads to a conclusion that it rather than ***Marshall*** governs this case. The majority and dissenting opinions in ***Dubose*** cite sixty-seven cases either directly or parenthetically. Of those sixty-seven cases, twenty-three concern eyewitness identifications.[13] All of those cases involve lineups or showups, sometimes both.[14]

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[13] ***Manson v. Brathwaite***, 432 U.S. 98, 101 (1977) (photo showup); ***Neil v. Biggers***, 409 U.S. 188, 194-95 (1972) (showup at police station after several months of in-person and photo lineups and showups); ***Coleman v. Alabama***, 399 U.S. 1, 3-6 (1970) (lineup); ***Foster v. California***, 394 U.S. 440, 441-42 (1969) (lineup followed immediately by showup in police station, followed by second lineup about a week later); ***Simmons v. United States***, 390 U.S. 377, 382 (1968) (identification by photo display); ***Stovall v. Denno***, 388 U.S. 293, 295 (1967) (showup in hospital); ***Gilbert v. California***, 388 U.S. 263, 270 n.2 (1967) (post-indictment pretrial lineup without counsel); ***United States v. Wade***, 388 U.S. 218, 219-20 (1967) (same); ***Turner v. United States***, 622 A.2d 667, 670 (D.C. 1993) (showup at crime scene); ***Commonwealth v. Johnson***, 650 N.E.2d 1257, 1258-59 (Mass. 1995) (1,500-image photo array in six books, followed a day later by showup at detention site); ***State v. Leclair***, 385 A.2d 831, 832-33 (N.H. 1978) (four-photo array, followed by single-photo showup, followed by "what amounted to a one-man showup" in police station); ***State v. Cromedy***, 727 A.2d 457, 459 (N.J. 1999) (large photo array including defendant's photo, followed eight months later by unplanned encounter, followed "[w]ithin fifteen minutes" by showup in police station); ***People v. Adams***, 423 N.E.2d 379, 381-83 (N.Y. 1981) (showup in police station); ***State v. McMorris***, 213 Wis. 2d 156, 162-63, 570 N.W.2d 384 (1997) (post-indictment pretrial lineup without counsel) ; ***State v. Wolverton***, 193 Wis. 2d 234, 265-66, 533 N.W.2d 167 (1995) (two showups at crime scene), *abrogated by State v. Dubose*, 2005 WI 126, ¶¶ 26, 33, ___ Wis. 2d ___,

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699 N.W.2d 582; ***State v. Streich***, 87 Wis. 2d 209, 212, 274 N.W.2d 635 (1979) (unplanned identification at police station, followed by showup in police station), *limited on other grounds by Dubose*, 699 N.W.2d 582, ¶ 33 n.9; ***Powell v. State***, 86 Wis. 2d 51, 54, 271 N.W.2d 610 (1978) (five-image photo array); ***State v. Isham***, 70 Wis. 2d 718, 722-23, 235 N.W.2d 506 (1975) (at crime scene, voice-identification showup followed immediately by visual-identification showup); ***Fells v. State***, 65 Wis. 2d 525, 530, 223 N.W.2d 507 (1974) (seven-photo array shown to victim in hospital, followed several weeks later by lineup), *abrogated by Dubose*, 699 N.W.2d 582, ¶¶ 26, 33 ___ Wis. 2d ___; ***State v. Russell***, 60 Wis. 2d 712, 716-17, 720, 211 N.W.2d 637 (1973) ("police station 'showup' or one-to-one identifications" (footnote omitted)); ***State v. DiMaggio***, 49 Wis. 2d 565, 571-72, 586, 182 N.W.2d 466 (1971) (showup at crime scene); ***Johnson v. State***, 47 Wis. 2d 13, 16, 176 N.W.2d 332 (1970) (showup at crime scene); ***State v. Kaelin***, 196 Wis. 2d 1, 7, 538 N.W.2d 538 (Ct. App. 1995) (showup at crime scene), *limited on other grounds by Dubose*, 699 N.W.2d 582, ¶ 33 n.9.

[14] Two cases also include spontaneous identifications by eyewitnesses. In ***Cromedy***, 727 A.2d 457, while "standing on the corner of a street . . . waiting for the light to change," the victim of a rape "saw an African-American male across the street from her who she thought was her attacker." ***Id.*** at 459. The victim called the police, and "[w]ithin fifteen minutes," the victim identified the defendant in a showup at the police station. ***Id.*** This identification occurred eight months after the victim "was shown many slides and photographs, including a photograph of the defendant, in an unsuccessful attempt to identify her assailant." ***Id.*** The appeal dealt with the trial court's denial of the defendant's request for a jury instruction on cross-racial identification, not with any claim of undue suggestiveness in the unplanned identification on the street.

In ***Streich***, 87 Wis. 2d 209 — a pre-***Marshall*** case — a police detective asked the witness "to come down to the police station . . . to identify a suspect." ***Id.*** at 212. At the time, the detective "had not seen the suspect and did not

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Moreover, ***Dubose*** does not cite ***Marshall***, 92 Wis. 2d 101; ***Jones***, 63 Wis. 2d 97; or ***Brown***, 50 Wis. 2d 565 — further evidence that this court did not intend ***Dubose*** to overrule or otherwise limit the precedential value of those cases.

In effect, by selecting ***Dubose*** without distinguishing or even citing ***Marshall***, and without explaining why or how ***Dubose*** overrules ***Marshall*** without even citing it, the majority in ***Hibl*** arrogated this court's authority to overrule case law. As Judge Brown implies in his dissent, ***Hibl***, 706 N.W.2d 134, ¶ 25, Pet-Ap. 115, the majority's reliance on ***Dubose*** rather than ***Marshall*** amounts to a violation of ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

(footnote continues from previous page)

know who he was." ***Id.*** The detective and the witness drove separately to the police station and "entered the station from different doors." ***Id.*** "While [the witness] was in the secretary's office at the police station he observed [Streich] through an open door in the squad room at which time he recognized him as the person he had seen earlier that evening. He later observed [Streich] for several minutes through a one-way glass door at which time he saw [Streich] walk across the room." ***Id.*** The circuit court "found that the viewing of [Streich] through the squad room door by [the witness] was not arranged by the police and that the police said nothing to the witness before he volunteered the initial identification." ***Id.*** at 216. Without citing either ***Jones v. State***, 63 Wis. 2d 97, 216 N.W.2d 224 (1974), or ***State v. Brown***, 50 Wis. 2d 565, 185 N.W.2d 323 (1971), *overruled on other grounds by State v. Walker*, 154 Wis. 2d 158, 453 N.W.2d 127 (1990), this court held that "the identification of [Streich] by the witness was not the result of any unnecessary suggestiveness." ***Id.*** at 217.

B. The Court Of Appeals Erroneously Interpreted And Applied *Dubose.*

In addition to erroneously choosing ***Dubose*** as the controlling precedent, the court of appeals erroneously interpreted and applied the case. In this regard, the court of appeals' decision suffers from five serious flaws.

First, both ***Dubose***, 699 N.W.2d 582, and its abrogated predecessor, ***Wolverton***, 193 Wis. 2d 234, deal with identifications prompted by showups,[15] not identifications resulting from unplanned or spontaneous or accidental encounters. In ***Dubose***, this court wrote about the specific target of its decision: the inherent suggestiveness of the showup procedure.

> [W]e now adopt a different test in Wisconsin regarding the admissibility of showup identifications. We conclude that ***evidence obtained from an out-of-court showup is inherently suggestive*** and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary.

Dubose, 699 N.W.2d 582, ¶ 33 (footnote omitted) (emphasis added). ***Dubose*** abrogated ***Wolverton***

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[15] ***Stovall***, 388 U.S. at 302 (showup identification procedure described as "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup"); ***State v. Dubose***, 2005 WI 126, ¶ 1 n.1, ___ Wis. 2d ___, 699 N.W.2d 582 ("'A "showup" is an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes.'"); *see also* ***State v. Garner***, 207 Wis. 2d 520, 535, 558 N.W.2d 916 (Ct. App. 1996); ***Kaelin***, 196 Wis. 2d at 9.

because ***Wolverton*** (also a showup-identification case) relied on a standard for admissibility this court regarded as too lenient for admitting identification evidence derived from an "inherently suggestive" procedure. ***Dubose*** thus does not alter, either explicitly or implicitly, any standard of admissibility for eyewitness testimony obtained from procedures not inherently suggestive. A spontaneous identification does not involve a procedure, much less an inherently suggestive one.

Second, the court of appeals failed to follow this court's distinction in the application of ***Stovall***, 388 U.S. 293, to identifications resulting from showups (***Dubose***) and to identifications resulting from spontaneous encounters (***Marshall***).

Both ***Dubose*** and ***Marshall*** advert to the Supreme Court's decision in ***Stovall***, which established the legal standard for assessing the admissibility of an eyewitness's out-of-court identification. ***Dubose***, 699 N.W.2d 582, ¶ 33 (establishing *Stovall* "as our guide"); ***id.*** ¶ 33 n.9; ***Marshall***, 92 Wis. 2d at 116-17. In ***Stovall*** (also a showup case), the Court held that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it." ***Stovall***, 388 U.S. at 302. A due-process violation occurs when an identification results from a police-initiated and -controlled procedure "so unnecessarily suggestive and conducive to irreparable mistaken identification." ***Id.***

Despite their common reference to ***Stovall***'s standard, ***Dubose*** and ***Marshall*** apply the standard differently. In ***Dubose***, this court held on-the-street showups so "inherently suggestive" that trial courts can only admit identifications based on those showups if the police can show, "based on

the totality of the circumstances, the procedure was necessary."[16] ***Dubose***, 699 N.W.2d 582, ¶ 33.

In ***Marshall***, on the other hand, this court explicitly declared that ***Stovall*** does *not* apply to unplanned confrontations:

> Before this [*Stovall*] analysis is applied, however, it must first be determined whether the confrontation was deliberately contrived by the police for purposes of obtaining an eyewitness identification of the defendant. . . . Where the confrontation is not part of a police procedure directed toward obtaining additional evidence, but occurs as a result of mere chance or for some other reason not related to the identifica-

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[16] Based on well-accepted definitions of "showup," *see supra* note 15, an expansive reading of ***Dubose*** would also prohibit the evidentiary use of identifications resulting from the "best practice" identification procedure of sequential lineups. Wisconsin Dep't of Justice, *Model Policy and Procedure for Eyewitness Identification* (Sept. 9, 2005), *available at* http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf. Functionally, a sequential lineup consists of a series of showups — a series of one-on-one confrontations between a witness and a collection of possible suspects. *Id.* at 3 ("[p]resent the suspect and the fillers sequentially (one at a time) rather than simultaneously (all at once)"). ***Dubose*** clearly does not prohibit sequential lineups. ***Dubose***, 699 N.W.2d 582, ¶ 31 n.7 (favorably citing *Model Policy*). The difference between the on-the-street showup procedure condemned in ***Dubose*** and the "serial showups" sequential-lineup procedure lies in the presence or absence of mechanisms for controlling suggestiveness. Theoretically (if not as a matter of practicality), law enforcement officers could effect on-the-street showups through a procedure indistinguishable, but for the location, from a sequential lineup in a police station. Under ***Dubose***, however, a court would have to suppress an on-the-street showup identification made under even those controlled "best practices" circumstances.

> tion of the defendant, the rule announced in [*Stovall*, *Biggers*, and *Brathwaite*] does not apply.

Marshall, 92 Wis. 2d at 117-18.

Stuller's identification of Hibl fits squarely within the factual contours of ***Marshall***, not ***Dubose***. The court of appeals erred by ignoring ***Marshall*** and instead interpreting ***Dubose*** to apply to facts clearly within the compass of ***Marshall*** and clearly not within that of ***Dubose***.

Third, the court of appeals' misinterpretation of ***Dubose*** as setting a "new legal standard" applicable to *all* "pretrial witness identification[s]," ***Hibl***, 706 N.W.2d 134, ¶ 10, Pet-Ap. 104-05, rests on a fundamental misperception of the studies on which this court relied in ***Dubose***. All of those studies deal with research on identifications occurring during police-planned and -controlled procedures. ***Dubose***, 699 N.W.2d 582, ¶ 29. Those studies do not provide any basis for extending the ***Dubose*** concern with the inherent suggestiveness of police-planned and -controlled showups to spontaneous identifications resulting from unplanned or accidental encounters.

Fourth, whatever split might exist among other jurisdictions' courts "on the question of whether suppression of witness identification evidence must be predicated on pretrial police conduct or if suppression is appropriate following other types of confrontations also," ***Hibl***, 706 N.W.2d 134, ¶ 15, Pet-Ap. 107, ***Dubose*** does not place Wisconsin among the minority of jurisdictions that do not re-

quire government action.[17] ***Dubose*** deals with a police-planned and -controlled procedure long regarded as so inherently suggestive that it carries

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[17] The two cases cited by the court of appeals — ***Commonwealth v. Jones***, 666 N.E.2d 994 (Mass. 1996), and ***People v. Walker***, 411 N.Y.S.2d 156 (Westchester County Ct. 1978) — do not buttress its assertion that Wisconsin has joined the minority via ***Dubose***.

In ***Walker***, the court remanded the case for an evaluation of the reliability of an on-the-street identification by a "mob" of the victim's friends, ***Walker***, 411 N.Y.S.2d at 157, and ordered that the lower court apply ***Biggers*** and ***Brathwaite***, ***id.*** at 159 — precisely the standard this court rejected in ***Dubose*** in favor of ***Stovall***.

In ***Jones***, 666 N.E.2d 994, the court relied on "[c]ommon law principles of fairness," ***id.*** at 1001, to deal with an extreme set of facts indicating that two courthouse encounters inevitably tainted the witness's in-court identification. Notably, despite ample opportunity to do so, the Supreme Judicial Court did not rely on the United States Constitution, the Massachusetts Constitution, ***Stovall***, ***Biggers***, ***Brathwaite***, or rules of evidence to reach its result. ***Dubose***, by contrast, rests on the Wisconsin Constitution's due-process clause. ***Dubose***, 699 N.W.2d 582, ¶ 36. Due-process claims turn on governmental conduct, not private conduct. ***In re Commitment of Schulpius***, 2004 WI App 39, ¶¶ 34, 35, 270 Wis. 2d 427, 678 N.W.2d 369 ("essence of [procedural due process] right is 'the opportunity to be heard "at a meaningful time and in a meaningful manner,"'" while "[s]ubstantive due process . . . protects persons from *government conduct* that either "'shocks the conscience"' or 'interferes with rights "implicit in the concept of ordered liberty"'" (emphasis added)), *aff'd*, 2006 WI 1, ___ Wis. 2d ___, ___ N.W.2d ___.

Moreover, the ***Jones*** court did not absolve the State of responsibility for the suggestive pretrial encounters. ***Jones***, 666 N.E.2d at 999 n.7 ("The Commonwealth is not wholly free from responsibility for the second encounter."); ***id.*** at 1001 (describing circumstances of witness's encounter with defendant).

with it a high risk of misidentification. ***Dubose*** does not deal in any way with identification procedures that do not carry that risk.

Fifth, to the extent ***Dubose*** implies a similar standard for identifications resulting from other identification procedures, ***Dubose*** has, contrary to the court of appeals' belief,[18] eliminated reliability as a separate prong for admitting eyewitness identifications. ***Dubose*** creates a two-step analysis. First, the court inquires into the necessity of the procedure, based on the totality of the circumstances. ***Dubose***, 699 N.W.2d 582, ¶ 33. Second, if the court finds the procedure necessary, the court assesses the suggestiveness of the procedure used. ***Id.*** ¶¶ 35-37 (by implication).

Dubose does not impose, or even discuss, a separate requirement of judicial inquiry into the reliability of an identification, instead treating reliability as a quality derivative of the procedures used to obtain the identification. Only identifications obtained via "unnecessarily suggestive" procedures lack sufficient reliability to merit exclusion as evidence. Thus, if the court finds the procedure "unnecessarily suggestive," ***id.*** ¶ 37, the court excludes the identification evidence; otherwise, the court admits the identification evidence.

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[18] ***Hibl***, 706 N.W.2d 134, ¶ 14, Pet-Ap. 107.

IV. THE COURT OF APPEALS ERRONEOUSLY TOOK JUDICIAL NOTICE OF FACTS DERIVED FROM SOCIAL-SCIENCE RESEARCH EITHER INAPPLICABLE TO THIS CASE OR, CONTRARY TO WIS. STAT. § (RULE) 902.01(2), "SUBJECT TO REASONABLE DISPUTE."

To buttress its extension of ***Dubose*** to apply to identifications that result from spontaneous encounters, the court of appeals relied on a one-sentence summary of a 1987 law review article by Professor Samuel H. Gross — *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. Legal Stud. 395 (1987) ["*Loss of Innocence*"] — purportedly showing that many misidentifications result from spontaneous identifications.[19] ***Hibl***, 706 N.W.2d 134, ¶ 16 n.5, Pet-Ap. 108-09.

In effect, the court of appeals took judicial notice of facts not just subject to dispute,[20] but assertions of fact that recent research has essentially

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[19] Only three court decisions — one federal and two state (including ***Hibl***) — have cited Professor Gross's article. Only ***Hibl*** refers to the article in relation to a spontaneous identification.

[20] A fact based on a minority viewpoint, such as Professor Gross's disagreement with the majority view that suggestiveness does not play a role in spontaneous identifications, Samuel H. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. Legal Stud. 395, 435 (1987) ["*Loss of Innocence*"], all but defines a fact that fails to qualify as a fact "not subject to reasonable dispute." Wis. Stat. § (Rule) 902.01(2).

repudiated. Arguably, the court's reliance on Professor Gross's study violated Wisconsin's judicial-notice rule. Wis. Stat. § (Rule) 902.01(2).

But even if the court's reliance does not violate Rule 902.01(2), the court erroneously relied on the article, regardless of whether the court based its reliance on a one-sentence summary or on a complete reading of the piece. In accrediting Professor Gross's study to justify the result in this case, the court failed to understand either the study's limits or the study's inapplicability to this case.

The article's reference to spontaneous identifications occurs in the discussion of the mechanism by which a suspect first comes to the attention of the police. *Loss of Innocence*, *supra* page 38, at 416-20. Of the ninety-two stories (out of a total of 136 stories) in which Professor Gross could identify "[t]he basis of the original suspicion against the suspect," *id.* at 416, only fifteen identifications resulted from "a spontaneous encounter with an eyewitness," *id.* at 417. Professor Gross explained his concern about a suspect's appearance as the basis for initial suspicion:

> Where the suspect first comes to police attention because of his appearance, there simply may be no information implicating him beyond that which eyewitness identification can provide in any event — the fact that his appearance resembles that of the criminal. As expected, these cases are uncommonly prone to errors: 60 percent of the [ninety-two] misidentifications gathered here fall in this group. A clear and common example of this type of problem case is the "spontaneous identification," a case in which the eyewitness first spots the suspect in an unplanned encounter. Yet despite the fact that many reported misidentifications originated in this manner (including one of the most famous), previous discussions of eyewitness identification have missed the danger of this form of identification entirely. On the

> contrary, several authors — focusing solely on the fact that suggestiveness is not possible in spontaneous encounters — have stated that this is "the most reliable type of identification."

Id. at 435 (footnotes omitted).

The court of appeals' reliance on Professor Gross's views suffers from at least four deficiencies. First, Professor Gross's study examines misidentifications that resulted in *initially* focusing official attention on the suspect — a context inapplicable to Hibl's case. Here, Hibl did not become a suspect because of Stuller's spontaneous identification. Hibl first came to police attention through his employer, who advised the police about Hibl's knowledge of the collision. The ensuing interview of Hibl led to admissions by Hibl that, in turn, led to the charges against him. Stuller's spontaneous identification occurred long after police identified Hibl as the suspect and long after the prosecutor charged him. In contrast to Professor Gross's misidentification stories, the evidence already known to the police and prosecutor corroborated the reliability of Stuller's identification, not the other way around.

Second, although Professor Gross denigrates other authors' focus on the suggestiveness of identification procedures, eyewitness-identification research since 1987 has universally validated the critical role suggestiveness plays in misidentifications. Indeed, the "best practice" procedures recommended in *Model Policy*[21] — procedures based on extensive, widely respected, and widely ac-

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[21] *See supra* note 16.

cepted research[22] — focus exclusively on reducing suggestiveness (whether before, during, or after an identification procedure) as the way to reduce misidentifications.

Third, aside from declaration, Professor Gross does not offer any basis for disputing "the fact that suggestiveness is not possible in spontaneous encounters." *Loss of Innocence, supra* page 38, at 435. Because spontaneous encounters do not occur under circumstances in which elements of suggestiveness exist, the lack of suggestiveness enhances reliability.

Fourth, Professor Gross's study does not address an important indicator of reliability: the speed with which an eyewitness identifies a suspect. *Cf.* Gary L. Wells & Elizabeth Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 284 (2003) ("[T]he general relation between accuracy and speed of identification has received support in several studies.").[23] The case Professor Gross characterizes as "one of the most famous" instances of a misidentification based on a spontaneous encounter, *Loss of Innocence*, 16 J. Legal

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[22] *See, e.g.*, Gary L. Wells & Elizabeth Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277 (2003); Gary L. Wells, et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & Human Behav. 603 (1998).

[23] The speed with which an identification occurs has an analog in the "excited utterance" hearsay exception, Wis. Stat. § 908.03(2). A spontaneous identification also has an analog in the "present sense impression" exception. Wis. Stat. § (Rule) 908.03(1).

Stud. at 435, appears to have originated instead in an identification following the witness's consultation with co-workers, not in a truly spontaneous or instantaneous identification: "Balestrero remembered that the girl behind the counter in the insurance office had kept him waiting a moment while she talked in a low voice with some of the other clerks." Herbert Brean, *A Case of Identity*, Life, June 29, 1953, at 97, 98, Pet-Ap. 141. By contrast, Stuller's identification of Hibl occurred as soon as he saw him in an inherently nonsuggestive spontaneous encounter — an instantaneous response highly indicative of the triggering of "recognition memory"[24] and, therefore, of a reliable identification. *Cf.* ***State v. Ramirez***, 817 P.2d 774, 781 (1991) (spontaneous identification as an enumerated factor for assessing reliability of identification); *see also* ***McQueen v. Garrison***, 619 F. Supp. 116, 121 (E.D.N.C. 1985) ("Recognition memory is generally remarkably accurate.").

V. SUMMARY.

The court of appeals erroneously selected, interpreted, and applied ***Dubose*** as the controlling case here. As Judge Brown correctly argued, ***Marshall*** controls this case.

Regardless of the applicable case law, the circuit court erroneously suppressed Stuller's spontaneous identification of Hibl, and the court of ap-

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[24] Identification procedures attempt to trigger recognition memory. *Cf.* Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads,* 22 L. & Human Behav. 603, 634 (1998) (lineup as an example of a "recognition memory task").

peals erroneously affirmed that decision. Under ***Marshall***, a none of the identification cases — ***Stovall***, ***Biggers***, and ***Brathwaite*** (hence ***Wolverton*** and ***Dubose***) — apply to spontaneous identifications like Stuller's. Under ***Dubose-Stovall***, the threshold "necessity" prong does not come into play and, therefore, the court does not reach any issue of suggestiveness. Under ***Wolverton-Biggers-Brathwaite***, Stuller's identification did not occur under unduly suggestive conditions. Moreover, under the totality of the circumstances — especially the instantaneous and spontaneous character of the identification, as well as the existence of corroborating evidence unknown to Stuller — the identification satisfied any sensible test of reliability.

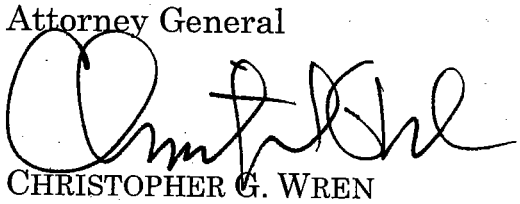
CONCLUSION

For the reasons offered in this brief, this court should confine ***Dubose*** to showup identifications, should reaffirm the applicability of ***Marshall*** to spontaneous, accidental, or unplanned identifications, and should reverse the court of appeals' and circuit court's decisions suppressing the eyewitness identification by Stuller.

Date: January 24, 2005.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER
Attorney General



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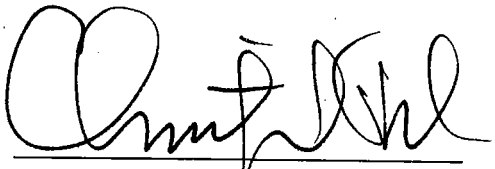
CERTIFICATION

In accord with Wis. Stat. § (Rule) 809.19(8), I certify that this brief satisfies the form and length requirements for a brief and appendix prepared using a 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 line, and a length of 10,997 words.



CHRISTOPHER G. WREN

APPENDIX

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2005 WI App 228

COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2936-CR

Cir. Ct. No. 2003CF115

STATE OF WISCONSIN

IN COURT OF APPEALS

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

BRIAN HIBL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: PAUL F. REILLY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 SNYDER, P.J. The State appeals from an order suppressing the pretrial and in-court identification of Brian Hibl by Alan R. Stuller, a witness for

the prosecution. The State contends that the circuit court erred in holding that the eyewitness identification of Hibl was impermissibly suggestive and unreliable. Although we employ a different analysis, we affirm the order of the circuit court.

FACTS

¶2 On June 25, 2002, at 2:53 p.m., Detective Lieutenant Steven Kukowski of the City of Muskego Police Department was driving southbound on Racine Avenue in the City of Muskego. Kukowski noticed a red pickup truck and a white van speeding northbound. He watched the two vehicles jockey for position as they traveled toward a portion of the road that narrows from two northbound lanes to one. He estimated that the two vehicles were going fifty miles per hour where the speed limit was thirty-five miles per hour. After the vehicles passed him, Kukowski continued to watch them in his rearview mirror and he observed the van pull ahead of the pickup truck. The pickup truck then pulled into the southbound lane, apparently attempting to pass the van. Then, although Kukowski did not see the actual collision, he suddenly noticed dust and vehicle parts in the air and saw that the pickup truck was spinning. The white van was no longer in sight.

¶3 Stuller witnessed the accident. Detective Paul Geiszler took a brief statement from Stuller at the scene and asked him to go to the police station to give a more complete statement. Stuller complied. At that time, Stuller identified the van driver as a white male; Stuller was unable to describe the driver in any other way. Stuller was not asked to make an identification of the van driver from any photo array or lineup procedure.

¶4 Two days later, Scott Anderson of Anderson Flooring, Inc. informed the police that one of his employees, Brian Hibl, reported witnessing the accident.

Detective James Kaebisch interviewed Hibl and took a statement from him. Hibl told Kaebisch that he had been driving a white cargo van northbound on Racine Avenue on June 25 at approximately the same time the accident occurred. Kaebisch reported that at one point Hibl admitted that he did see the accident and may have been a contributing factor. Hibl told Kaebisch that he had accelerated at a high rate of speed going north on Racine Avenue and had increased his speed as a red pickup truck attempted to pass him.

¶5 The State charged Hibl with one count of causing great bodily harm to another by reckless driving contrary to WIS. STAT. § 346.62(4) (2003-04),[1] and two counts of causing bodily harm by reckless driving contrary to § 346.62(3).

¶6 Prior to Hibl's November 18, 2003 trial date, Stuller received a subpoena to appear as a witness. On the day of trial, prior to commencement of the trial, Stuller identified Hibl in the hallway outside of the courtroom. He subsequently identified Hibl in the courtroom during the trial. Hibl moved for a mistrial, the State did not object, and the circuit court declared a mistrial.

¶7 Hibl then filed a motion to suppress the pretrial and in-court identifications made by Stuller. The circuit court held evidentiary hearings on June 4 and August 9, 2004, and granted Hibl's suppression motion. The State appeals.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

DISCUSSION

¶8 We review a motion to suppress using a two-step analysis. *See* ***State v. Dubose***, 2005 WI 126, ¶16, ___ Wis. 2d ___, 699 N.W.2d 582. First, we review the circuit court's findings of fact. "In reviewing an order suppressing evidence, appellate courts will uphold findings of evidentiary or historical fact unless they are clearly erroneous." ***Id.*** (citations omitted). Next, we independently review the application of relevant constitutional principles to those facts. ***Id.*** This review presents a question of law for our de novo review, but we benefit from the analysis of the circuit court. ***Id.***

¶9 We begin with the circuit court's rationale for granting Hibl's suppression motion. The court used the analytical framework presented in ***State v. Wolverton***, 193 Wis. 2d 234, 533 N.W.2d 167 (1995), *abrogated by* ***Dubose***, which requires a two-step analysis. First, the defendant must demonstrate that the pretrial identification occurred in an impermissibly suggestive manner. ***Id.*** at 264. If the defendant meets this burden, the State must then show that the identification was reliable despite the manner in which it occurred. ***Id.***[2]

¶10 Since the circuit court's order, our supreme court has revisited the ***Wolverton*** test. In ***Dubose***, our supreme court provided a substantial history of the evolution of the relevant law and articulated the new legal standard to be applied in matters of pretrial witness identification. *See* ***Dubose***, 699 N.W.2d 582,

[2] We note that the circuit court suppressed both the pretrial and in-court identification evidence offered by the State. The State offered no independent basis for Stuller's in-court identification of Hibl; therefore, if the pretrial identification was tainted, the in-court identification was properly suppressed. *See* ***State v. Mosley***, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981) ("where a subsequent *in*-court identification is also challenged as tainted by the prior one, the state must show the in-court identification derives from an independent basis").

¶¶17-27. It tracked, through several key cases, the United States Supreme Court's concern about the reliability of out-of-court identification evidence. The ***Dubose*** court explained:

> After the Supreme Court's decisions in [***Neil v. Biggers***, 409 U.S. 188 (1972)] and [***Manson v. Brathwaite***, 432 U.S. 98 (1977)], 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.

Dubose, 699 N.W.2d 582, ¶31. Departing from ***Biggers*** and ***Brathwaite***, and turning to ***Stovall v. Denno***, 388 U.S. 293 (1967), as a guide, our supreme court stated:

> [W]e now adopt a different test in Wisconsin regarding the admissibility of showup identifications. We conclude that evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible 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.

Dubose, 699 N.W.2d 582, ¶33 (footnote omitted). The supreme court further observed that "[s]tudies have now shown that … it is extremely difficult, if not impossible, for courts to distinguish between identifications that were reliable and identifications that were unreliable." ***Id.***, ¶31. Accordingly, our supreme court withdrew "any language in ***Wolverton*** … and in cases cited therein, that might be interpreted as being based on the Wisconsin Constitution. Those cases were based on the United States Constitution and focused more on the reliability of the identification than on the necessity for a showup." ***Dubose***, 699 N.W.2d 582, ¶33 n.9.

¶11 The question of necessity will only arise in situations where police procedure is involved. Hibl insists that the courthouse hallway encounter was not merely random chance, but occurred under circumstances suggesting a planned confrontation. He asserts that "[t]he State knew or should have know[n] that Stuller would confront Hibl either in or around the courtroom." Had the police or prosecutor arranged a confrontation, ***Dubose*** would require us to affirm suppression of the identification evidence because the State has not demonstrated that such a procedure was necessary.[3]

¶12 The State argues that Stuller's courthouse encounter with Hibl was not the result of police or prosecutor action. The circuit court observed that "[t]here is no evidence that the police or District Attorney's office intentionally or unintentionally suggested the identification" of Hibl to Stuller. Based upon our review of the record, we accept the characterization of the encounter as free from police or prosecutor manipulation; in other words, it was an accidental confrontation. Consequently, the ***Dubose*** analysis regarding necessity is not applicable here.

¶13 The remaining issue is whether, in the absence of police involvement, Stuller's identification of Hibl was properly suppressed. "Preliminary questions concerning ... the admissibility of evidence shall be

[3] "A showup will not be necessary ... unless the police lacked probable cause to make an arrest or ... could not have conducted a lineup or photo array." ***State v. Dubose***, 2005 WI 126, ___ Wis. 2d ___, ¶33, 699 N.W.2d 582. Here, Hibl's own statement, together with the testimony of the police detectives, established probable cause for his arrest. Detective Kaebisch acknowledged that he never arranged a lineup or presented a photo array to determine whether Stuller could identify Hibl. By way of explanation, Kaebisch stated that Stuller's statement on the day of the accident gave no indication that Stuller had any ability to identify the driver of the white van. He stated that he looked at Stuller's statement and could not "see where any additional follow-up would be required."

determined by the judge ...." WIS. STAT. § 901.04(1). A circuit court may, at its discretion, exclude evidence that is unfairly prejudicial. WIS. STAT. § 904.03. A circuit court's decision to admit or exclude evidence is a discretionary determination and will not be upset on appeal if it has "a reasonable basis" and was made "in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983) (citation omitted).

¶14 Our supreme court has stated that proffered evidence must be "reliable enough to be probative." ***State v. Walstad***, 119 Wis. 2d 483, 519, 351 N.W.2d 469 (1984) (citation omitted) (discussing the admissibility of expert opinion testimony). The supreme court turned to ***Stovall*** to demonstrate that the reliability of pretrial identifications is a question of admissibility, not credibility. ***Dubose***, 699 N.W.2d 582, ¶17 n.3. "The overwhelming majority of American courts have always treated the evidence question not as one of admissibility but as one of credibility for the jury. Law enforcement authorities fairly relied on this virtually unanimous weight of authority, *now no longer valid*, in conducting pretrial confrontations in the absence of counsel." ***Stovall***, 388 U.S. at 299-300 (citation omitted; emphasis added).

¶15 Courts have split on the question of whether suppression of witness identification evidence must be predicated on pretrial police conduct or if suppression is appropriate following other types of confrontations also. "The majority of courts require that an allegedly suggestive pretrial encounter be the result of either police or prosecution action to have an effect on the admissibility of in-court identification. These courts reason that without government involvement there is no violation of a defendant's constitutional due process rights." Lynn M. Talutis, Annotation, *Admissibility of In-Court Identification as*

Affected by Pretrial Encounter That Was Not Result of Action by Police, Prosecutors, and the Like, 86 A.L.R.5th 463, § 2(a) (2001). "Other courts have, however, done away with the government action requirement. These courts typically reason that the deterrence of police conduct is not the basic purpose for excluding identification evidence. Rather, it is the likelihood of misidentification that violates a defendant's right to due process." ***Id.***

¶16 In ***Dubose***, our supreme court aligned itself with the latter view, focusing on the likelihood of misidentification as the purpose for scrutinizing identification evidence. ***Dubose***, 699 N.W.2d 582, ¶¶31-32.[4] Although ***Dubose*** addressed a police showup procedure, concerns about misidentification are not limited to those situations where the police arranged the confrontation.[5] Principles of fairness dictate that identification evidence, even absent police involvement,

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[4] The supreme court cited several studies that document the problems associated with eyewitness identification evidence. ***Dubose***, 699 N.W.2d 582, ¶29.

[5] Referencing Samuel H. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 435 (1987), one commentator observed that

> [c]ourts have struggled with the question of whether to engage in exclusion when, by chance, an eyewitness encounters or sees the defendant. Professor Gross calls this a "spontaneous identification," and in his study he found "many reported misidentifications originated in this manner," but he was chagrined that persons writing about identification procedures had failed to acknowledge these are prone to errors, and had instead credited their reliability.

Marger Malkin Koosed, *The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identifications*, 63 OHIO ST. L.J. 263, 300 (2002).

must be scrutinized to determine whether suppression is required.[6] Here, the circuit court, citing ***Wolverton***, considered the following factors in its rationale:

> [1] the opportunity of the witness to view the [accused] at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of his [or her] prior description of the criminal, [4] the level of certainty demonstrated at the confrontation, and [5] the time between the crime and the confrontation. (Alterations added.)

It proceeded with the following analysis:

> Mr. Stuller first identified the defendant in the hallway outside of the courtroom with approximately nine other people in the hallway; this occurred on the day Mr. Stuller knew he would see the alleged defendant.... Just prior to identifying the defendant, Mr. Stuller spoke with the police officer assigned to the case and to the Assistant District Attorney assigned to the case.... There is no evidence that the police or District Attorney's office intentionally or unintentionally suggested the identification of the Defendant to Mr. Stuller; however, Mr. Stuller's juxtaposition in the courtroom hallway with the ADA, anticipating the alleged defendant in court in a few minutes, constitutes an identification that occurred in an impermissibly suggestive manner....
>
> Mr. Stuller observed the driver/defendant on June 25, 2002, from 50 feet away while he was traveling 35 to 40 miles per hour, and the driver/defendant was traveling toward him in a white van at a high rate of speed.... On the day of the alleged offense, Mr. Stuller could not identify the driver's facial features, height, weight, or whether or not he wore glasses.... Mr. Stuller could only identify the driver as a "white male." Mr. Stuller's identification of Defendant occurred fifteen months after he witnessed the incident.

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[6] *See, e.g.*, ***Commonwealth v. Jones***, 666 N.E.2d 994, 1000-01 (Mass. 1996) (holding that although no governmental action contributed to the eyewitness identification and no due process rights were implicated, fairness required preclusion of the evidence); ***People v. Walker***, 411 N.Y.S.2d 156, 159 (N.Y. County Ct. 1978) (holding that identification process conducted by nonpolice is subject to the same reliability and suggestiveness analyses as those traditionally imposed on procedures conducted by law enforcement personnel).

¶17 The circuit court's rationale is sound. Proffered evidence must be "reliable enough to be probative." ***Walstad***, 119 Wis. 2d at 519 (citation omitted). Because the circuit court's order to suppress was made in accordance with accepted legal standards applied to the record facts, we will not disturb it. *See* ***Pharr***, 115 Wis. 2d at 342.

CONCLUSION

¶18 In ***Dubose***, our supreme court turned the focus from the reliability of eyewitness identification to that of necessity in cases where police procedure is involved. ***Dubose***, 699 N.W.2d 582, ¶33. Here, where necessity is not an issue, the only consideration left for the circuit court is that of reliability. The circuit court's analysis demonstrates that Stuller's courthouse hallway identification of Hibl was not reliable; therefore, we affirm the court's order granting Hibl's motion to suppress the pretrial and in-court identification evidence.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

¶19 BROWN, J. (*dissenting*). I disagree with the majority opinion for several reasons. First, I think it is essential that we establish what this case is about. This case regards the admissibility of an in-court identification following a pretrial encounter that did *not* result from government action. Thus, this case is different from those where the pretrial identification results from either a police or prosecution procedure such as a showup or a lineup or photo array. In shorthand, this is what the law calls an "accidental confrontation" or an unplanned or "spontaneous identification." *See generally* Lynn M. Talutis, Annotation, *Admissibility of In-Court Identification as Affected by Pretrial Encounter That Was Not Result of Action by Police, Prosecutors, and the Like*, 86 A.L.R.5th 463, § 14 (2001).

¶20 I understand the central position of the majority to be as follows: Other jurisdictions are divided about whether accidental identifications may be deemed inadmissible as a matter of law. Most courts adhere to the proposition that, without government involvement, there is no "suggestive procedure" used to obtain an identification; since there is no "procedure," there can be no state-sponsored manipulation which may affect the reliability of the identification. Thus, the law does not need the circuit court to act as "gatekeeper" on the question of manipulation prior to testimony before the trier of fact. Rather, it is for the trier of fact, usually a jury, to assess the reliability of the spontaneous identification. A minority of courts have held that police conduct is not the basic purpose for excluding identification evidence. Rather, it is the likelihood of misidentification

that violates a defendant's right to due process. Therefore, circuit courts possess gatekeeper responsibility to assess the reliability of the spontaneous identification, just as they have similar responsibility with regard to state-sponsored identification procedures. The majority concludes that, in ***State v. Dubose***, 2005 WI 126, ___ Wis. 2d ___, 699 N.W.2d 582, our supreme court sided with the minority view.

¶21 I take issue with the majority's expansive interpretation of ***Dubose***. I read ***Dubose*** as being limited to the context of pretrial showups, thus leaving prevailing rules intact with respect to other pretrial encounters. One of those prevailing rules, not even acknowledged by the majority, is the rule announced in ***State v. Marshall***, 92 Wis. 2d 101, 117-18, 284 N.W.2d 592 (1979), *abrogated on other grounds by* ***State v. Dean***, 103 Wis. 2d 228, 307 N.W.2d 628 (1981), *superceded in part by statute*, 1995 Wis. Act 440. In ***Marshall***, our supreme court first reiterated the two-part test that existed at the time to determine admissibility of identification evidence under federal due process standards. First, the courts were to decide whether the confrontation procedure was unnecessarily suggestive. ***Marshall***, 92 Wis. 2d at 117. If so, then they were to turn to whether the evidence was nonetheless reliable. ***Id.*** Only when the pretrial encounter was *both* unnecessarily suggestive and unreliable did the court exclude the evidence. ***Id.***

¶22 Of particular importance to this case, the ***Marshall*** court then made clear that when the government has not deliberately employed a suggestive technique in order to obtain an identification, the two-part test is inapplicable. The court stated:

> Before this [two-part] analysis is applied ... it must first be determined whether the confrontation was *deliberately contrived* by the police for purposes of obtaining an eyewitness identification of the defendant. [***Stovall v.***

> ***Denno***, 388 U.S. 293 (1967)], [***Neil v. Biggers***, 409 U.S. 108 (1972)] and [***Mason v. Brathwaite***, 432 U.S. 98 (1977)] ... all involved planned confrontations between a suspect and a supposed witness to a crime orchestrated by the police for the sole purpose of having the witness identify the suspect as the perpetrator of that crime.... Where the confrontation is not part of a police procedure directed toward obtaining additional evidence, but occurs as a result of mere chance or for some other reason not related to the identification of the defendant, the rule announced in those cases does not apply.

Marshall, 92 Wis. 2d at 117-18 (emphasis added). By definition, the State does not design or "deliberately contrive" accidental and unplanned confrontations. Thus, when faced with an allegedly suggestive encounter between an identification witness and the defendant, ***Marshall*** requires, as a condition precedent, that we first determine whether the relevant actor was a government actor. ***Marshall*** cited ***Jones v. State***, 63 Wis. 2d 97, 216 N.W.2d 224 (1974), and ***State v. Brown***, 50 Wis. 2d 565, 185 N.W.2d 323 (1971), *overruled on other grounds by* ***State v. Walker***, 154 Wis. 2d 158, 453 N.W.2d 127 (1990), as examples of cases in which, although the circumstances were suggestive, the court nonetheless upheld the use of identification testimony derived from an unplanned confrontation.[1] ***Marshall***, 92 Wis. 2d at 118.

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[1] In ***State v. Brown***, 50 Wis. 2d 565, 185 N.W.2d 323 (1971), *overruled on other grounds by* ***State v. Walker***, 154 Wis. 2d 158, 453 N.W.2d 127 (1990), police had summoned the witness to the safety building to identify the defendant. ***Id.*** at 567. But before the police procedure could take place, the witness observed the defendant emerging from an elevator in the company of police officers. ***Id.*** at 567, 571. She identified the defendant immediately. ***Id.*** at 571. ***Jones v. State***, 63 Wis. 2d 97, 216 N.W.2d 224 (1974), involved similar facts. Police were guiding the defendant to the district attorney's office when the victim, who was sitting in the corridor with a detective, observed the group. ***Id.*** at 101. The victim identified the defendant at that time. ***Id.*** In both cases, the court reasoned that these identifications were unplanned and spontaneous. *See* ***id.*** at 101-02; ***Brown***, 50 Wis. 2d at 570.

¶23 In my view, ***Marshall*** controls this case and indeed is factually similar. In that case, a neighbor gave a man directions to the victim's apartment and later heard an argument and gunshots coming from that direction. ***Id.*** at 108-09. The victim had been murdered. ***Id.*** Although the neighbor was unable to pick out the man to whom he gave directions from a photo array, the State still considered him to be an important witness and subpoenaed him to testify at Marshall's trial. ***Id.*** at 109, 118. Before the case was called, the neighbor observed the man to whom he had given directions. ***Id.*** at 119. The man was one of several seated in the courtroom and was sitting with a woman roughly three rows ahead of him. ***Id.*** Nobody had asked the neighbor to make an identification or suggested that the man was the defendant. ***Id.*** The neighbor summoned a detective into the courthouse hallway and told him that he recognized the man who had come to his door on the night of the murder. ***Id.*** The supreme court held that the use of the pretrial identification was admissible because it was unplanned and "was as much a surprise to the State as it was to the defendant." ***Id.*** at 118.

¶24 Here too, the witness, Stuller, appeared pursuant to a subpoena to testify about matters other than the defendant's identity. The record does not reveal that anybody asked Stuller to identify Hibl. Nor is there any evidence that either the police or the assistant district attorney suggested that Hibl was the defendant. Rather, Stuller spontaneously identified Hibl among several people he saw in the hallway. Of particular importance, the trial court *found* that "there is no evidence that the police or District Attorney's office intentionally or unintentionally suggested the identification of the Defendant to Mr. Stuller." Indeed, the circumstances surrounding Stuller's identification were, if anything, probably less suggestive than the identification made in ***Marshall*** because there, the neighbor had seen Marshall's face in the photo array at some point before.

Here, however, nothing suggests that Stuller had ever seen Hibl's face anywhere prior to the trial date—except perhaps in the white van he observed on the day of the accident.

¶25 We are bound by prior decisions of the supreme court unless or until those prior decisions are overruled by that court. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). The ***Dubose*** holding in no way overruled ***Marshall***. In fact, ***Marshall*** is never mentioned in ***Dubose***.

¶26 The ***Dubose*** opinion must be limited to "showups." Reading the opinion, it is quite evident that the ***Dubose*** majority disapproved of the widespread use of state-sponsored showups because of their "inherent unreliability" and set out to do something about it. Basically, the court held that the State may not use a showup as a procedure for obtaining an identification of a defendant if there are other, fairer means available to obtain the identification. In pertinent part, the ***Dubose*** majority wrote:

> [W]e now adopt a different test in Wisconsin regarding the admissibility of *showup* identifications. We conclude that evidence obtained from an out-of-court *showup* is inherently suggestive and will not be admissible 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. *A lineup or 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, 699 N.W.2d 582, ¶33 (emphases added; footnote omitted). Thus, with respect to showups, the court changed the test in state-sponsored identification procedures. The ***Dubose*** test is limited, by its very words, to showups.

¶27 Indeed, the rationale ***Dubose*** gave for the newly announced rule in showup cases further supports the notion that it left ***Marshall*** intact. It stated that its strict necessity requirement helps "ensure that the police would *take precautions* when considering the use of a showup," a procedure the court deemed "inherently suggestive." ***Dubose***, 699 N.W.2d 582, ¶¶32-33 (emphasis added). Both parts of that rationale are inapposite to unplanned encounters. First, it would be absurd to announce a categorical rule that accidental encounters are "inherently suggestive." Second, I do not see how the courts could reasonably expect the State to guard against unplanned encounters. Even if the courts were to impose such a duty with respect to only unplanned confrontations factually similar to the one here, I cannot envision any logical stopping point to the rule. I can think of no standard that logically distinguishes among encounters in a courtroom or courthouse hallway and those that occur outside the courthouse, in a donut shop across the street from the courthouse, or at an intersection just blocks away from the courthouse. I simply cannot believe that ***Dubose*** provides authority for courts to prohibit identifications made based on fortuity.

¶28 Although the majority appears to acknowledge in one breath that the ***Dubose*** analysis does not apply, *see* majority op. ¶12, in the next it relies on ***Dubose*** as authority for allowing courts to independently assess the reliability of even unplanned encounters. I acknowledge it to be true that the ***Dubose*** majority opinion did discuss the extensive studies conducted on the issue of identification evidence and did comment how the research supports the conclusion that eyewitness identification is now the greatest source of wrongful convictions in the United States and is responsible for more wrongful convictions than all other causes combined. *See* ***Dubose***, 699 N.W.2d 582, ¶30. But it is unwarranted for the majority in this case to make the leap that the ***Dubose*** court was implementing

a new rule allowing trial courts to exercise gatekeeper responsibility with regard to *all* identifications. One need only look at the ***Dubose*** court's language to determine that this is not the case. The ***Dubose*** court, in referring to the recent studies, said that "[i]n light of such evidence," it was changing its approach in the area of "suggestive procedures." *See* ***id.***, ¶31 (citation omitted). To read ***Dubose*** to say anything more than that is grave error.

¶29 This point brings me to my next complaint about the majority opinion. The majority appears to assert, either as an alternative argument or as a means to buttress its ***Dubose*** interpretation—I am not sure which—that this case is merely a review of the circuit court's exercise of discretion in deciding not to admit this identification evidence. The majority seemingly claims that, under WIS. STAT. § 901.04, the trial court in this case and, by extension, any circuit court in this state, has the authority to keep evidence out if it deems the evidence to be unreliable. Therefore, even if this is not a police procedure case, since the circuit court in this case relied on the facts of record and gave a reasoned explanation for why it believed the spontaneous identification to be impermissibly suggestive, the majority feels that we must defer to this judgment and affirm. In my view, this is a serious misunderstanding of the law.

¶30 First, I need to state the obvious. The circuit court kept the evidence out because it thought that the spontaneous encounter was "impermissibly suggestive." As I have already explained, the only time a court considers whether an identification was "impermissibly suggestive" is if the suggestiveness was brought about by state action. That is what ***Marshall*** holds. A court does not validly exercise discretion based on a misunderstanding of the law and that is what has occurred here. As the court in ***Jarrett v. Headley***, 802 F.2d 34, 42 (2d Cir. 1986), stated, if the *procedures* are not impermissibly suggestive, independent

reliability is not a constitutionally required condition of admissibility and the reliability of the identification is simply a question for the jury. The circuit court thus had no business deciding this case under the rubric of an "impermissibly suggestive" procedure.

¶31 Second, what the majority fails to understand is that the usual role of the circuit court is to act as only a limited gatekeeper with regard to admissibility issues. Only when due process concerns come into play has our jurisprudence given circuit courts a greater gatekeeping function. As we wrote in ***State v. Peters***, 192 Wis. 2d 674, 689, 534 N.W.2d 867 (Ct. App. 1995), the role of trial judges is "oblique." Certainly, evidence must be relevant to be admissible. And just as certainly, someone must have the job of deciding whether the evidence is admissible. This is the job of the circuit court. The circuit court must determine under WIS. STAT. § 904.01 only whether there is "*any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ***Id.*** (emphasis added). This is an extremely low threshold. If relevant, the circuit court still has the authority to exclude the evidence for other reasons, including, to name a few, statutory considerations such as hearsay, the superfluous nature of the evidence, waste of judicial time and resources, or the court's determination that the evidence is inherently improbable or that its probative value is outweighed by its prejudice to the defendant. *See* ***Peters***, 192 Wis. 2d at 689. Once these considerations have been analyzed by the circuit court, the limited gatekeeper role is finished. As Professor Blinka has stated, "If the evidence has any tendency to prove (or disprove) a consequential proposition, it should be admitted." DANIEL D. BLINKA, WISCONSIN PRACTICE: WISCONSIN EVIDENCE § 401.102 (2d ed. 2001). The weight of such evidence is for the trier of fact. ***Id.***

¶32 But there are certain areas of the law where our supreme court has given circuit courts more responsibility. One such area is where identification was made pursuant to a specified police procedure. ***State v. Wolverton***, 193 Wis. 2d 234, 533 N.W.2d 167 (1995), *abrogated by* ***Dubose***, 699 N.W.2d 582 (new test applicable to showup procedures), is a case in point. There, our supreme court recognized that certain police identification procedures might be orchestrated or manipulated by the State. *See* ***Wolverton***, 193 Wis. 2d at 264. If such manipulation and orchestration by the State is shown to be present, it may seriously affect the credibility of the identification. To test the state procedure, the court directed circuit courts to exercise the power to assess (1) the witness' opportunity to view the criminal at the time of the offense, (2) the degree of attention the witness paid, (3) the accuracy of prior descriptions, (4) the time elapsed between the crime and the confrontation, and (5) the level of certainty demonstrated at the confrontation. ***Id.*** at 264-65. In sum, the supreme court expressly authorized greater gatekeeping authority in this area.

¶33 It is my view that because ***Marshall*** does not employ this kind of reliability test in the context of an unplanned encounter, the State need only meet the very low threshold test for reliability that WIS. STAT. § 904.01 requires all types of evidence to meet. Nothing in the circuit court's analysis or the facts convinces me that Stuller's identification of Hibl had *no tendency whatsoever* to support the proposition that Stuller recognized Hibl as the individual who drove the van on the day of the accident. What the circuit court's opinion really does is call into question any identification made in the halls of our courthouses, no matter

how spontaneous and free from police or prosecutorial suggestion it may be. I cannot abide by this result and dissent.[2]

[2] Even in light of recent data calling into question the veracity of some spontaneous identifications, I see no great problem in continuing to allow the juries to test the credibility of this type of identification rather than leave it to the circuit courts. It bears repeating that "cross-examination has been described as the greatest legal engine ever invented for the discovery of truth." ***State v. Stuart***, 2005 WI 47, ¶26 n.7, 279 Wis. 2d 659, 695 N.W.2d 259 (quoting ***California v. Green***, 399 U.S. 149 (1970). The solution is to allow defendants greater latitude in bringing this data, and the expert witnesses who can testify to this data, to the attention of the jury. In the past, circuit courts have been reluctant to allow such evidence by defendants. But, should that change, juries would be well equipped to decide the credibility of these identifications.

STATE OF WISCONSIN : CIRCUIT COURT : WAUKESHA COUNTY

STATE OF WISCONSIN,
Plaintiff,

Case # 03-CF-000115

vs.

BRIAN S. HIBL,
Defendant.

ORDER TO SUPRESS PRETRIAL AND IN COURT IDENTIFICATION OF THE DEFENDANT BY ALLAN R. STULLER

On November 18, 2003, a witness in the present case, Mr. Allan R. Stuller, identified defendant Brian S. Hibl as the driver of the non-contact vehicle involved in an accident on June 25, 2002. Prior to November 18, 2003, Mr. Stuller provided the police with a description of the driver as being a "white male." The police did not perform a photo array or line-up for Mr. Stuller to identify the driver. On November 18, 2003, Mr. Stuller identified Mr. Hibl in the hallway outside the courtroom prior to the commencement of the trial and then later in the courtroom during the trial. A mistrial was declared. This order is in response to Defendant's Motion to Suppress Identification of the Defendant by Mr. Stuller.

A criminal defendant is denied due process when the pretrial identification evidence admitted at trial is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." State v. Wolverton, 193 Wis. 2d 234, 264, 533 N.W.2d 167, 178 (1995) (*quoting* Simmons v. United States, 390 U.S. 377, 384, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968)). In order to prevail, the defendant must initially prove that the identification was impermissibly suggestive. Id.

If the defendant meets this burden, the State then has the burden to prove that under the "totality of the circumstances" the identification was nevertheless reliable. Id. The court considers the following factors to assess reliability:

> [1] the opportunity of the witness to view the criminal [defendant] at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of his prior description of the criminal, [4] the level of certainty demonstrated at the confrontation, and [5] the time between the crime and the confrontation.

Id. at 265 (citations omitted).

In the instant case, Mr. Stuller identified the defendant in an impermissibly suggestive manner. Wolverton, 193 Wis. 2d at 264. Mr. Stuller first identified the defendant in the hallway outside of the courtroom with approximately nine other people in the hallway; this occurred on the day Mr. Stuller knew he would see the alleged defendant. (Aff. 40-41.) Just prior to identifying the defendant, Mr. Stuller spoke with the police officer assigned to the case and to the Assistant District Attorney assigned to the case. (Id. 14-15.) There is no evidence that the police or District Attorney's office intentionally or unintentionally suggested the identification of the Defendant to Mr. Stuller; however, Mr. Stuller's juxtaposition in the courtroom hallway with the ADA, anticipating the alleged defendant in court in a few minutes, constitutes an identification that occurred in an impermissibly suggestive manner. (Id.) Thus, Defendant has met his burden of showing that the identification occurred in an impermissibly suggestive manner.

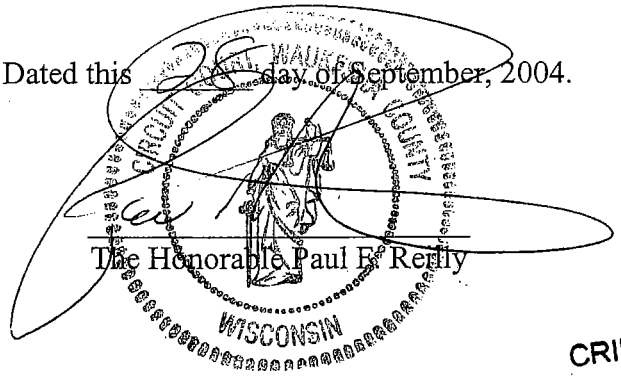
The State, therefore, has the burden is to show that under the "totality of the circumstances" the identification was nevertheless reliable. Wolverton, 193 Wis. 2d at 264. The State cannot meet this burden because the identification was not reliable based

on the factors in Wolverton. Id. First, Mr. Stuller observed the driver/defendant on June 25, 2002, from 50 feet away while he was traveling 35 to 40 miles per hour, and the driver/defendant was traveling toward him in a white van at a high rate of speed. (Aff. 12-13.) On the day of the alleged offense, Mr. Stuller could not identify the driver's facial features, height, weight, or whether or not he wore glasses. (Id. 14-15.) Mr. Stuller could only identify the driver as a "white male." Mr. Stuller's identification of Defendant occurred fifteen months after he witnessed the incident. (Id. 19.) The State cannot meet its burden to show that the identification is reliable.

As the pretrial identification in the hallway of the courthouse on November 18, 2003, is unreliable and inadmissible, the trial identification of the defendant, which stems from the hallway identification, is unreliable and therefore inadmissible.

Accordingly, the Court orders the identifications of the Defendant by Mr. Stuller suppressed.

Dated this 25th day of September, 2004.



The Honorable Paul F. Reilly

FILED
CRIMINAL / TRAFFIC
DIVISION
AUG 2 8 2004
WAUKESHA COUNTY, WISCONSIN

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

STATE OF WISCONSIN,

Plaintiff

v.

BRIAN S. HIBL,

Defendant

FILED
CRIMINAL / TRAFFIC
DIVISION
JAN 5 2004
WAUKESHA COUNTY, WISCONSIN

Case No. 03CF000115

MOTION TO SUPPRESS PRETRIAL AND IN-COURT IDENTIFICATION

The defendant, appearing specially by his attorneys, Luck & Rosenthal, S.C., by Joel H. Rosenthal and reserving his right to challenge the Court's jurisdiction, moves the Court for an order excluding as evidence the identification of the defendant made at any lineup, photographic or other pretrial identification of the defendant, and any subsequent or anticipated in-court identification of the defendant by Alan R. Stuller.

This motion is brought pursuant to sec. 971.31(2) and (5), Stats., on the grounds that the identification was in violation of the rights guaranteed the defendant under the 4th, 5th, 6th and 14th Amendments to the United States Constitution; Article I, Sections, 1, 2, 7, 8, 9, and 11 of the Wisconsin Constitution; and Terry v. Ohio, 392 U.S. 1 (1968).

Further, the defendant moves for exclusion from use as evidence all derivative evidence. Taylor v. Alabama, 457 U.S. 687 (1982);

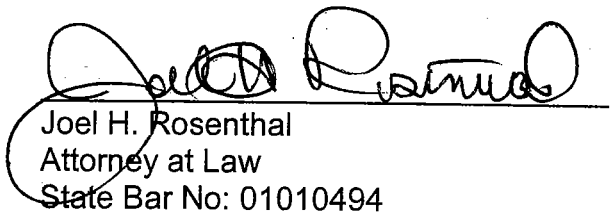
The defendant specifically requests a hearing before the trial of this action and outside the jury's presence. State v. Cole, 50 Wis. 2d 449, 184 N.W.2d 75 (1971).

In further support, the defendant incorporates herein the Affidavit of Counsel, Attorney Joel H. Rosenthal, which sets forth the circumstances of the post incident pretrial identification of the defendant by Alan R. Sutter. United States v. Bouthot, 878 F.2d 1506 (1st Cir. 1989) (copy attached).

Wherefore, the defendant requests a hearing to develop further facts to show that the "identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 890 U.S. 377, 384 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968).

Dated at Brookfield, Wisconsin, this 2nd day of January, 2004.

Attorney for the defendant,
Brian S. Hibl



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for the District of Massachusetts, Mark L. Wolf, J., granted motions. The Government appealed. The Court of Appeals, Torruella, Circuit Judge, held that photographic identification was impermissibly suggestive.

Affirmed and remanded.

1. Criminal Law ⇐1024(1)

Government had right to appeal from district court order allowing defendants' motion to suppress state guilty pleas for all purposes, including cross-examination and impeachment; state guilty pleas were offered to prove that defendants stole firearm, which was a material fact relevant to federal prosecution for possession of firearms, and United States attorney certified to that fact as required by statute. 18 U.S.C.A. § 3731.

2. Criminal Law ⇐1134(9)

Ordinarily, it is inappropriate for federal court to review collateral attack of state court guilty pleas without allowing state courts a prior opportunity to do so.

3. Criminal Law ⇐273.4(1)

Guilty plea waives defendant's right against compelled self-incrimination and right to trial by jury. U.S.C.A. Const. Amends. 5, 7.

4. Criminal Law ⇐273.1(4)

A state judge, even if aware of federal implications of state conviction, was not constitutionally required to warn defendants about exposure to federal prosecution before accepting guilty plea to state charges.

5. Criminal Law ⇐274(3)

State prosecutor's failure to disclose to defendants existence of ongoing federal investigation was not a misrepresentation which warranted setting aside guilty pleas to state charges.

6. Criminal Law ⇐393(1)

If collateral review establishes that guilty plea was validly entered, nothing in self-incrimination clause prevents proof of resulting conviction from being admitted into evidence at subsequent trial that is a collateral consequence of the guilty plea. U.S.C.A. Const.Amend. 5.

7. Constitutional Law ⇐268(5)
Criminal Law ⇐700(3)

Failure of state prosecutor to disclose to defendants ongoing potential prosecution by federal Government did not amount to the kind of misbehavior that so shocked sensibilities of civilized society as to constitute a violation of due process. U.S.C.A. Const.Amends. 5, 14.

8. Criminal Law ⇐339.10(1)

In-court eyewitness identification following pretrial identification must be set aside if identification procedure was so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification.

9. Criminal Law ⇐339.10(1)

There is no per se rule excluding identifications tainted by impermissibly suggestive procedures; identifications will be admitted at trial if totality of circumstances indicates that they are reliable, and it follows that federal court should scrutinize all suggestive identification procedures, not just those orchestrated by police, to determine if they would sufficiently taint trial so as to deprive defendant of due process. U.S.C.A. Const.Amends. 5, 14.

10. Criminal Law ⇐339.7(3)

Photographic identification was impermissibly suggestive; identification occurred after witness had been subpoenaed to appear in state trial involving defendants and after witness had seen defendants being brought into court and observed proceedings that followed.

Paul V. Kelly, Asst. U.S. Atty., with whom Frank L. McNamara, Jr., U.S. Atty., Boston, Mass., was on brief, for U.S.

Robert L. Sheketoff and Jeffrey Smith, by Appointment of the Court, with whom Norman S. Zalkind, and Zalkind, Sheketoff, Homan, Rodriguez & Lunt, Boston, Mass., were on joint brief, for defendants, appellees.

2d 954 (1987) (drawing similar *Miranda* context); *Cepulonis* F.2d 573, 577 (1st Cir.1983) misinformation may be more constitutional challenge than information). We do not district court's finding that ed information was material fact have led the defendants lecision to plead guilty. *See* Even so, there is no doubt titution does not require a de a defendant with every nation that would affect his ead guilty. *Cf. Moran v.* U.S. 412, 422–23, 106 S.Ct. 39 L.Ed.2d 410 (1986) (reach- clusion in the *Miranda* con- ise to rule that a plea-bar- lant has a constitutional ition possessed by the pros- g an ongoing or potential another sovereign.[5] The s precedents "do not place luty on the prosecution to ible ramifications of a de- plea. Rather, they prohib- itations and mandate com- nises made." *Jordan,* 870 *United States v. Persico,* 2d Cir.1985) (deciding that ing guilty to bribery and es in the Eastern District re not entitled to be told ry in that District was vestigating possible RICO ted by them). We hold ty pleas were not induced tation.

t court found that the his case were "different" dant seeks to withdraw a at 656. He conceded situation legitimate con- that the government direct consequences in

1980). *But cf. United States* 30, 33 (2d Cir.1985) (stating s entered into by one U.S. inarily bind any other U.S. ot express any opinion on it issue.

order to protect a plea. Those legitimate considerations, he reasoned, do not apply in the context of the admissibility of evidence. Consequently, he appears to have concluded that the Self-Incrimination Clause prevents the federal prosecutor from admitting the state convictions into evidence at the federal trial because the state prosecutors had not disclosed to the defendants the collateral consequences of pleading guilty. We cannot accept this logic. We refuse to graft a "second generation" test on the validity of a guilty plea. If collateral review establishes that a plea was validly entered, nothing in the Self-Incrimination Clause prevents proof of the resulting conviction from being admitted into evidence at a subsequent trial that is a collateral consequence of the guilty plea.[6] *See Jordan,* 870 F.2d at 1315–19; *Long,* 852 F.2d at 980; *United States v. Howze,* 668 F.2d 322, 324 (7th Cir.1982).

[7] The district court's order was also based on the belief that the state prosecutor's conduct was so offensive that it deprived the defendants of the fundamental fairness guaranteed by the Due Process Clause. We do not condone the behavior of the state prosecutor in this case, but at the same time we do not feel that his conduct amounts to the "kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States." *Moran,* 475 U.S. at 433–34, 106 S.Ct. at 1147–48 (holding that police conduct which involved deceiving an attorney about when her client would be questioned and failing to inform a suspect of his attorney's efforts to represent him and communicate with him did not deprive suspect of fundamental fairness). The state prosecutor's behavior may have been unethical, but "[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Mabry v. Johnson,* 467 U.S. 504, 511, 104 S.Ct. 2543, 2548, 81 L.Ed.2d 437 (1984). The defendants in this case were not deprived of their liberty in any fundamentally unfair manner in the state court proceedings.

The June 8 order is *vacated.*[7]

Second. The factual background for the June 13 order is as follows. Paul Northway is the Chief of Parks for the town of Holden. On September 4, 1986, at approximately 2:00 p.m., Northway was the passenger in a truck that passed directly in front of the Hultgreen residence. On that afternoon, he observed two white males putting a pink blanket with what appeared to be pipes sticking out of it into the back of a truck. He had approximately thirty seconds to observe what was going on; at the closest point, he was no more than ten feet from the person holding the bundle.

When Northway heard that the Hultgreen residence had been burglarized, he immediately contacted the police, but did not provide any specific details—age, height, weight—identifying the two persons that he had seen. Later, but before Northway's first appearance in court, Detective Bourget showed Northway ten photographs, including one of Bouthot, to see if Northway could identify any one of those men as being a participant in the robbery. Bourget did not keep records of this session and no longer remembers it, but Northway is certain that he was shown photographs and that he did not identify Bouthot from among them.

6. A defendant who pleads guilty waives, among other things, his right to confront witnesses with respect to the crime with which he is charged. The Seventh Circuit has pointed out that the use of that guilty plea to prove an element of a crime charged at a subsequent trial may jeopardize the defendant's confrontation rights with respect to the second crime with which he is charged. *See United States v. Howze,* 668 F.2d 322, 324 n. 3 (7th Cir.1982); *see also United States v. Edwards,* 669 F.Supp. 168, 170–71 (S.D. Ohio 1987). Because the guilty pleas here cannot be used in the government's direct case, the problem identified by the Seventh Circuit is not presented.

7. Because our decision addresses only the constitutional issues, we express no opinion on whether the trial court may exclude the guilty pleas, even as impeachment evidence, under Fed.R.Evid. 403. *See* Transcript of Motion Hearing held on January 5, 1988, at 22–23 (*reproduced in* Brief for the United States, Addendum A).

Northway was subpoenaed to appear as a witness in the state trial. When present on these occasions, he spoke with other witnesses, including members of the Hultgren family. He saw all five defendants being brought into court, and observed the proceedings that followed.

Twenty months later, in June 1988, federal officers preparing for trial in this case conferred with Northway. He was shown fourteen photographs and immediately identified the five photographs that portrayed the defendants in this case. He also identified Bouthot as the man who was carrying the bundle wrapped in a pink blanket. He bases the identification in part on the fact that Bouthot and he look alike. The district court conceded the strong resemblance between the two men, but found that Northway did not recognize this resemblance on September 4, 1986. "Mr. Northway was unable to identify Joseph Bouthot or anyone else prior to the time he went to Worcester District Court in connection with this case."[8] App. at 816.

[8] In his June 13 ruling on the identification evidence, the district court relied on the two-part test that is followed in this Circuit. *See Judd v. Vose*, 813 F.2d 494, 498 (1st Cir.1987); *Perron v. Perrin*, 742 F.2d 669, 675 (1st Cir.1984). An in-court eyewitness identification following a pretrial identification must be set aside if the "identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968). The first part of the test determines whether the identification procedure was impermissibly suggestive. If this prong is satisfied, the court must address the second prong of the test. That prong inquires whether, under the totality of the circumstances, the suggestiveness is such that there is a very substantial likelihood of irreparable misidentification. This determination is based on the factors described in *Neil v. Biggers*, 409 U.S. 188, 199–200, 93 S.Ct. 375, 382–83, 34 L.Ed.2d 401 (1972)—the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.

Applying this framework to the facts of this case, the district court found that the Worcester County Court events were "very suggestive." App. at 818. "It is hard to imagine anything that could more vividly impress the witness' mind in the identity of Joseph Bouthot." *Id.* He then turned to the second part of the test, reviewing the *Biggers* factors. He found that Northway had 30 seconds to observe Bouthot, and that Northway was not paying special attention to Bouthot during that brief time. *Id.* at 818–19. Northway's initial description of Bouthot was "extremely vague." *Id.* at 819. Northway was not "very certain" that Bouthot was the person he saw on September 4. *Id.* at 820. Finally, over twenty months elapsed between the crime and the identification. The district court concluded that the second part of the test was satisfied, and that it would therefore violate due process to allow Northway to make an in-court identification of Bouthot.

The problem with the district court's analysis, the government argues, is that there was no impermissibly suggestive identification procedure conducted by the government.[9] To establish a due process

8. The government challenges this finding, arguing that it is clearly erroneous. It claims that the record contains unrebutted evidence to prove that Northway had noticed the resemblance between Bouthot and him *before* September 4, 1986. Northway recognized Bouthot's photograph in the array first shown to him by Detective Bourget, but did not communicate that fact to Bourget because he found it "embarrassing" that he looked so much like the defendant. App. at 721. The district court concluded that Northway's testimony on this issue was not credible. *See* App. at 818. Credibility determinations by the trier of fact are accorded special deference. *See Anderson v. Bessemer City*, 470 U.S. 564, 575, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985). Upon reviewing the record, we find that there is no justification for overturning the district court's factual findings.

9. The government also suggests that the Worcester County courthouse confrontations did not amount to a "procedure," *see* Reply Brief for the United States at 9, presumably

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violations of the Constitution, overly suggestive identifications are suppressed primarily to avoid an unfair trial. *See id.* at 408. In the latter scenario, the Due Process Clause protects an evidentiary interest: reliability. *See Manson v. Brathwaite,* 432 U.S. 98, 113–14, 97 S.Ct. 2243, 2252–53, 53 L.Ed.2d 140 (1977) ("[R]eliability is the linchpin in determining the admissibility of identification testimony...."); *Clemons v. United States,* 408 F.2d 1230, 1251 (D.C.Cir.1968) (Leventhal, J., concurring), *cert. denied,* 394 U.S. 964, 89 S.Ct. 1318, 22 L.Ed.2d 567 (1969). There is no *per se* rule excluding identifications tainted by impermissibly suggestive procedures; such identifications will be admitted at trial if the totality of the circumstances indicates that they are reliable. *See Brathwaite,* 432 U.S. at 114, 97 S.Ct. at 2253. Because the due process focus in the identification context is on the fairness of the trial and not exclusively on police deterrence, it follows that federal courts should scrutinize all suggestive identification procedures, not just those orchestrated by the police, to determine if they would sufficiently taint the trial so as to deprive the defendant of due process. *See Thigpen v. Cory,* 804 F.2d 893, 895 (6th Cir.1986) ("[O]nly the effects of, rather than the causes for, preidentification encounters should be determinative of whether the confrontations were unduly suggestive."), *cert. denied,* 482 U.S. 918, 107 S.Ct. 3196, 96 L.Ed.2d 683 (1987); *Green v. Loggins,* 614 F.2d 219, 222 (9th Cir.1980); *United States v. Ballard,* 534 F.Supp. 749, 751 (M.D.Ala.1982); *State v. Fullwood,* 476 A.2d 550, 558 n. 9 (Conn.1984); *People v. Reynolds,* 116 Ill.App.3d 328, 71 Ill.Dec. 849, 856, 451 N.E.2d 1003, 1010 (Ill.App. 1983); *People v. Moore,* 96 A.D.2d 1044, 466 N.Y.S.2d 456, 457 (App.Div.1983); W. LaFave & J. Israel, 1 *Criminal Procedure* § 7.4, at 583 (1984).

[10] Having resolved the doctrinal issue, we now turn to the actual facts of this case. The government, in its brief and during oral argument, has never challenged the district court's conclusions that the Worcester courthouse confrontations were (a) impermissibly suggestive and (b) created a "substantial likelihood of irreparable misidentification." We have reviewed the record, and agree with the district court that "it is the corrupting effect of the exposure which Mr. Northway had with Mr. Bouthot ... [in] the Worcester County District Court which has created a present certainty that Mr. Bouthot is the one he saw in the back of the car carrying the blanket.... [A]ny in[-]court identification would be based on exposure at the Worcester County Court rather than Mr. Northway's independent memory of what happened or what he saw happen[ ] on September 4, 1986." App. at 820. Consequently, we *affirm* the district court's June 13 order granting Bouthot's Motion to Suppress the Northway identification.[11]

The case is remanded to the district court for trial.

COMMONWEALTH OF MASSACHUSETTS, Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and United States of America, Respondents.

No. 88–2211.

United States Court of Appeals, First Circuit.

Heard May 1, 1989.

Decided June 29, 1989.

State sought review of orders of Nuclear Regulatory Commission authorizing

11. Our decision should not be misinterpreted to narrow the jury's province. In most cases, the jury is capable of assessing the appropriate weight to be given to identification evidence. *See Brathwaite,* 432 U.S. at 116, 97 S.Ct. at 2254. It is only in rare circumstances, such as those presented in this case, when identification testimony creates a "very substantial likelihood of irreparable misidentification," that identification evidence will be withheld from the jury.

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2. Administrative ⟹668

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for other judicial
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4. Electricity ⟹8.5(

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STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

STATE OF WISCONSIN,

Plaintiff

v. Case No. 03CF000115

BRIAN S. HIBL,

Defendant

AFFIDAVIT OF COUNSEL

I, JOEL H. ROSENTHAL, being duly sworn under oath, deposes and state as follows:

1. That I am an attorney at law duly licensed to practice in the State of Wisconsin and is a partner in law firm of Luck & Rosenthal, S.C., attorneys for the defendant herein;

2. That your affiant is the attorney of record for the defendant in the above captioned matter and has received and reviewed the discovery in this case and that said discovery does not contain any information which would have indicated that there were any civilian and/or police witnesses capable of identifying the defendant as being the driver of the vehicle allegedly involved in the collision which is the basis of the prosecution herein.

3. That in addition your affiant had numerous conversations with Assistant District Attorney Ted Szczupakiewicz, the prosecutor herein, and Mr. Szczupakiewicz had advised your affiant that there were no known State witnesses who could identify the defendant as being the driver of the vehicle allegedly involved in the collision which is the basis of the prosecution herein;

4. That this matter was scheduled for a jury trial on the 15th day of September, 2003, and the jury selection process had taken place at which time the Court ordered a brief recess until opening statements;

5. That your affiant during this period of time was approached by the

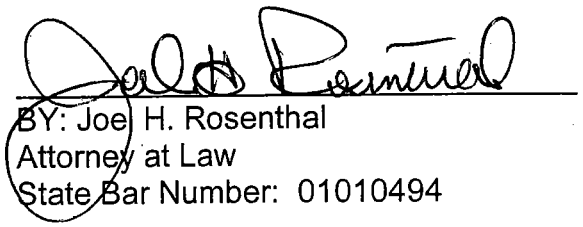
prosecutor herein, and advised that a witness, Alan R. Stuller, had advised him that he had identified the defendant herein as the person driving the non contact van which was allegedly involved in the collision which is the basis of the prosecution herein;

6. That based upon this information that the defendant moved for a mistrial and the State joined in said Motion and the court granted said Motion.

7. That upon information and belief your affiant believes that the State knew prior to said consultation that it was possible that Mr. Stuller could identify the driver of said vehicle and that the State by its failure to show the withness a photographic array and/or to attempt to identify the occupant of said vehicle in a lineup created the circumstances under which the identification of the defendant by Alan R. Stuller occurred under unduly suggestive circumstances and that said identification should be suppressed;

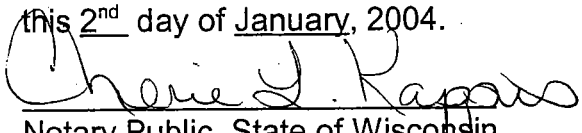
Where the affiant makes this Affidavit in support of the Motion to Suppress Identification (Pretrial and In-Court Identification).

DATED at Brookfield, Wisconsin, this 2nd day of January, 2004.



BY: Joel H. Rosenthal
Attorney at Law
State Bar Number: 01010494

Subscribed and sworn to before me
this 2nd day of January, 2004.



Notary Public, State of Wisconsin
My commission expires: 3-21-04.

04-2936-CR

FWA - State appea

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

State of Wisconsin,
Plaintiff,

- vs-

BRIAN HIBL,
Respondent.

Transmittal of
Notice of Appeal

Trial Court 03 CF 115

FILED

NOV 0 8 2004

CLERK OF COURT OF APPEALS
OF WISCONSIN

Clerk
Court of Appeals
PO Box 1688
Madison, WI 53701-1688

I hereby transmit a copy of the Notice of Appeal filed herein on November 4, 2004, and a copy of the trial court record (docket entries) of the above-entitled case as maintained pursuant to Section 59.39(3), Wisconsin Statutes. No fees are enclosed.

Dated this 4th day of November, 2004

CLERK OF COURTS, BY

Jean Dibb

Jean Dibb
Deputy Clerk
Criminal/Traffic Division
Waukesha County, Wisconsin

RECEIVED
CRIMINAL TRAFFIC
DIVISION

NOV 4 2004

WAUKESHA COUNTY
WISCONSIN

STATE OF WISCONSIN : CRIMINAL-TRAFFIC DIVISION : WAUKESHA COUNTY
CIRCUIT COURT

STATE OF WISCONSIN,

Plaintiff,

v. CASE NO: 03-CF-115

BRIAN HIBL

Defendant.

FILED

NOV 0 8 2004

CLERK OF COURT OF APPEALS
OF WISCONSIN

NOTICE OF APPEAL

TO: Carol Stigler
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Boulevard
Waukesha, WI 53188

Joel Rosenthal
Attorny at Law
839 N. Jefferson Street
Suite 501
Milwaukee, WI 53202

11908

PLEASE TAKE NOTICE that pursuant to Wis. Stat Section (Rule) 808.04(4), and Wis. Stat. Section 947.05(1)(d)2, the State of Wisconsin appeals to the Wisconsin Court of Appeals, District II from an order to suppress pretrial and in court identification of the defendant by Allan R. Stuller entered on September 28, 2004, in the Waukesha County Circuit Court, the Honorable Paul F. Reilly, presiding, in which the court rules that the identification of the defendant Brian S. Hibl as the driver of the non-contact vehicle involved in an accident on June 25, 2002, by Allan R. Stuller, was impermissibly suggestive and unreliable and therefore inadmissible pursuant to State v. Wolverton 193 Wis. 2d 234 (1995).

FILED
CRIMINAL/TRAFFIC
DIVISION

NOV - 4 2004

WAUKESHA COUNTY, WISCONSIN

DXF

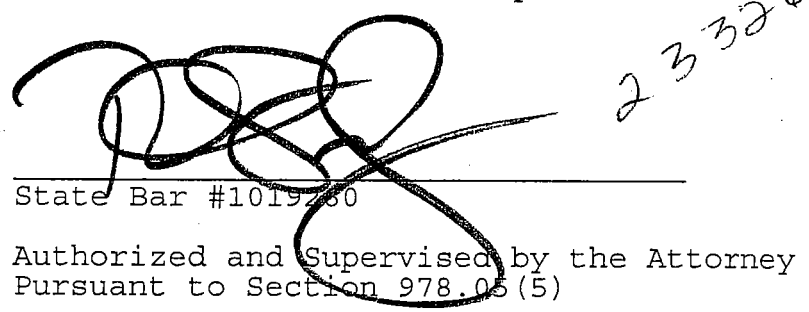
This appeal arises out of a pending felony matter and therefore does not qualify as an appeal within the scope of Wis. Stat. Section 752.31(2).

This appeal is not entitled to a statutory preference.

Dated this 4th day of November, 2004, at the City of Waukesha, Wisconsin.

PEGGY A. LAUTENSCHLAGER
Wisconsin Attorney General

TED SZCZUPAKIEWICZ
Assistant District Attorney



State Bar #1019260

Authorized and Supervised by the Attorney General
Pursuant to Section 978.05(5)

Criminal Court Record

Caption	Responsible C.O.	Case Number
State of Wisconsin vs. Brian S Hibl	Paul F. Reilly	2003CF000115

Name/Alias	Address	City	St	ZIP	Sex	Race	DOB
Brian S Hibl	495 East Marquette Avenue	Oak Creek	WI	53154	M	Caucasian	01-29-1980

Filing Date/C.O.	Disposition Date/C.O.	District Attorney	Defense Attorney	Next Action
02-11-2003		Ted S Szczupakiewicz	Joel H Rosenthal	11-04-2004 08:30 am
Patrick C. Haughney				Status conference
				11-09-2004 08:30 am
				Jury trial - 12 person
				11-10-2004 08:30 am
				Jury trial - 12 person
				11-10-2004 08:30 am
				Jury trial - 12 person
				11-11-2004 08:30 am
				Jury trial - 12 person
				11-11-2004 08:30 am
				Jury trial - 12 person
				11-12-2004 08:30 am
				Jury trial - 12 person

FILED
NOV 08 2004
CLERK OF COURT OF APPEALS
OF WISCONSIN

No.	Offense Date	Offense Description	Statute	Sev	Amended From	Disposition	Sent
1	06-25-2002	Reckless Driving-Cause Great Bodily Harm	346.62(4)	Felony U			
2	06-25-2002	Reckless Driving-Cause Bodily Harm	346.62(3)	Misd. U			
3	06-25-2002	Reckless Driving-Cause Bodily Harm	346.62(3)	Misd. U			

Date	Court Record Entries	Amount	C.O. Court Reporter Tape/Counter Location
02-11-2003	Complaint filed be		Patrick C. Haughney
02-26-2003	Initial appearance Defendant Brian S Hibl in court with attorney Joel H Rosenthal. Law Intern appeared for the State of Wisconsin. Preliminary Hearing requested. Time period waived.		Martin Binn Jackie Malone
02-26-2003	Signature bond set Defendant to have no contact with John S. or his family members. Preliminary hearing scheduled for 03-21-2003 at 10:00 am.	2000.00	Martin Binn Jackie Malone
02-26-2003	[BD] Signature bond signed	2000.00	
03-13-2003	[AP] Letters/correspondence Request for adjournment filed by defendant/defense counsel		
03-14-2003	[AP] Letters/correspondence Request for adjournment filed by defendant/defense counsel		
03-21-2003	[AM] Preliminary hearing Prosecutor appeared in person. Defendant appeared in person and with counsel. Exhibit list filed. Information received and filed.		Martin Binn Nancy Hyatt
04-11-2003	[AP] Transcript preliminary hearing, dated March 21, 2003		
04-16-2003	Arraignment Defendant Brian S Hibl in court with attorney Joel H Rosenthal. Law Intern appeared for the State of Wisconsin. Not guilty plea entered. bl Hearing scheduled for 05-30-2003 at 11:00 am.		Martin Binn Nancy Hyatt

Caption	Responsible C.O.	Case Number
State of Wisconsin vs. Brian S Hibl	Paul F. Reilly	2003CF000115

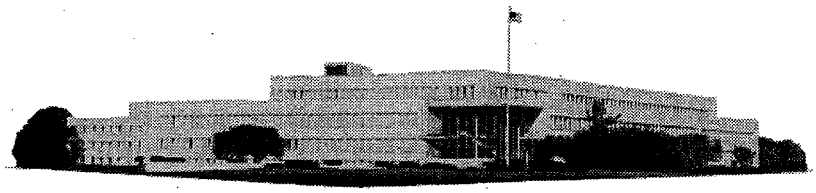
05-30-2003	Hearing Defendant Brian S Hibl in court with attorney Joel H Rosenthal. Susan L Opper appeared for the State of Wisconsin. Motions to be filed within 10 days from today's court date. BA	Patrick C. Haughney Christine Waite
06-09-2003	[BB] Motion to dismiss and suppress statement	
08-04-2003	Judicial transfer	Paul F. Reilly
08-15-2003	[BA] Motion hearing Prosecutor appeared in person. Defendant appeared in person and with counsel.. Case called for motion to dismiss.- Court denies motion. State is requesting new jury date.	Paul F. Reilly Mary Ward
11-13-2003	[BA] Status conference Prosecutor appeared in person. Defendant appeared in person and with counsel.	Paul F. Reilly Mary Ward
11-17-2003	[BA] Letters/correspondence	
11-17-2003	[BA] Letters/correspondence From defense listing witnesses & jury instructions.	
11-18-2003	[BA] Jury trial Prosecutor appeared in person. Defendant appeared in person and with counsel. State address some issues of Motion in Limine.Court conducts Voir Dire. State & Defense conducts Voir Dire. Attorney Rosenthal requesting a mis-trial- State agrees. Court grants mis-trial by newly discovered evidence.	Paul F. Reilly Mary Ward
12-19-2003	Hearing Defendant Brian S Hibl in court with attorney Joel H Rosenthal. Ted S Szczupakiewicz appeared for the State of Wisconsin. BA	Paul F. Reilly Susan DeMent
01-05-2004	[AN] Motion to suppress pretrial and in-court identification filed by defense counsel.	
02-19-2004	[AP] Letters/correspondence Request for adjournment filed by plaintiff.	
05-06-2004	[BL] Letters/correspondence Letter confirming date on 06-04-04	
05-07-2004	[BL] Letters/correspondence Confirming court date	
05-26-2004	[BV] Letters/correspondence Request for adjournment filed by defendant/defense counsel.	
06-04-2004	[BA] Motion hearing Prosecutor appeared in person. Defendant appeared in person and with counsel. Case called for motion to suppress. Exhibit list filed. Defense counsel is requesting trial date.	Paul F. Reilly Mary Ward
06-08-2004	[AP] Transcript motion hearing, dated June 4, 2004	
07-13-2004	[AW] Other papers Request for adjournment filed by plaintiff.	
07-21-2004	[BB] Letters/correspondence from defense regarding State's adj. request	
07-30-2004	[BA] Review hearing Prosecutor appeared in person. Defendant appeared by counsel. Case called for review- Court grants adjournment.	Paul F. Reilly Mary Ward
08-09-2004	[BA] Motion hearing Prosecutor appeared in person. Defendant appeared in person and with counsel. Continued motion from 6-2004. Exhibit list filed. 10 days to file brief.	Paul F. Reilly Mary Ward
08-10-2004	[AW] Transcript Continued Hearing on Motion August 9, 2004	

Caption	Responsible C.O.	Case Number
State of Wisconsin vs. Brian S Hibl	Paul F. Reilly	2003CF000115

08-12-2004	[BD] Letters/correspondence plaintiff requesting additional time to respond to any written argument submitted by defense counsel.	
08-18-2004	[AY] Brief in Support of Motion to Suppress Pretrial and In Court Identification.	
08-20-2004	[AY] Letters/correspondence Request for adjournment filed by defendant/defense counsel	
09-15-2004	[AY] Letters/correspondence Information, filed by defense counsel, regarding State's witnesses.	
09-28-2004	[BA] Order Order to suppress pretrial and in court identification of the defen dant by Allan R. Suller signed & filed.	Paul F. Reilly
11-02-2004	[CC] Letters/correspondence from State regarding appeal of motion.	Paul F. Reilly Mary Ward
11-04-2004	[AF] Notice of appeal Filed by the State	

COUNTY OF WAUKESHA

CAROLYN T. EVENSON
Clerk of Circuit Court



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November 4, 2004

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Ms. Cornelia Clark
Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

Re: State of Wisconsin vs. Brian Hibl
Trial Court File No. 03 CF 115

Dear Ms. Clark:

Enclosed herewith please find a copy of the Notice of Appeal, the trial court record (docket entries), and the original Transmittal of Notice of Appeal form. No fees are enclosed.

Thank you.

Very truly yours,

CRIMINAL/TRAFFIC DIVISION

Jean Dibb

Jean Dibb
Deputy Clerk

jd
enc.

Vol. 34, No. 26

LIFE

REG. U.S. PAT. OFF

June 29, 1953

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CLIMBERS AT EVEREST, PRISON FENCE MENDERS IN KOREA, ROCK THROWERS IN GERMANY AND ELECTRIC CHAIR AT SING SING

IT WAS A WEEK WHEN EVERYTHING HAPPENED

Because LIFE takes very seriously its obligation to bring to its readers the great news events, you will find this in a sense a rather formidable issue. For seldom have so many happenings of world importance taken place in one week as in the period on which this issue of LIFE reports.

To start with we have an exclusive picture report on the conquering of Mount Everest after decades of futile trying. This historic victory actually took place May 29, but it crowded its way into last week's news because it took that long for the climbers' pictures to be carried down the great mountain and delivered in New York to provide the exclusive story on pages 18 through 25.

When Syngman Rhee opened the gates for 26,000 prisoners of war held by the U.N. last week, LIFE Photographer Horace Bristol, forewarned by our Tokyo Bureau of possible impending trouble, had just arrived in Pusan to help record the developments. Photographers Mike Rougier and Jun Miki, to whose doorstep the news had come forcefully the week before (LIFE, June 22), joined in covering the search for escaped prisoners near Seoul, contributing to the picture account of Korea on pages 26 through 31.

Far away on the other side of the world, as revolutionary rioting broke out in the streets of East Berlin and other German cities, LIFE Correspondent Roy Rowan entered the Communist zone, was promptly arrested by the police of East Berlin. But he was released by them in time to obtain an eye-witness account of the flash uprising and bloody Soviet punishment and to take some of the pictures for the story which appears on pages 37 through 40.

An event, built to great proportions by long legal processes and heated controversy, the electrocution of atomic spies Julius and Ethel Rosenberg, brought the case to its grim end (*pp. 45–46*).

Indeed, the week's budget of news was of such generous proportions that you will find in LIFE on the Newsfronts of the World (*p. 48*) three events of real historical significance: Egypt, which had been a monarchy for 50 centuries, chose this busy week to become a republic; the king of Cambodia (in Indochina) made a dramatic gesture to press for democracy for his country and Colombia got a new president through a swift, neat and bloodless revolution.

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A CASE OF IDENTITY

by HERBERT BREAN

AT about 5:30 on the evening of last Jan. 14 a 43-year-old nightclub musician named Balestrero mounted the steps of his home, a modest stucco two-family house at 41-30 73rd St. in Queens, a borough of the City of New York, and took out his key. As he did so, he heard a hail from across the dark street: "Hey, Chris!" Balestrero turned curiously. His first name is Christopher, but he is known to his family and friends as "Manny," a shortening of his middle name Emanuel. Three men came up to him out of the murky shadows of a winter evening. They said they were police officers and showed him badges clipped to wallets.

Balestrero, experiencing a little quiver of uneasiness, asked what they wanted. The detectives ordered him to come to the 110th precinct station. They were polite, firm and uninformative. Balestrero became alarmed. He is a quiet, mild, family-loving man, who is a first-rate string bass player, never misses a night's work and is content to take the subway home afterward instead of hoisting a few with the boys. His conscience was clear, and the detectives were polite, but their inexorable manner was frightening.

Without even going in to tell his wife that he had returned from an afternoon visit with his mother in Union City, N.J., Balestrero accompanied the three detectives to the precinct station, and then on a tour of a dozen Queens liquor and drug stores and delicatessens. At each stop the routine was the same. Balestrero was instructed to go into the store and walk to the counter and back under the scrutiny of the proprietor. As they drove between stores, the detectives talked with Balestrero of inconsequential things like television programs. They assured him that if he had done nothing he had nothing to fear.

On their return to the station the detectives told him what it was all about. On two occasions last year—July 9 and Dec. 18—an office of the Prudential Insurance Company of America, located in an arcade building at Roosevelt Avenue and 74th Street, had been held up by an armed man. Each time the robbery occurred shortly after noon. The first time the bandit obtained $200, the second time $71. The same man had done both jobs. He, Manny Balestrero, had been identified by witnesses as the bandit.

Up to this point the train of events had had the somnambulistic quality of a bad dream. Now it became a nightmare. The building and insurance office that the cops were talking about were just two and a half blocks from Balestrero's home, where he had lived for 20 years. He was well known in that neighborhood. Below the building was the subway station from which he took the F train each night to Manhattan's glittering Stork Club, where he plays in a rumba band. On the arcade's ground floor is a Bickford's cafeteria where each morning about 4:30 he ate his musician's breakfast of coffee and eggs before walking home. On the second floor is a Household Finance branch where he occasionally negotiated small loans (and had an A-1 credit rating), and the Prudential branch office that had been robbed.

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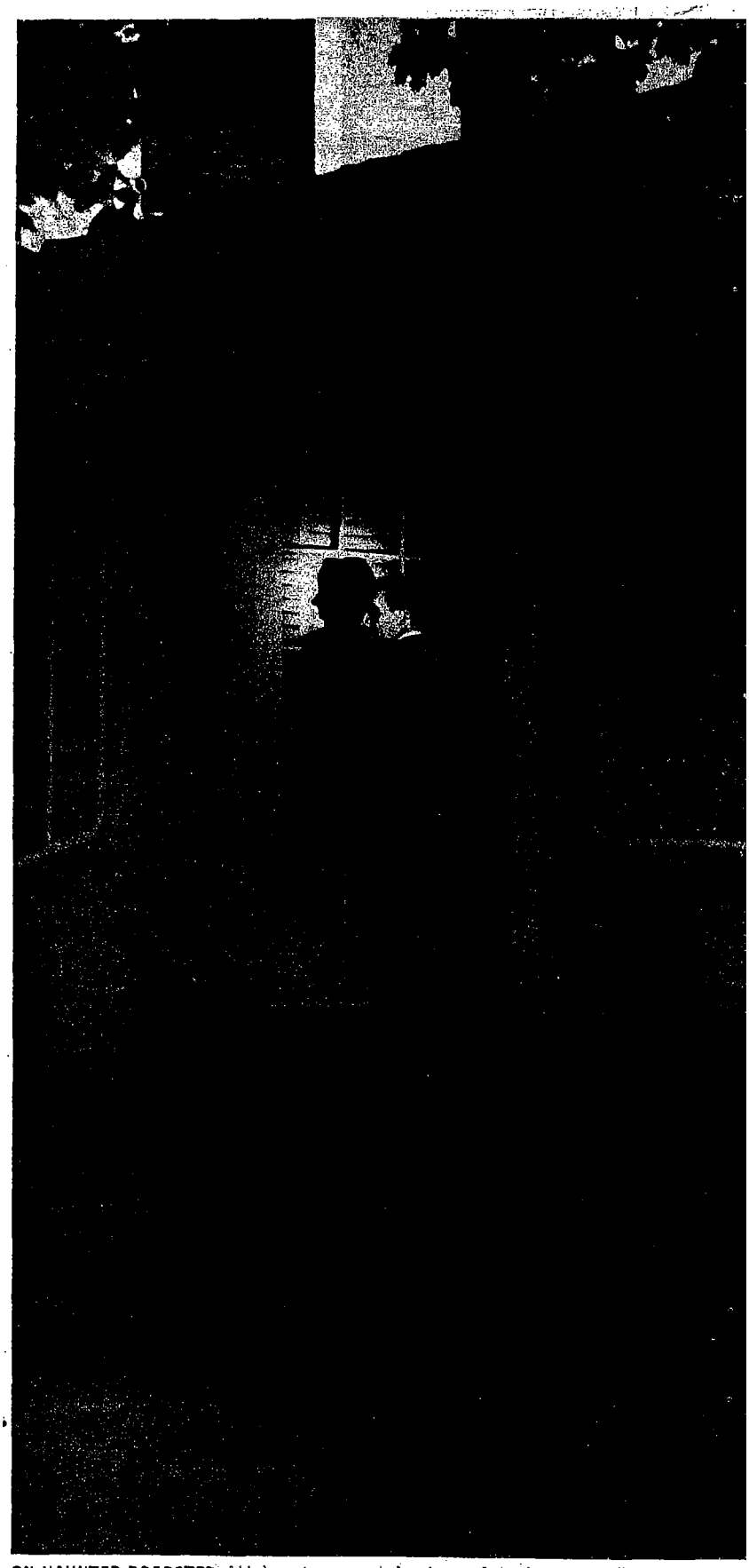

ON HAUNTED DOORSTEP of his home in Queens, Manny Balestrero pauses to glance back at shadowed street. It was here that hail "Hey, Chris!" plunged him into his personal nightmare.

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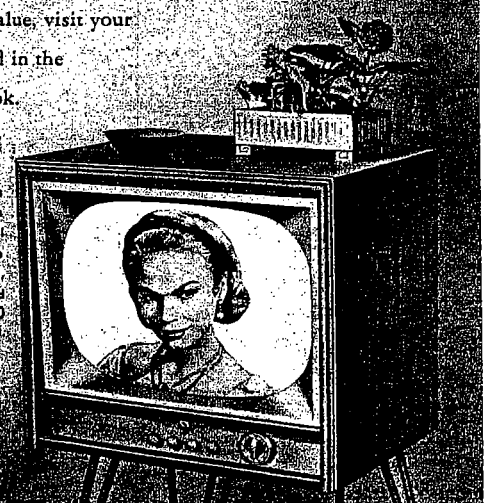

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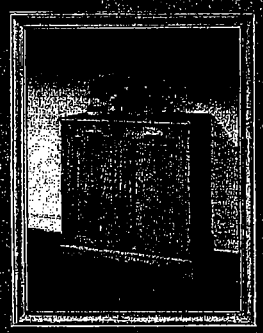

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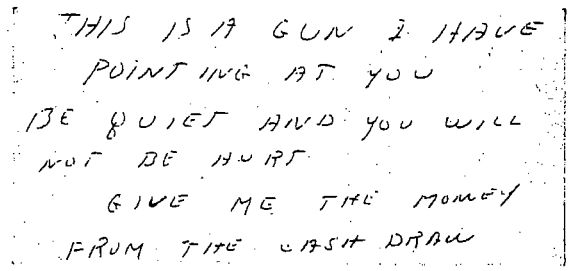


RESEMBLANCES BETWEEN THE ORIGINAL STICK-UP NOTE (LEFT) AND THE

BALESTRERO CONTINUED

Balestrero knew the Prudential office well—his family held four life insurance policies with the company. Twice when there was illness in the family Balestrero had visited the office to negotiate loans on the policies. The detectives began asking questions, and Balestrero began to be terribly afraid. When was he last in the insurance office? It had been only yesterday. Balestrero's wife Rose had learned that she needed some major dental work. It would cost about $325. At her suggestion Balestrero had walked over to the insurance office to inquire about the size of a loan he could get on her policy.

As he talked with the detectives, Balestrero remembered that the girl behind the counter in the insurance office had kept him waiting a moment while she talked in a low voice with some of the other clerks. The cops asked if he had been in the office on Dec. 18. Balestrero said he had not. Or on July 9? He couldn't remember what he had done on July 9. But he needed money, eh? Of course he needed money (he nets $85 a week, union scale, at the Stork Club), and he had gone yesterday to borrow some. Now, once again, was he sure he had not gone into the insurance office on Dec. 18?

Over and over they repeated the questions, while Balestrero's panic grew. It was not a brutal third degree; the detectives remained polite. But they were obviously skeptical of Balestrero's stumbling answers. They told him two girls from the insurance office were on their way down now to see if they could identify him. Balestrero sat there, helpless and terrified.

The detectives gave him paper and pencil and dictated a note for him to write in block letters. It was the text of a holdup note passed to a girl clerk by the bandit during the second holdup. It read: "This is a gun I have pointing at you. Be quiet and you will not be hurt. Give me the money from the cash drawer." Balestrero printed the note half a dozen times. Each time he spelled the last word correctly, but once he misspelled it: DRAW. That is how it had appeared in the original holdup note (*above*). If there had been any thought of mistaken identity in the minds of the detectives it probably vanished with that error.

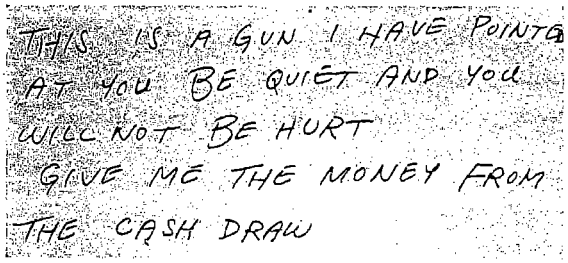
From a darkened room

BALESTRERO was told to put on his gray tweed overcoat, his hat and his maroon muffler. Presently he became aware that people were looking at him from an adjoining, darkened room. He could not see them but he knew they were there. Then he was placed in a line with some other overcoated men whom he took to be other detectives. Two girls came into the room. They had already identified him from the darkened room. Now to his bewilderment they picked him out again from this informal lineup.

Balestrero is a timid man, by his own admission afraid of his own shadow. He has never been in a fight in his life, never carried a weapon, never been arrested, never even received a traffic ticket. As the net of evidence tightened, his mind spun and he did not know what to do or say. "When things happen like that and you're innocent," he has said since, "you want to shout and scream and you can't. I don't know how many ways I tried to say to them I was innocent. They acted as if I was guilty and wanted me to say so."

He told them he wanted to call his wife. The detectives said they would let her know where he was and they did. Two of them went to his house and asked for his "notebook" (the original holdup note was written on a lined page torn from a notebook) and his "blue overcoat" (the bandit wore one the second time). Rose Balestrero told the officers her husband had no such notebook that she knew of, and only the gray overcoat he was wearing.

Finally Balestrero was led to a detention cell in the station



BALESTRERO COPY CONVINCED POLICE THEY HAD FOUND THE RIGHT MAN

house for the night. He could not sleep. A religious man, he spent most of the night in prayer, much of it on his knees. He wondered what would happen to him, but even more about his family and what his wife was thinking and doing. He worried about his father who had recently had a stroke (what would this do to him?) and about his job at the Stork Club. This was the first night he had missed in two years at the Stork.

By morning he was a famished bundle of nervous fatigue. Two detectives drove him across the Queensborough Bridge to police headquarters in lower Manhattan. There he was photographed, fingerprinted and registered and was given a roll and a mug of coffee. Then he was driven back to Queens Felony Court for arraignment on a charge of assault and robbery. There, for the first time since the previous noon, he saw his wife.

While the charges against him were read, Balestrero stared across the courtroom at her, wondering what she felt and thought. The hearing took only a few minutes. Balestrero was held in $5,000 bail, which his family could not immediately supply, and he was led back to his cell.

A blow to dignity

WHEN he was again removed from it, he joined a handful of other prisoners bound for the Long Island City jail. They were handcuffed in pairs and ordered into a van. Being manacled did something corrosive to Balestrero's dignity as a person. He stared at the steel ring encircling his wrist, and he could not look up. He does not know what the man he was handcuffed to looked like.

At the prison he was checked in, stripped, physically examined, given a tin plate and cup and some bedding and led to a cell. This cell had a heavy steel door with only a little window, and once it had crunched shut on him Balestrero felt caged-in and hopeless. About 5 o'clock he was brought some food—noodles with a kind of sauce over them, hot chocolate, bread and butter, stewed pears. Balestrero looked at the food but could not eat. After a time he heard his name mentioned outside from a distance. Instantly he was on his feet. He flung himself at the door and hammered on it with his tin cup, yelling, "That's me—Balestrero! I'm in here, in this cell! Here!"

Balestrero had now been in custody just 24 hours. He had been given every right of the American judicial system. Any professional criminal accustomed to police procedures would say he had been treated with fairness and impersonal consideration. But when he was taken downstairs and saw his brother-in-law Gene Conforti, who had succeeded in obtaining the bail, Balestrero collapsed. His sister Olga went out and got him some coffee. Then they drove him home, and he went quickly to bed and fell into the sleep of utter exhaustion.

When Balestrero awoke the next morning, the nightmare was still upon him. Word was sent that—while the others in the band had vouched for him—it might be better if he did not come to work for a week or so. That was all right. Balestrero did not feel like working, and he had somehow to cope with the incredible problem of finding a lawyer to defend him as an accused robber.

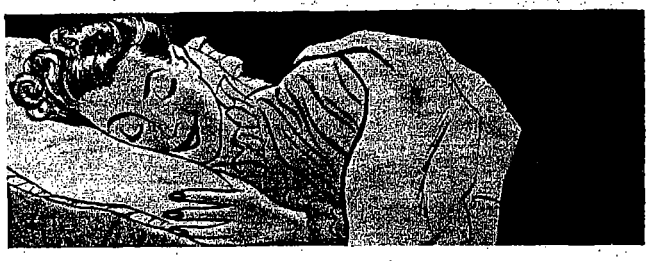
Finally, on the recommendation of friends, the Balestreros decided to ask former State Senator Frank D. O'Connor to take the case. The following Sunday they met with O'Connor after church in his law office. Once he had assured himself of his new client's honesty and repute, O'Connor's assignment was superficially simple. If Balestrero had not committed the two robberies, he had been someplace else at the time. If O'Connor could prove where he had been, then his client would have alibis for each crime.

The first occasion, noon of July 9, 1952, was fairly easy. Rose Balestrero remembered they were in the country. The Stork Club

CONTINUED ON NEXT PAGE

"I drink all the coffee I want...

I get all the sleep I need!"



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COMPARE THE CALORIES:

Ry-Krisp, 1 double-square wafer	21
Bread, 1 slice	63
Plain roll or bun	118
Biscuit or muffin	129

A HAPPY FAMILY before Balestrero's arrest, his wife Rose, and sons, Robert (*left*) and Gregory, were photographed on outing along Hudson River.

had closed for a week during the summer, from July 3 to 10, and early in the week the Balestreros with their two boys, Robert, 12, and Gregory, 5, had gone to Edelweiss Farm near Cornwall, N.Y., some 50 miles from New York City. Balestrero's presence there was easy to establish. July 9 was the birthday of the proprietor's wife and he had planned a party for her that was called off when she fell ill. Even so the proprietor could remember that none of the guests, Balestrero included, was missing for that midday meal. Other guests were located and under dint of patient questioning remembered that it had been a rainy day. One of them, Karl Wuechner, had written a letter to his mother in Germany. He recalled that when he started to drive into Cornwall to post the letter, Balestrero had asked if he and his two sons could go along since they had nothing better to do on a rainy day. Later a pinochle game had begun; Balestrero played in it. O'Connor arranged to get the letter back from Germany, obtained weather records and depositions from the pinochle players. That took care of July 9.

Dec. 18 was not so easy. On that day Balestrero had pursued his usual routine, which consists of working until 4 a.m., breakfasting at Bickford's and then coming home, via the Arcade Building's subway station, to sleep until noon or after. Then Balestrero, under the persistent questioning of O'Connor, remembered something else. At about that time he had a great deal of trouble with two abscessed teeth. Records of Dr. August J. Bastien, the family dentist, showed that during the week of Dec. 14 Balestrero's right jaw had been so swollen that the teeth could not be extracted, and he had to be given penicillin. The swelling had not died down by Dec. 22, so Bastien sent Balestrero to Dr. George Long, the family medical man. Both doctors signed statements that Balestrero's jaw could not have returned to normal between the two dates, and members of the rumba band said they recalled that Balestrero's jaw had continued enormously swollen during the week. None of the identifying witnesses had mentioned that the holdup man had a swollen jaw.

Trouble in the family

THE development of these hopeful strategies took days of patient investigation and interrogation, but they did little to buoy Balestrero's morale. In fact it steadily dropped. That was because of his growing concern over his wife. Rose had always been a bustling, hard-working housewife. To other women in the neighborhood she had been a cheerful, amiable friend.

Now she acquired an illogical feeling that somehow she was responsible for her husband's misfortune, because it was to help her that he had gone to the insurance office on Jan. 13. As the days passed she became more and more depressed, said little to her family, and found it difficult to perform the daily housework. She stared dry-eyed into space and walked fearfully from room to room.

As one more weapon in his defense, O'Connor had arranged for Balestrero to take a lie detector test. But when the Balestreros appeared for it, it was Rose who interested the psychologist who was to give the test more than her husband. He referred her to a psychiatrist who, after an examination, insisted that she leave at once for a sanitarium. Balestrero had always depended on his wife

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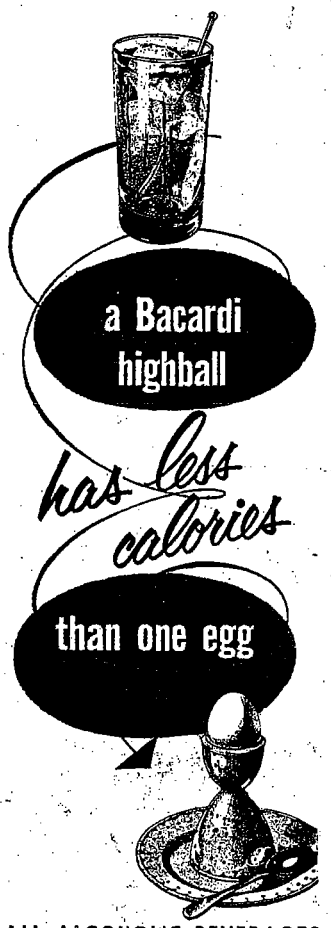

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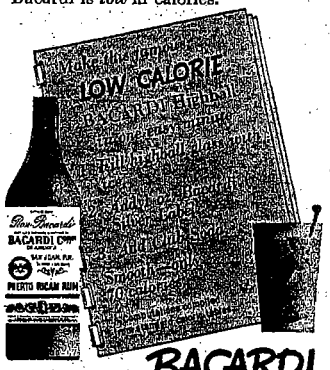

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DEFENSE ATTORNEY O'Connor took Balestrero case on faith.

("she was my right arm") and her breakdown was the final blow.

Nothing in Balestrero's past had prepared him for the position in which he thus found himself. He had been born on Manhattan's West 38th Street, of immigrant parents, had started studying violin when he was 5, and had always applied himself to music. He played with dance bands around Broadway, and in 1938, with the growing popularity of Latin music, he switched to string bass with which he soon established a reputation. He played in most of the top New York nightclubs as well as on many radio programs, and occasionally he had been urged to start a band of his own. But with his quiet personality, he preferred being simply a side man.

Ten days after Balestrero's arrest O'Connor had written Sherman Billingsley, the Stork Club proprietor, the results of his preliminary investigation and Billingsley said Balestrero was to come back at once, a decision for which Balestrero feels warmly grateful. He needed money, but even more he needed something to do. He knew the bass parts in the band's arrangements so well that he could play them automatically, and now he often did, staring unseeingly at the gay supper room while his fingers plucked out music he did not hear.

A gesture of confidence

HIS trial opened on April 21 in Queens County Court before Judge William B. Groat. In a carefully calculated gesture of confidence in their case, O'Connor agreed to the first 12 jurors to be approved by the prosecution. Actually, however, he was anything but confident. The months of worry and nerve strain were visibly telling on Balestrero, and O'Connor feared privately that he would suffer a breakdown like his wife's before the trial could end.

The prosecution's opening statement did not help. Assistant District Attorney Frank J. Crisona told the jury that he would show Balestrero had needed money, by his own admission to the police, that he played the horses and was familiar with the location and layout of the insurance office. Four girls in the office would positively identify him as the robber. The holdup note and samples of Balestrero's printing would be introduced and the points of similarity explained.

After the usual preliminaries, the key witnesses took the stand. The first girl was asked if the holdup man was in the courtroom and, if he was, to step down and place her hand on his shoulder. The girl pointed out Balestrero, but when she tried to touch his shoulder she almost fainted from fear. It obviously impressed the jury. After that, the other girl witnesses were asked only to point him out, and one after another they did. Balestrero again was seized with a wild desire to stand up and shout. "It's a horrible feeling, having someone accuse you. You can't imagine what was inside of me. I prayed for a miracle."

And a miracle—of sorts—happened. On the third day of the trial Juror No. 4, a man named Lloyd Espenschied, rose suddenly in the jury box. The witness on the stand at the time was Yolande Casagrande, whose identification of Balestrero had seemed to O'Connor to be somewhat shaky. O'Connor had been cross-examining for perhaps 45 minutes when Espenschied got up and irately addressed the bench: "Judge, do we have to listen to all this?" The question implied a presupposition of the defendant's guilt by a juror—a violation of his responsibility to refrain from any conclusion until all evidence is in. It gave the defense an opportunity to move for a mistrial. O'Connor was not sure he wanted one as he felt he had a good case. But after talking it over with his client he made the motion and it was granted.

Yet it was a hollow victory as far as Balestrero was concerned. The defense had not even had a chance to present its case, and now he must go through the whole thing again. He went back to work haunted by the thought that he might once more be seized and jailed. He could not go into Bickford's for breakfast as he always had in the past because it was in that building that all his troubles had begun.

He recalls April 29 as the lowest point in his life. He had visited his wife in the afternoon, found her little improved, and when he returned home from the sanitarium, he received a telephone call

CONTINUED ON PAGE 104

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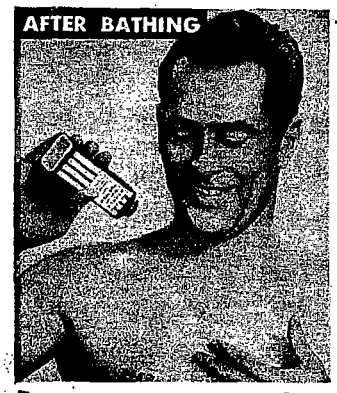

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CROOK AND VICTIM, confessed robber Charles J. Daniell (*left*) and Balestrero, are not doubles but both have intense eyes which confused witnesses. Daniell pleaded guilty last week, faces possible maximum sentence of 10 years.

BALESTRERO CONTINUED

from O'Connor saying that the new trial had been set for July 13. Despair flooded him as he made his nightly journey to the Stork. The evening is a half-remembered period of tortured fogginess.

At 1 a.m. the "Latin" band had just gone on the bandstand after a recess and begun to play when Balestrero noticed Jack Elliot, pianist for the Stork's "American" band, coming toward him pointing and grinning. "Put that bass down," called Elliot. "They've caught the guy who did those robberies." Balestrero sensed what that meant, but he kept on playing his string bass. "Don't you understand?" yelled Elliot over the band's din. "They got the holdup man!" Balestrero gripped the neck of the bass fiddle harder. He didn't dare let go. The drummer next to him had heard Elliot. "Will you put that damned bass down?" he growled good humoredly. "Your troubles are over."

Balestrero felt himself begin to tremble. He couldn't believe it. He plucked out a few more measures of music. Then, grinning a little crazily, he put down the instrument and climbed off the bandstand. "You're to call your lawyer right away," Elliot told him.

Balestrero went up to the dressing room. He was shaking so much that he could not fit the nickels into the telephone's slot, and another musician had to do it for him. He reached O'Connor and asked if it was true. O'Connor said it was. Balestrero doesn't know what he said after that. (It was, "Oh, God! Oh, God! Oh God!") O'Connor said to come to his office at once. The others crowded around, shaking his hand and thumping his back.

When Balestrero reached O'Connor's office it was thronged with reporters who told him what had happened. Earlier that evening a woman named Frieda Mank, who operates a delicatessen with her husband in Astoria, had noticed a man lurking watchfully outside the store and she had telephoned the police. Soon after, at about 10:30 p.m., the man came in with his hand in his pocket, told her he had a gun and demanded the money in the cash register. Mrs. Mank stamped her foot on the floor, a prearranged signal to her husband who she knew was in the basement. Then Mrs. Mank seized a butcher knife. Her husband charged up from the basement, grabbed the robber from behind and flung him into a corner. That is where he was when detectives arrived from the 114th precinct.

"Name any stick-up"

THE man was Charles James Daniell, 38, a jobless plastics moulder who at first claimed that this was his only attempt at robbery. But when detectives told him that he would be viewed by victims of a recent wave of stick-ups (as Balestrero had been), he dropped his pose. "Name any stick-up in Jackson Heights," said Daniell, "and I did it." He admitted some 40 holdups. "I read in the papers," he said, "they got a guy for holding up the Prudential office. I pulled both those jobs. If this man was convicted, I was going to write the court or the D.A. and try to clear him."

Balestrero, O'Connor and the reporters drove to the 114th precinct station. There Balestrero confronted the man who more than anyone else was responsible for his 15 weeks of torment. Daniell was handcuffed to a chair. He looked up at Balestrero once and did not look again. There was a fleeting resemblance between the two men, particularly in the set and expression of their eyes (*above*).

Balestrero asked, "Do you realize what you have done to my wife?" Daniell did not answer.

It was almost 5 a.m. by the time Balestrero got home. There was a family celebration. He finally went to bed for a half hour's

CONTINUED ON PAGE 107

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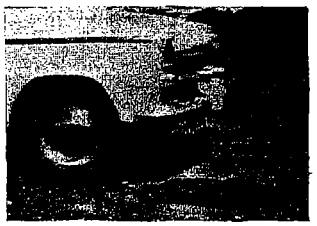

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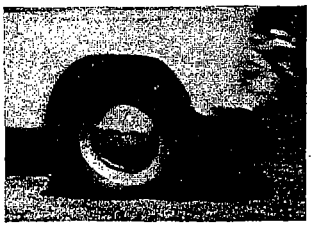

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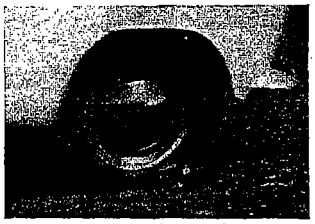

to take it

See ad on page 47

rest, but he was soon up again to see reporters and to make the trip to the sanitarium. He had a wistful hope that if he broke the news suddenly to Rose she would recover immediately. As he told his wife what had happened, a flicker of happiness lighted her face and he knew she understood. But no miraculous recovery occurred, and Mrs. Balestrero is still under treatment although she now spends weekends at home.

The story of Balestrero's exoneration got a big play in the papers, bigger than the original stories of his arrest, and he also made a bashfully uneasy television appearance with his sons. He did not hear from the police, the insurance company or the girl witnesses who "identified" him. (Said one later, "I never wanted to send an innocent man to jail. I did what I thought was right. I still think it was right.") But he did receive many messages of congratulation, some from total strangers. One letter was from the principal of his younger son's school and told how she had been sure he was blameless from the start and how she had offered her Holy Communion for him during the trial. Another was from the handwriting expert retained by O'Connor, who said he had been certain of Balestrero's innocence after examining the holdup note. There was a telegram signed "Frank Marti and his Copacabana Band," with which Balestrero used to play. It began "Congratulations to our honest pal," and went on to commiserate on his wife's illness. Showing these to friends, Balestrero's eyes sometimes fill with tears of appreciation at how wonderful people are.

He still knows moments of unreasoning fear of being arrested and he still cannot bring himself to go into Bickford's, but he shows a remarkable lack of bitterness. He does not blame the police ("They couldn't help it") or the girl witnesses ("If they have a conscience, they'll realize they were wrong"). Asked about his forgiving attitude, Balestrero looks away. "Well, I'll tell you," he says. "It's like I keep telling my friends. Be careful of accusing anyone. Before you accuse anyone you should *think*—because you can destroy a family, physically and mentally, like mine would have been destroyed."

The night after his sudden exoneration he was eager to go back to work even though he had had little sleep. He wanted to tell the world about his exoneration. When it came time for the La Rotonda band to go on, the manager of the club detained Balestrero a few minutes in the dressing room. When he finally rushed downstairs, the last member of the band to appear, he discovered that the other members of both orchestras were on the stand. As he walked in they began playing and singing *For He's a Jolly Good Fellow*. All the waiters, captains and busboys had been assembled too and they broke into applause. The patrons, forgotten for once, looked up curiously. Balestrero wept. "Oh, I felt so *good*," he says.

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CERTIFICATION FOR APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER STATE OF WISCONSIN

(*State of Wisconsin v. Brian Hibl*, No. 2004AP2936-CR)

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. § (Rule) 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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.

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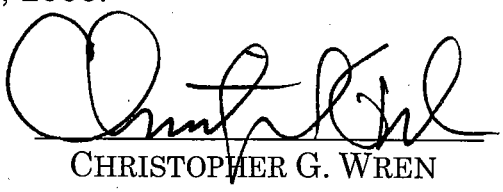

CHRISTOPHER G. WREN

STATE OF WISCONSIN

SUPREME COURT

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
WAUKESHA CO. JUDGE P. REILLY

BRIEF OF DEFENDANT-RESPONDENT BRIAN HIBL

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STATE OF WISCONSIN

SUPREME COURT

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

BRIEF OF DEFENDANT-RESPONDENT BRIAN HIBL

ISSUES PRESENTED FOR REVIEW

1. Should the holding in ***State v. Dubose***, 2005 WI 126, __ Wis. 2d __, 699 N.W.2d 582 (2005), be applied to the facts in this case where a suggestive and unplanned but foreseeable encounter 1) takes place within the context of the criminal justice system, 2) is brought about by state action and 3) is not preceded by a traditional pretrial identification procedure?

   The court of appeals implicitly answered, "Yes."

This Court should answer, "Yes"

2. Does the holding in ***Dubose*** implicitly clarify ***State v. Marshall***, 92 Wis. 2d 101, 284 N.W.2d 592 (1979) with respect to situations where the state's failure to utilize a traditional pretrial identification procedure creates the circumstances where an unnecessarily suggestive identification is likely to occur?

   The court of appeals implicitly answered, "Yes."
   This Court should answer, "Yes."

3. Did the court of appeals take judicial notice of acts derived from social-science research "subject to reasonable dispute" contrary to Wis. Stats. (Rule) § 902.02(2)?

   The court of appeals implicitly answered "No."
   This Court should answer "No."

4. Did the trial court have the authority absent a due process violation to preclude the eyewitness identification by Alan Stuller?

   The court of appeals answered, "Yes.
   This Court should answer, "Yes."

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Defendant-Respondent Brian Hibl requests oral argument. Although this written brief fully develops and meets the issues presented for appeal, oral argument would assist the Court because the factual circumstances in this case are different from the factual circumstances in existing precedent. Defendant-Respondent requests that

the Court explicitly expand the holding of ***Dubose*** to include the type of factual situation in the instance case.

Publication is also appropriate for the reason mentioned above.

STANDARD OF REVIEW

> On review of a motion to suppress, this court employs a two-step analysis. First, we review the circuit court's findings of fact. We will uphold these findings unless they are against the great weight and clear preponderance of the evidence. "In reviewing an order suppressing evidence, appellate courts will uphold findings of evidentiary or historical fact unless they are clearly erroneous." Next, we must review independently the application of relevant constitutional principles to those facts. Such a review presents a question of law, which we review de novo, but with the benefit of analyses of the circuit court and court of appeals.

Dubose, 2005 WI 126 at ¶16 (citations omitted).

FACTS AND PROCEDURAL HISTORY

This case involves an automobile collision that occurred on June 25, 2002, on Racine Avenue in Muskego, Wisconsin. John Schley was driving southbound on Racine Avenue with his minor children Elizabeth and Aaron as passengers when their vehicle was struck by a northbound vehicle which crossed into their lane causing a head-on collision killing the driver of the northbound vehicle and injuring the Schleys (2:2-3; R-Ap. 130-131).

Brian Hibl was charged in a three-count criminal complaint dated February 10, 2003 (2:1-6; R-Ap. 129-134) with the criminally negligent operation of a vehicle,

as defined in Wis. Stats. § 939.25 (2003-2004)[1], causing great bodily harm to John D. Schley in violation of Wis. Stats. §346.62(4) and causing bodily harm to Elizabeth Schley and Aaron Schley, respectively, in violation of Wis. Stats. §346.62(3), (2:1-2; R-Ap. 129-130). A preliminary examination was conducted on March 21, 2003, and the case was bound over for trial based in part upon a statement given by Hibl to Detective James Kaebisch of the Muskego Police Department (13:29-31, 43-44; R-Ap. 142-144, 145-146). An Information was filed with the same charges (4).

The State's theory is that the northbound vehicle was engaged in a speeding incident with Hibl's northbound vehicle just prior to the collision and that Hibl was criminally negligently operating his vehicle, causing injuries to the Schleys. Defense counsel for Hibl, in conversations with the prosecutor, was informed that the State's case was based upon the defendant's admissions and that there were no witnesses capable of identifying Hibl as the driver of the northbound non-contact vehicle (7:1; R-Ap. 127). This representation was consistent with the discovery turned over to counsel for the defendant by the state and the allegations contained in the criminal complaint (7:1; R-Ap. 127). Stuller was unwilling to speak with a private investigator (14:31; R-Ap. 164).

At the scene of the collision Stuller was interviewed by Lt. Paul Geiszler. Stuller told Geiszler that he could not provide a description of the driver of the non-contact vehicle (14:24; R-Ap. 157). He returned to the Muskego Police Department later the same evening and gave Lt. Geiszler a three-page statement which he signed. In that statement he identified the driver of the non-contact white van as a white male. He gave no

---

[1] Unless otherwise noted, all further references to Wisconsin Statutes refer to Wis. Stats. (2003-2004).

further description (14:27-28; R-Ap. 160-161). He was asked by Lt. Geiszler whether he could identify the driver and he told him, "I didn't think I could" (14:28; R-Ap. 161).

Scott Anderson, owner of Anderson Floor Covering, Inc., Brian Hibl's employer, spoke with a member of the Muskego Police Department on June 27, 2002, and informed the officer that Hibl had witnessed the collision. When asked to describe the company's vehicle Anderson described it as a white paneled work van with Anderson Flooring and various other lettering in green printed on the side, which the police concluded was a "match [of] the description provided by Officer Kukowski of the vehicle he observed just prior to the accident" (2:4; R-Ap. 132).[2]

Detective James Kaebisch contacted Hibl the same day, June 27, 2002, and observed the same van Hibl was operating on June 25, 2002. Kaebisch subsequently obtained an admission from Hibl on June 27, 2002, two days after the collision, after Hibl originally informed Kaebisch that he had come upon the scene of the accident after it occurred. (2:4-5; R-Ap. 132-133).

Stuller was never asked to view photographs or attend a lineup in an attempt to identify Hibl as the driver of the white van (14:28; R-Ap. 161). Stuller testified that he only became aware that Hibl was charged with a crime when he received a subpoena to appear as a witness at the trial three weeks to a month before the trial (14:29; R-Ap. 162). He claimed that he did not have any contact with anyone from the Muskego Police Department or the Waukesha County District Attorney's Office between the date of the collision, June 25, 2002, and the date he

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[2] Neither Kukowski (13:3; R-Ap. 137) nor Stuller (14:9-11; R-Ap. 148-150) identified the white van as having Anderson Flooring lettering in their descriptions of the non-contact vehicle.

received the subpoena to appear as a witness in the trial (14:30; R-Ap. 163). He refused to talk to a private investigator for the defendant (14:31; R-Ap. 164).

Prior to his appearance as a witness, Stuller had telephone contact with the prosecutor but did not recall his conversation (14:33; R-Ap. 166). The trial was scheduled in the courtroom of the Honorable Paul Reilly on November 18, 2003, approximately seventeen months after the collision on June 25, 2002. When he arrived at the courtroom, Stuller seated himself outside the courtroom (14:35; R-Ap. 168). He talked to an unidentified officer from the Muskego Police Department but denied talking about the case (14:36; R-Ap. 169). Stuller admitted that the officer might have been Kaebisch (14:36; R-Ap. 169).

After selection of the jury, the court took a break prior to the opening statements of counsel. During the break, Stuller started to review with the prosecutor the statement he had given on the night of the collision (14:37; R-Ap. 170). He could not recall whether the prosecutor asked him whether he could identify Hibl (14:38; R-Ap. 171). While reviewing his statement with the prosecutor, he observed Hibl whom he identified to the prosecutor as the driver of the non-contact northbound white van on June 25, 2002 (14:38; R-Ap. 171). This observation took place in the hallway area two or three minutes after Stuller started talking to the prosecutor (14:39-40; R-Ap. 172-173). With regard to this observation, Stuller stated, "I just turned to my left and I saw the defendant, Mr. Hibl," (14:40; R-Ap. 173). Stuller testified that he told the prosecutor, "That's him," (14:42; R-Ap. 175). Defense counsel was then later informed by the prosecutor that Stuller had just identified Hibl as the driver of the non-contact northbound vehicle while Stuller was conferring with the prosecutor in the hallway outside the courtroom (7:1,4; R-Ap. 127-128).

The trial court granted Hibl's mistrial motion without objection from the state (7:4, ¶6; R-Ap. 128). The defendant subsequently filed a Motion to Suppress the Pretrial and In-Court Identifications of Hibl by Stuller (6). The Court held evidentiary hearings on June 4, 2004, when Stuller testified (14), and on August 9, 2004, when Detective James Kaebisch, Muskego Police Department, testified (15), and the prosecutor made a statement in lieu of testimony regarding the circumstances surrounding his knowledge of Stuller's identification. (15:21-22; R-Ap. 190-191).

Detective James Kaebisch testified at the suppression hearing on August 9, 2004, and identified himself as a 21-year veteran of the Muskego Police Department whose responsibilities involved "follow-up on major case investigations," (15:4; R-Ap. 177). He characterized his role as the "lead officer" who "put[s] the whole case together, do[es] follow-ups. That's basically it," (15:5; R-Ap. 178). During the investigation in this case, he and other officers were interested in interviewing witnesses "regarding the potential identity of [the] non-contact vehicle..." (15:7; R-Ap. 180). Even though he was the lead officer, Detective Kaebisch was not aware of Stuller as a potential witness (15:8; R-Ap. 181). He recalled looking at Stuller's report "briefly," and even though he knew that several witnesses had been interviewed by officers at the scene he "was not aware that Mr. Stuller had come to the Muskego Police Department later on June 25th, 2002, and given a voluntary statement to a City of Muskego police officer," (15:8; R-Ap. 181).

Kaebisch had no personal contact with Stuller (15:11; R-Ap. 182). He never arranged a lineup or a photographic array to determine whether Stuller could identify Hibl (15:11-12; R-Ap. 182-183). He was not even aware that Stuller had been subpoenaed as a witness

(15:13; R-Ap. 184). He testified that even if he were aware of Stuller as a potential witness, he would not have attempted some type of pretrial identification or done any additional follow-up investigation (15:19-20; R-Ap. 188-189). This is the same officer who obtained an admission from Hibl, after Hibl's original denial, only two days after the collision[3] (2:4-5; R-Ap. 132-133).

At the hearing on Hibl's suppression motion, Detective Kaebisch recounted his conversation with Stuller regarding the circumstances surrounding his identification of Hibl (*see* 15:14-16; R-Ap. 185-187). He interviewed him right after the identification itself at the request of the prosecutor. He testified that Stuller observed Hibl leave the courtroom at which time he identified him as the driver of the non-contact vehicle (15:15; R-Ap. 186). Kaebisch testified as follows:

> And at that time, [Stuller] said that they were discussing the case and his testimony, and at that time he, I guess, looked up and saw the defendant, Mr. Hibl, coming out of the courtroom, at which time he made a statement "there he is," something to that effect, and told Mr. Szczupakiewicz that was the driver of the suspect vehicle we were looking for, that he had saw that day, of the third vehicle.

(15:15; R-Ap. 186).

The prosecutor confirmed Stuller's testimony as to what took place regarding their conversation (15:21; R-Ap. 190). He recalled telephoning Stuller about his testimony, during which call Stuller never gave him any indication that he was able to identify Hibl as the driver of the vehicle (15:22; R-Ap. 191). He stated: "I don't

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[3] In addition to eyewitness misidentifications, false confessions are a contributing factor to wrongful convictions. *See* Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 Cal. Western L. Rev. 333 (2002) at p. 340.

recall whether or not we even discussed his ability to make any identification of him [Hibl]. So, that was it. Basically, the nature of the conversation related to other things about Mr. Stuller's testimony," (15:22; R-Ap. 191).

The trial court entered a written order suppressing the identification on September 28, 2004, (11), and the state appealed from that order. (12).

The state filed its notice of appeal on November 8, 2004 (12). The state filed its brief on January 21, 2005. The defendant filed his brief on February 21, 2005, and the prosecutor filed a notice that he would not file a reply brief.

This court issued its decision in ***State v. Dubose***, 2005 WI 126, __ Wis. 2d ___, 699 N.W. 2d 582 (2005), on July 14, 2005.

The court of appeals issued its decision on September 28, 2005. ***State v. Hibl***, 2005 WI App 228, ___ Wis. 2d ___, 706 N.W. 2d 134 (R-Ap. ___). The court of appeals, with a dissent by Judge Brown, applied this Court's analysis in ***Dubose*** to the courthouse identification of Brian Hibl by Alan Stuller. *See* ***Hibl,*** 2005 WI App 228 at ¶¶ 12-18. The court of appeals decision did not cite or analyze this court's prior rulings dealing with what the state has characterized as "spontaneous identifications": ***State v. Marshall,*** 92 Wis. 2d 101, 284 N.W.2d 592 (1979); ***State v. Streich,*** 87 Wis. 2d 209, 274 N.W.2d 635 (1979); ***Jones v. State,*** 63 Wis. 2d 97, 216 N.W.2d 224 (1974); and ***State v. Brown,*** 50 Wis. 2d 565, 185 N.W.2d 323 (1971), *overruled on other grounds by State v Walker,* 154 Wis. 2d 158, 453 N.W.2d 127 (1990).

The State filed a petition for review, which was granted by this court.

ARGUMENT

I. ALLEGED FACTUAL ERRORS IN DECISION OF CIRCUIT COURT

As a preliminary matter, the State alleges certain factual errors in the circuit court's determinations. These alleged errors are either not actually errors or are errors that do not affect of the trial court's decision.

First, the State claims, "the circuit court clearly erred when it wrote that Stuller identified Hibl 'in the courtroom during the trial,'" (Brief of Plaintiff-Appellant-Petitioner State of Wisconsin (hereinafter referred to as "State's Brief"), p. 11-12, n. 9). The identification occurred during a break in the trial, as *voir dire* had concluded, and Stuller identified Hibl when Stuller was standing in the hallway (14:39-40; R-Ap. 172-173). This misstatement does not affect the trial court's determinations as to the reliability of Stuller's identification.

Second, the State claims that the trial court "cites 'Aff. 40-41' in support of two facts . . . [although] the court meant to cite the June 4, 2004 transcript of the suppression hearing," (State's Brief at p. 14). This is a citation error and not a factual error, which also does not affect the court's decision. With respect to the State's contention that the court cited the affidavit for the fact that Stuller knew he would see the defendant on the day of the trial, the court's citation is likely only meant to be a citation for the number of people in the hallway. The court wrote: "Mr. Stuller first identified the defendant in the hallway outside of the courtroom with approximately nine other people in the hallway; this occurred on the day Mr. Stuller knew he would see the alleged defendant (Aff. 40-41.)," (11:2; R-Ap. 122). Moreover, although Stuller denied an expectation that he would see the driver

of the white van on the day he was subpoenaed to court (14:36; R-Ap. 169), the court was free to find, based on Stuller's testimony and other facts, that Stuller's testimony on that point was not credible. The court was free to therefore find that Stuller had expected to see the van's driver on the day Stuller was subpoenaed to court.

Third, the State claims that the trial court erred when it cited to the same non-existent affidavit for the proposition that Stuller spoke with the police officer assigned to the case just prior to identifying Hibl (State's Brief at p.14). Again, the citation error has no effect on the court's decision. Stuller did testify that, prior to meeting with the prosecutor, he had spoken to an unidentified Muskego Police Officer, whom Stuller acknowledged that it might have been Detective Kaebisch (14:36; R-Ap. 169). The circuit court had the authority was to find that based on all of the evidence that Stuller talked to Detective Kaebisch prior to identifying Hibl.

Finally, the State claims that the court erred when it stated that "while conversing in the hallway, Stuller and the prosecutor 'anticipat[ed] the alleged defendant in court in a few minutes,'" (State's Brief at pp. 14-15). Here again, despite Stuller's testimony, the court had the authority to find that Stuller did anticipate Hibl's appearance in court despite his testimony to the contrary.

The alleged factual errors are therefore either not errors but findings the court was free to make in the face of conflicting evidence or were citation errors that have no effect on the court's decision that the identification of Hibl occurred in an impermissibly suggestive manner and that Stuller's identification was unreliable.

II. THE COURT OF APPEALS CORRECTLY SELECTED *DUBOSE* AS THE CONTROLLING PRECEDENT IN AFFIRMING THE TRIAL COURT'S SUPPRESSION OF THE COURTHOUSE IDENTIFICATION OF THE DEFENDANT.

A. The encounter between Alan Stuller and Brian Hibl was the result of state action and not a chance encounter or "spontaneous."

Central to the State's argument is the contention that the encounter between Alan Stuller and Brian Hibl in the corridor at the Waukesha County Courthouse was "spontaneous" in nature and that the court of appeals erred in applying ***Dubose,*** 2005 WI 126, __ Wis. 2d ___, 699 N.W. 2d 582 (2005), rather that ***Marshall,*** 92 Wis. 2d 101, 284 N.W. 2d 592 (1972). The encounter between Stuller and Hibl that occurred in this case did not involve a traditional pretrial identification procedure of a showup, photographic identification, or lineup identification. Its characterization as "spontaneous," in the context of the criminal justice system, gives the erroneous impression that there was no state action involved in the encounter.

The standard dictionary definition of "spontaneous" includes "developing without apparent external influence, force, cause, or treatment" and "not apparently contrived or manipulated: Natural." Merriam-Webster's Collegiate Dictionary 1136 (10th ed. 1997). The word "spontaneous" derives from the Latin *sponta*, meaning, "of one's free will, voluntarily." *Id.* The circumstances that brought Alan Stuller and Brian Hibl together in the corridor at the Waukesha County Courthouse were anything but voluntary and were the result of state action.

The traditional pretrial identification procedures of showups, photographic and lineup identifications are the subject of most cases that deal with the legal issues arising from pretrial identifications. These same identification techniques are also the subject of the standards and guidelines developed in response to DNA exoneration and other wrongful convictions. *See e.g.,* Bureau of Training and Standards for Criminal Justice, State of Wisconsin, *Model Policy and Procedure for Eyewitness Identification* (Sept. 12, 2005), *available at* http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf; Avery Task Force, *Eyewitness Identification Procedure Recommendations,* January, 2005.

Therefore, it is no surprise that of the twenty-three cases concerning eyewitness identifications cited by the majority and dissenting opinions in ***Dubose,*** as noted by the State in its brief, all involve lineups, showups, or sometimes both (State's Brief at pp. 29-30). The footnote summarizations of these cases indicate that eight of these cases include the other traditional eyewitness procedure of photo identification as well (State's Brief at pp. 29-30, n. 13).

Unplanned confrontations are much less common. This Court has addressed unplanned identifications on several occasions: ***State v. Brown,*** 50 Wis. 2d 565, 185 N.W.2d 323 (1971); ***Jones v. State,*** 63 Wis. 2d 97, 216 N.W.2d 224 (1974); ***State v. Streich,*** 87 Wis. 2d 209, 274 N.W.2d 635 (1979); and ***State v. Marshall,*** 92 Wis. 2d 101, 284 N.W.2d 592 (1979). Each of these cases previously addressed by this Court occurred within the context of the criminal justice system: ***Jones*** (district attorneys office); ***Brown*** (Safety Building); ***Streich*** (police station); ***Marshall*** (courtroom).

There is a difference of opinion among the courts that have addressed these so-called "spontaneous"

confrontations whether the suppression of an identification must be predicated upon pretrial police conduct or is applicable to other types of confrontation as well. Wisconsin has required that the challenged identification be the product of pretrial police procedure. ***State v. Marshall***, 92 Wis. 2d 101, 117-119, 284 N.W. 2d 592 (1979) (applicable where confrontation was deliberately contrived by police for obtaining eyewitness identification). Other courts have taken a contrary view. ***United States v. Bouthot***, 878 F 2d 1506, 1516 (1st Cir. 1989) ("Because the due process focus in the identification context is on the fairness of the trial and not exclusively on police deterrence, it follows that federal courts should scrutinize all suggestive identification procedures, not just those orchestrated by the police, to determine if they would sufficiently taint the trial so as to deprive the defendant of due process.").

There are significant factual differences among cases not involving intentional pretrial eyewitness identification procedures which have been variously characterized as involving "spontaneous" or "accidental" or unplanned confrontations.[4] In fact, the utilization of the word "spontaneous" itself is misleading. In some cases, the confrontations are independent of any state action and occur outside the criminal justice system. *See* Talutis, 86 ALR 5th 463. Other cases, such as those previously addressed by this Court, involve varying degrees of state action, and the likelihood of an encounter between a witness and a suspect or defendant is either

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[4] There is no consensus as to what these types of identifications should be called. They have been referred to as "unplanned" (***Marshall,*** 92 Wis. 2d at 118), "not pre-arranged" (*Id.*), "informal" (***Jones,*** 63 Wis. 2d at 105) and "spontaneous" (***Hibl,*** 2005 WI App 228, at ¶30, in dissenting opinion). The State's brief refers to them as "spontaneous" (State's Brief at p. 19), "unplanned" (*Id.* at p. 20), "accidental" (*Id.* at p. 32), and "serendipitous," (*Id.* at p. 17).

possible (as where a potential witness sees a suspect in custody) or inevitable, as here, where a witness is subpoenaed to court to testify during a trial.

In the previous cases, the police were either in the process of attempting or had utilized a traditional eyewitness identification procedure when the witness encountered and identified the suspect or defendant under unplanned circumstances. In ***Brown, Jones*** and ***Marshall,*** the police attempted pretrial identifications with potential eyewitnesses. In ***Brown,*** the police had shown the witness a lineup in which the defendant did not participate. ***Brown***, 50 Wis. 2d at 570. The witness did not identify any individual in the lineup as the man who had perpetrated the armed robbery. Later, as Brown exited an elevator in the Safety Building, the witness saw Brown and identified him as the robber. *Id.*

In ***Jones*** the police attempted a lineup with the witness, but the witness was unable to identify anyone in the lineup because Jones was not wearing his glasses. The witness was told to return to the station later, and when he arrived he was taken to a room outside the district attorney's office where he waited with a detective. ***Jones,*** 63 Wis. 2d at 101-02. As they waited, the defendant entered the hallway with two officers and a detective, at which point the witness identified defendant. *Id.*

In ***Marshall*** the police had shown the witness a photographic array that included a picture of the defendant. The witness did not identify the defendant at that time but instead picked out the photograph of another man whom the witness indicated resembled the man he had seen. ***Marshall,*** 92 Wis. 2d at 108-109. The witness was later subpoenaed to court to testify at the defendant's trial. The witness saw the defendant sitting in court a few

rows in front of him and then identified him as the man he had seen. *Id.*

Finally, in ***Streich,*** the witness was told to come to the police station to identify the suspect. At the station and while in the secretary's office, the witness looked through an open door in the squad room and saw the defendant, at which point he identified him as the man he had seen. ***Streich,*** 87 Wis. 2d at 212.

The common thread in the above cases is that the police had either previously attempted an identification or were in the process of so doing when the witness identified the defendant or suspect under other unplanned circumstances. One of the instances occurred in a courtroom at trial, ***Marshall***, while the other three, ***Brown***, ***Jones*** and ***Streich***, occurred in various criminal justice locations. In each of these instances, the police utilized traditional eyewitness identification procedures to determine whether a witness could make an identification and only after such an effort did an unplanned encounter occur. In ***Marshall, Brown,*** and ***Jones*** the witnesses participated in the tradition eyewitness identification procedure but did not affirmatively identify the defendant, and the identification came later in a different encounter. In one instance, in ***Streich***, the unplanned encounter between the witness and the defendant occurred just as the police were going to attempt the identification technique.

In the instance case, however, the state did not attempt a pretrial eyewitness identification prior to subpoenaing Stuller to appear at the trial of the defendant, where it was inevitable that he would encounter the defendant. The state had seventeen months between the date of Stuller's initial observation and the commencement of the trial in which to arrange a pretrial identification by Stuller to determine whether he could

identify Hibl as the driver of the non-contact white van, but the State failed to do so.

The failure to attempt an identification was understandable before Hibl's alleged admission since the police had no suspects. However, it was inexcusable once Hibl allegedly made his admission after his initial denials on June 27, 2002. Fairness required that the state make an attempt by either photo identification or participation in a lineup. The state, including both the police and the district attorney's office, has a duty to the accused as much as to the general public. "The duty of the prosecutor is to seek justice, not merely to convict." Criminal Justice Standards Committee, American Bar Association, ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3rd ed. 1993) (hereinafter referred to as "ABA Standards"), Standard 3-1.2. This Court has previously cited approvingly and adopted various sections of the ABA Standards. *See State v. DeLao*, 2002 WI 49, ¶22, 252 Wis. 2d 289, 302, 643 N.W.2d 480, 486 (2002). In the instant case, the state ignored its duties to both the public and the accused by failing to assure that the police had determined by traditional eyewitness identification procedures whether Stuller could identify Hibl.

Contrary to the circumstances in the previous "spontaneous" identification cases, the state here did *not* attempt an identification using a standard identification technique that is not suggestive. The circumstances under which Stuller encountered Hibl were both unnecessary and suggestive. The circumstances were unnecessary because it would have taken little effort to attempt either a photo or a lineup identification at any point in the 511 days between the collision and the trial. The circumstances were suggestive because the identification took place after Stuller spoke to both the lead officer on the case and the prosecutor, both of whom

knew the identity of Hibl. Detective Kaebisch knew Hibl's identity because he obtained a confession from Hibl on June 27, 2002 (2:4-5; R-Ap. 132-133). The prosecutor knew Hibl's identity because he had appeared with Hibl in court for the preliminary hearing on March 21, 2003 (13:1; R-Ap. 135) and in court moments before his conversation with Stuller.

The encounter and subsequent identification of Hibl by Stuller was not by chance or "spontaneous." It was the result of state action that brought the two together on November 18, 2003, within the context of the criminal justice system.

B. The holding in *Dubose* implicitly clarifies *Marshall* with respect to instances where the state's failure to utilize a traditional pretrial identification procedure created the circumstances where an unnecessarily suggestive identification was likely to occur.

The holding in ***State v. Dubose,*** 2005 WI 126, __ Wis. 2d __, 699 N.W.2d 582 (2005), applies specifically to showups. ***Dubose,*** 2005 WI 126 at ¶ 33. However, the court's analysis shows that the majority was concerned with pretrial identification procedures in general and the contribution of misidentifications to wrongful convictions. *Id.* at ¶¶ 29-31. This concern is not limited to "showups" but applies to all pretrial identifications. As noted above, most of these encounters or confrontations are intentional or "contrived" in the words of ***Marshall.*** *See* ***Marshall,*** 92 Wis. 2d at 117. The witness or potential witness and the suspect or defendant are brought together (in the cases of lineups and showups) by intentional state action for the purpose of determining whether the witness can make a reliable identification.

Encounters such as the one in this case and which occur within the context of the criminal justice system are more appropriately described as negligent encounters where the witness or potential witness and the suspect or defendant encounter one another under uncontrolled circumstances that are avoidable. The state has no control over a witness or potential witness who encounters a suspect or defendant at a shopping mall or on the street. *See* Talutis, 86 ALR 5th 463 for a discussion of such cases. However, the state does have control over whether a potential identification witness encounters a suspect or defendant in a district attorney's office or in a courtroom when it subpoenas the witness to trial. The difference in motive does not detract from the reality that the encounter itself, whether intentional (as in the case of a showup, photograph identification procedure or lineup identification procedure) or negligent (where no attempt at a pretrial identification has been made), occurs under circumstances that are unnecessarily suggestive. The potential impact upon the reliability of the identification exists.

This Court is sensitive to the issues involved in the defendant's appearance in court and its effect upon the fairness of a trial. Wisconsin has addressed situations where defendants appear in custody before jurors in jailhouse clothing that gives the implication of guilt. ***See State v. Clifton***, 150 Wis. 2d 673, 679, 443 N.W.2d 26 (Ct. App. 1989). Likewise courts take care that jurors do not know that defendants are in custody at the time of trial because of the prejudicial nature of that information. The same care against prejudicial encounters is necessary between potential identifying witness and suspects or defendants.

The State argues that the court of appeals misapplied ***Dubose*** where there was no requisite pretrial police procedure involved in the confrontation between

Hibl and Stuller (State's Brief at pp. 27-31). It further argues that since there was no pretrial police involvement, then there was no impermissibly suggestive confrontation requiring the deterrent remedy of suppression (State's Brief at pp. 32-37). Finally, the State argues that there is no reason to determine whether there exists a reliable independent basis for the identification (State's Brief at p. 37).

There is no evidence that the state intentionally subpoenaed Stuller to the trial in the anticipation that he would identify Hibl as the driver of the non-contact white van whose criminally negligent driving caused the injuries to the Schleys. The prosecutor had informed defense counsel that there were no eyewitnesses who could identify Hibl as the driver of the non-contact vehicle (7:1; R-Ap. 127). However, the confrontation between Stuller and Hibl was inevitable and not spontaneous as the State asserts. State action that was once appropriate under ***Marshall*** would no longer be accepted under ***Dubose***. In ***Marshall*** this Court explicitly rejected any analogy between a showup identification and the confrontation in that case. It stated that even if the police would have intentionally planned a courtroom confrontation between the witness and the defendant it would not be a due process violation based on the circumstances surrounding the identification in that case. ***Marshall,*** 92 Wis. 2d at 119 ("Even if this had been a confrontation planned by the police . . . there was nothing about the circumstances under which Cummings observed the defendant that was 'so unnecessarily suggestive and conducive to irreparable mistaken identification' that he was denied due process of law."). This type of identification procedure would not withstand a due process analysis in light of ***Dubose.***

Here the state knew that Stuller would confront Hibl either in or around the courtroom. The subpoenaing

of Stuller required his attendance. Furthermore, the state knew or should have known that Stuller had not been asked to make a pretrial identification. If Stuller had not confronted Hibl in the corridor or hallway, he would have faced him in the courtroom during his testimony. The trial would deal with the issue of the identity of the driver of the non-contact vehicle and whether that driver was Brian Hibl.

In ***Marshall*** the police had attempted a pretrial photographic identification by the witness who subsequently identified the defendant in the courtroom at the trial. The witness did not identify the defendant's photograph from an array. He actually picked out a photograph of another person.[5] ***Marshall***, 92 Wis. 2d at 109. The state acted fairly in ***Marshall*** because it had taken reasonable steps to determine whether the witness could identify the defendant. He could not identify Marshall from a photograph but did identify him in person. ***Marshall*** was decided prior to the rash of DNA exonerations and the recognition that care has to be taken by law enforcement to obtain fair identification evidence.

The formulation in ***Marshall*** as a predicate for a due process evaluation of an unplanned confrontation is inapplicable to contemporary identification procedures. The court's formulation in that case implies the very suggestiveness that is incompatible with the objective of reliability. The formulation implies that the purpose of the procedure is to obtain an identification. In the words of ***Marshall***, "Before this analysis is applied, however, it must first be determined whether the confrontation was

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[5] Under current practice, subsequent attempts at identification are discouraged because of their contribution to misidentification. *See* Bureau of Training and Standards for Criminal Justice, State of Wisconsin, *Model Policy and Procedure for Eyewitness Identification* (Sept. 12, 2005), *available at* http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf, #6 at page 3.

deliberately contrived by the police *for purposes of obtaining an eyewitness identification of the defendant.*" *Id.* at 117 (emphasis supplied). The court was referring to the test for reliability.

Police are now encouraged to employ techniques which "enhance the reliability of eyewitness identification reducing the potential for erroneous identifications in criminal cases. Avery Recommendations at p. 1. Police are not encouraged to "obtain[] an eyewitness identification of the defendant." *Id.* The ***Marshall*** formulation implies the very partisanship that has contributed to misidentification and constitutes a due process violation. Police are encouraged to use neutral parties to conduct eyewitness identification procedures so that unintended messages are not conveyed to potential witnesses.

Police are discouraged from approaching eyewitness identification procedures in the formulation described in ***Marshall***. The focus of law enforcement is upon reliability and the removal of suggestiveness from eyewitness identification procedures. ***Marshall*** is unaffected by ***Dubose*** where encounters occur without state action outside the context of the criminal justice system. The state cannot be held accountable where a witness makes an identification where no state action is involved. This does not mean that an eyewitness identification cannot be unreliable for some other reason. The state should be held accountable where the witness makes an identification where state action is involved.

In this case, the state should have attempted a pretrial eyewitness identification by Stuller who claimed to have seen the driver of the non-contact north bound vehicle. The state is attempting to hold Hibl criminally liable for the injuries to the Schleys. (14:13; R-Ap. 152), The state failed to attempt such a procedure (14:28; R-Ap. 161) and then approximately 17 months later

contributed to a suggestive pretrial identification having subpoenaed a potential identifying witness to the trial (14:29-30; R-Ap. 162-163). This Court's concerns for misidentification expressed in ***Dubose*** are applicable to the unplanned but inevitable encounter within the context of the criminal justice system that occurred in this case.

At a suppression hearing the defense has the burden of showing that the identification was unduly or unnecessarily suggestive and conducive to irreparable misidentification. ***State v. Armstrong***, 110 Wis. 2d 555, 329 N.W.2d 386 (1983). If the pretrial confrontation was impermissibly suggestive, the burden shifts to the state to show by clear and convincing evidence that the out-of-court identification was reliable; or that the in-court identification was from an independent source. ***State v. McMorris***, 213 Wis. 2d. 156, 167, 570 N.W. 2d 384 (1997). In making this decision, the court must look at the totality of circumstances surrounding the identification. ***Neil v. Biggers***, 409 U.S. 188 (1972); ***State v. Haynes,*** 118 Wis. 2d 21, 30, 345 N.W.2d 892 (Ct. App. 1984). This is exactly what the circuit court did in this case (11:2-3; R-Ap. 122-123).

C. The holding in *Dubose* should be applied to the facts in this case where an unnecessarily suggestive and unplanned but foreseeable encounter 1) occurs within the criminal justice context, 2) is brought about by state action and 3) is not preceded by any pretrial identification using traditional identification procedures.

In ***Dubose,*** this Court relied on ***Stovall v. Denno***, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967), for its characterization of the due process concerns at issue in identification cases:

> The Court determined that necessity is a key factor in reviewing whether a showup violates due process. Although the identification was suggestive, the Court determined that it did not violate the defendant's right to due process because the procedure was necessary. . . *Stovall* 'established a due process right of criminal suspects to be free from confrontations that, under all circumstances, are unnecessarily suggestive.' The right was enforceable by exclusion at trial of evidence of the constitutionally invalid identification.

Dubose, 2005 WI 126 at ¶18 (citations omitted). The Court then stated:

> With *Stovall* as our guide, we now adopt a different test in Wisconsin regarding the admissibility of showup identifications. We conclude that evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible 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.*

Dubose, 2005 WI 126 at ¶33 (footnote omitted, emphasis supplied).

Although ***Dubose*** dealt with the eyewitness identification procedure of the showup, the Court expressed concern with identification testimony in general. The authority cited by this Court related to other identification techniques such as photospreads and lineups.[6] ***Dubose,*** 2005 WI 126 at ¶29. The court

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[6] The Court cites numerous articles, including the following: Nancy Steblay et al, *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 L. & Human Behav. 523 (2003); Winn S. Collins, *Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 Wis. L.Rev. 529; Gary L. Wells & Elizabeth Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psycol. 277 (2003); Tiffany Hinz & Kathy Pezdek, *The Effect of Exposure to Multiple Lineups on Face Identification*

concluded 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 cause combined."[7] ***Dubose*** 2005 WI 126 at ¶30.

A variety of sources have noted that eyewitness errors have been linked to two psychological factors: 1) unintentional suggestion to the witness, and 2) the relative judgment process or the tendency when viewing a simultaneous presentation (an entire photo array or lineup at once) "for the eyewitness to identify the person who looks the most like the real perpetrator relative to the other people." Bureau of Training and Standards for Criminal Justice, State of Wisconsin, *Model Policy and Procedure for Eyewitness Identification* (Sept. 12, 2005) (hereinafter referred to as "*Model Policy*"), *available at* http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf, p.2.

Accuracy, 25 L. & Human Behav. 185 (2001); U.S. Department of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999), *available at* http://www.ncjrs.org/pdffiles1/nij/178240.pdf; Gary L. Wells et al., *Eyewitness Identification Procedures; Recommendations for Lineups and Photospreads*, 22 L. & Human Behav. 603 (1998).

[7] In support of this statement, the majority in *Dubose* cites the same author, Wells, that the Office of the Attorney General cites in its *Model Policy and Procedure for Eyewitness Identification*, for the proposition that, "scientific research has uncovered psychological factors that can cause wellmeaning eyewitnesses to make mistakes, and has shown that new methods of conducting eyewitness procedures can address these factors and reduce error." Bureau of Training and Standards for Criminal Justice, State of Wisconsin, *Model Policy and Procedure for Eyewitness Identification* (Sept. 12, 2005), *available at* http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf, p.2.

A similar analysis is contained in the Eyewitness Guidelines of the Avery Task Force Eyewitness Identification Procedure Recommendations. The Task Force made a number of recommendations "[t]o address the effects of memory contamination and relative judgment" including double-blind procedures and sequential presentations "for sequential photo arrays, sequential live lineups, and "show-ups."" Avery Task Force, *Eyewitness Identification Procedure Recommendations,* January 2005 (hereinafter referred to as "Avery Recommendations"), p. 1.

The "double-blind procedure" refers to the fact that the individual conducting the procedure "should not know which photo or member of the lineup is the suspect." Avery Recommendations IA at p. 1. The Task Force recommended sequential presentations to "reduce the occurrence of misidentifications that result from a witness making relative judgment identifications by comparing members of the array or lineup to determine which one looks most like the suspect, rather than focusing on whether a particular array or lineup member actually is the suspect." Avery Recommendations, IB, at p. 1. The Avery Task Force also calls for recording the results of the pretrial identification. The AG's Model contains similar recommendations. *Model Policy*, at p. 3.

The recommendations from as varied sources as the Avery Commission and the Office of the Attorney General of the State of Wisconsin do not specifically address the issue of "spontaneous" identifications. In fact, it can be argued that the utilization of the procedures they recommend would militate against these types of identifications. As noted above, these identifications either occur without any state involvement and are unavoidable, or they occur under situations such as existed in this case where the confrontation was the result

of negligence and the failure of the state to determine whether the witness could in fact identify defendant.

The same concerns that underlie these recommendations are present in the confrontation which occurred in this case and which concerned the court in ***Dubose***. The confrontation took place at the courthouse on the first day of the defendant's trial. The confrontation took place while the witness was talking to the prosecutor who knew the identity of the defendant and after he had spoken to the detective who had taken the defendant's admission approximately 17 months earlier. The prosecutor had been in court with Hibl moments earlier and on the date of the preliminary hearing (13:1; R-Ap. 135). The opportunity to unintentionally influence or signal the witness was present. This potential unintentional influence is one of the concerns noted by both Avery and the AG's Office. *See Model Policy*, at p. 4; Avery Recommendations IA at p. 1.

Furthermore, the preference for a sequential presentation during an eyewitness identification procedure recommended by authorities is absent in this type of avoidable encounter. Stuller had given the most general of descriptions of the driver of the non-contract white van (a white male) to the investigating officer. He didn't think that he could identify that person but he didn't rule it out. When asked whether he could identify the driver, he stated only that he "didn't think [he] could," (14:28; R-Ap. 161). Yet Stuller was allowed to examine the faces of everyone present in the hallway on the day of trial and was therefore able to make relative judgments about Hibl's appearance. In fact, Stuller could not state what it was specifically about Hibl that he recognized. He only stated that Hibl "stood out to [him] from everybody else in the hallway," (14:41; R-Ap. 174). That's exactly the relative judgment process which is a leading cause of misidentification.

Under the circumstances, there was no explanation for this unnecessary and inherently suggestive encounter other than the failure of the state to have made certain that a pretrial eyewitness identification had been attempted by Stuller. Thus, the circuit court was justified in conducting an analysis under the due process clause of the United States Constitution and the court of appeals was justified in applying this court's analysis in ***Dubose*** to the facts of the confrontation in this case.

The decision in ***Dubose*** clarifies ***Marshall's*** inapplicability to the facts of this case. In ***Marshall*** the state had attempted a pretrial identification, and was justified in subpoenaing its witness to court. The encounter between Stuller and Hibl without an effort at a pretrial identification was avoidable, and the suggestive circumstances surrounding the encounter were unnecessary. Although the confrontation between Stuller and Hibl was not "deliberately contrived by the police for purposes of obtaining an eyewitness identification," ***Marshall,*** 92 Wis. 2d at 117, the confrontation was the result of state action, was foreseeable, and under ***Dubose,*** was unnecessary. The unnecessarily suggestive confrontation violated Hibl's due process rights.

The state's decision to subpoena Stuller as a witness to the trial on November 18, 2003, to testify about the collision, meant that a confrontation between Stuller and Hibl was inevitable approximately 511 days after the collision. The trial court saw and heard Stuller at the motion hearing and rejected Stuller's contention that he had no expectation when he was subpoenaed that he would confront the driver of the non-contact northbound vehicle (11:2; R-Ap. 122). The trial court had the authority to make such a finding based upon all the evidence, the demeanor of the witness and common sense even in the face of Stuller's denial. *See* ***Jones,*** 63 Wis. 2d at 107. "The trial court is the ultimate arbiter of the

credibility of witnesses and a reviewing court will accept the inference drawn by the trier of fact." ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279, 282 (1979).

The court rejected Stuller's contention because it flies in the face of common sense. Who else did Stuller expect to see in court? Neither Stuller nor the prosecutor precluded the possibility during their earlier telephone conversation that they had discussed Stuller's ability to identify Hibl, which would have been an obvious subject of discussion. In addition, Wis. Stats. § 971.04 mandates a defendant's appearance at trial. *See* Wis. Stats. §971.04(1). Waukesha County local rules provide that "[i]n addition to the requirements of § 971.04, defendants are required to appear . . . for all evidentiary hearings, plea dates, trial dates and jury status conference dates." Waukesha County Circuit Court Rules, Criminal/Traffic Court Division, Rule 7.

The circuit court was justified in finding that "Stuller's juxtaposition in the courtroom hallway with the ADA, anticipating the alleged defendant in court in a few minutes, constitutes an identification that occurred in an impermissibly suggestive manner," (11:2; R-Ap. 122). The identification of Hibl, under these circumstances, was unnecessarily suggestive and conducive to a misidentification, and the trial court was justified in requiring that the State show that there was clear and convincing evidence that the identification was reliable.

The record shows that the trial court correctly found that the State did not sustain its burden. On June 25, 2002, Stuller was working and stopped to see his father who was not home at the time. He made a left turn going southbound onto Racine Avenue and his attention was drawn to a white construction van and an S-10 pickup truck proceeding northbound toward him (14:9-10; R-Ap. 148-149). The two vehicles passed him and they were

speeding (14:11-12; R-Ap. 150-151). As soon as they passed him, the pickup truck pulled out into the oncoming traffic and struck the car directly behind Stuller containing the Schleys (14:12; R-Ap. 151).

Stuller had observed the driver of the white van from a distance of 50 feet while the van was going 60 miles per hour, and he identified the driver as a white male (14:13-14; R-Ap. 152-153). He had no opinion of the driver's height, weight, facial features or whether he was wearing glasses (14:14-15; R-Ap. 153-154). He testified that he looked directly at the white van driver for three to five seconds while he was driving at 35 to 40 miles per hour (14:19-20; R-Ap. 155-156). The white van was going 60 miles an hour in the opposite direction. Once he started to look at the S-10 pickup, the second northbound vehicle, in his rear view mirror, he took his eyes off the white van and didn't notice it anymore (14:20; R-Ap. 156). Stuller's observation of the driver of the non-contact vehicle was brief, while both vehicles were traveling at high rates of speed in opposite directions and at a time when nothing notable was happening other than the speeding itself.

The facts surrounding Stuller's observation of the driver of the white van coupled with the circumstances of his confrontation with Hibl created an unreliable identification that occurred in an impermissibly and unnecessarily suggestive manner. The two people with whom Stuller interacted at or before the identification of Hibl knew Hibl's identity as the defendant in the case. If these individuals did not explicitly discuss Stuller's potential to identify the driver, they were in a position to unintentionally affect his identification. Stuller identified Hibl at the very time that he was talking to the prosecutor, and, for some inexplicable reason, Stuller turned to his left (14:40-41; R-Ap. 173-174). Stuller indicated that he recognized Hibl because he "stood out"

for some reason, although Stuller could not identify what exactly it was about Hibl that "stood out," (14:41; R-Ap. 174). Thus, Stuller's identification took place 1) in an uncontrolled environment, 2) interacting with a person who knew Hibl's identity as the defendant, as opposed to the neutrality of the recommended "double-blind" procedure, and 3) in an area in which Hibl "stood out" compared with others in the room. Stuller's identification of Hibl is riddled with the very suggestive factors that eyewitness identification policies now attempt to eliminate. An identification under these circumstances, coupled with the facts of Stuller's observation of the driver, resulted in an unreliable identification.

D. The Court of Appeals did not take judicial notice of facts derived from social science research either inapplicable to this case or contrary to Wis. Stats. §902.01(2), "Subject to Reasonable Dispute."

The state claims that the court of appeals citation of Samuel Gross's article *Loss of Innocence: Eyewitness Identification and Proof of Guilt,* 16 J. Legal Stud. 395 (1987), amounted to taking judicial notice of facts derived from social science research either inapplicable to this case or contrary to Wis. Stats. §902.01(2), subject to dispute (State's Brief at pp. 38-42). The court of appeals cited Gross for the proposition that, "Although ***Dubose*** addressed a police showup procedure, concerns about misidentification are not limited to those situation where the police arranged the confrontation." ***Hibl***, 2005 WI App 228 at ¶ 16.

This general proposition is true and as previously noted courts have engaged in addressing whether there are due process and reliability issues independent of due process considerations in situations which the state refers to as "spontaneous" identifications where there is no state

action. Courts have analyzed these "spontaneous" or "incidental" confrontations and have reached different conclusions regarding whether due process considerations are involved. *See* Lynn M. Talutis, *Admissibility of In-Court Identification as Affected by Pretrial Encounter that was not Result of Action by Police, Prosecutors, and the Like*, 86 ALR 5th 463 (2001).

The state uses its extended analysis of the shortcomings of the Gross article to reach the conclusion that, "Stuller's identification of Hibl occurred as soon as he saw him in an inherently nonsuggestive spontaneous encounter – an instantaneous response highly indicative of the triggering of 'recognition memory' and therefore, a reliable memory," (State's Brief at p. 42). What is not pointed out is that between Stuller's original observations on June 25, 2002, and his pretrial courthouse identification of Hibl on November 18, 2003, the following occurred:

1) He possessed articles about the collision but claimed that he hadn't read them;
2) He was subpoenaed as a witness to testify on behalf of the state against Hibl but claimed that he didn't discuss his ability to identify Hibl with anyone;
3) He refused to talk to a private investigator for the defense;
4) He had a telephone conference with the prosecutor where he didn't rule out that he had discussed his possible identification of Hibl;
5) He talked to the same officer who had taken an admission from Hibl prior to his identification of Hibl although he stated that they didn't talk about the case; and
6) He talked to the prosecutor during a break in the trial and as he was talking to the prosecutor he made an instantaneous identification of Brian Hibl.

In this situation and in view of the circumstances surrounding the original observations on June 25, 2002, Stuller's instantaneous identification of Hibl was too good to be reliable.

III. ASSUMING ARGUENDO THAT THE ENCOUNER WAS NOT THE RESULT OF STATE ACTION, THE COURT HAD THE AUTHORITY TO SUPPRESS THE IDENTIFICATION.

Under Wisconsin law, relevant evidence is defined as evidence "having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stats. §904.01. "All relevant evidence is admissible, except as otherwise provided by the constitutions of the United State and the State of Wisconsin, by statute, by these rules, or other rules adopted by the supreme court. Evidence which is not relevant is not admissible." Wis. Stats. § 904.02. The court has the statutory authority to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." Wis. Stats. §904.03

Evidence of other crimes, wrongs, or acts is not admissible to provide the character of a person in order to show that the person acted in conformity therewith. Wis. Stats. §904.04. This same statute "does not exclude the evidence when offered for other purposes, such as...identity...." *Id.* The court can admit or exclude evidence of prior behavior when identification is at issue. ***State v. Stawicki***, 93 Wis. 2d 63, 286 N.W. 2d 612 (Ct. App. 1979).

On the other hand, a court has the authority to include or exclude relevant evidence when the court determines that the evidence is unreliable. This is true whether it is for the purpose of identification or some other purpose. This Court acknowledged this authority in "spontaneous" identifications cases that predate ***Dubose***. In ***Jones*** and ***Brown*** this court upheld determinations of reliability in two accidental confrontation cases after it found no due process violations. ***Jones v. State***, 63 Wis. 2d 97, 216 N.W. 2d 224 (1974) (unplanned confrontation between a witness and a suspect in the outer office or lobby of a district attorney's office); ***State v. Brown***, 50 Wis. 2d 565, 185 N.W. 2d 323 (1971) (witness identification of a defendant in police custody as he emerged from an elevator on his way from police headquarters to the district attorney's office).

Contrary authority, as noted by the state, is found in ***Marshall***, where this court stated that "[o]nly where unnecessarily suggestive confrontation procedures have been used and, under the totality of circumstances the identification appears not to be reliable, is it to be excluded. '. . . reliability is the linch-pin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations.'" ***Marshall,*** 92 Wis. 2d at 117 (citations omitted).

Jones is discussed by the State at length (*See* State's Brief at pp. 17-20) because there this Court found that the witness's identification of Jones in a district attorney's office was an "informal confrontation" and not "a one-to-one confrontation," (State's Brief at 20). The State concludes from this as follows:

> As ***Jones*** shows, an unplanned encounter between a defendant and an eyewitness, even in the anteroom of a district attorney's office, does not occur in unduly suggestive circumstances, does not amount to a one-on-one

> confrontation, at least when the confrontation occurs in a location occupied by other people as well.

(State's Brief at p. 20).

What is missing from the State's analysis of ***Jones*** is the fact that after the court dismissed the defendant's due process argument, it went through an analysis of the issue of reliability, applying the ***Biggers*** test, and found that in view of the particularized description the witness had given the police, including the defendant's race, gender, estimated age, build, height, weight, and clothing, the identification was reliable. ***Jones,*** 63 Wis. 2d at 107. In ***Jones***, the Court cited ***Biggers***, stating:

> [T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 108.

The court in ***Jones*** did exactly what the trial court did in this case on the issue of reliability. The difference here is that the trial court, applying the same criteria as the ***Jones*** court, found that Stuller's identification was unreliable (11:2-3; R-Ap. 122-123). Here Stuller could provide only the most generic information (white male), and the circumstances surrounding the observation of the event were not conducive to a reliable identification, where Stuller observed the driver of the van for three to five seconds while Stuller's van and the white van were driving in opposite directions at a distance of 50 feet. The circumstances permitted only a very brief observation while the observer and the observed were in moving vehicles traveling in opposite directions at of

speed 60 miles and 35 to 40 miles per hours, respectively (14:13-14; R-Ap. 152-153).

Detective Lieutenant Steve Kukowski testified at the preliminary hearing that he had also observed the two northbound vehicles speeding past him under circumstances similar to those under which Stuller observed the vehicles. (13:4-7; R-Ap. 138-141). Kukowski was apparently right in front of Stuller traveling in the same direction just before the accident. Kukowski testified that he did not see the driver of the white van (14:15; R-Ap. 154), despite the fact that Kukowski is a trained law enforcement officer. .

The State also fails to make note of the reliability analysis undertaken by this Court in ***Brown***. The state concludes, "this court held in ***Brown*** that a serendipitous encounter between a defendant and an eyewitness in a police station does not occur under suggestive conditions and does not taint a subsequent in-court identification," (State's Brief at p.17). In ***Brown***, the court upheld one of two identifications and found that the witness first identified the defendant as he left an elevator in the Safety Building in Milwaukee and that she previously had correctly observed that the defendant was not in a lineup. ***Brown,*** 50 Wis. 2d at 570. The court not only held that her observation of the defendant being transported in police custody had not tainted her subsequent in-court identification, but most significantly, as the court had done in ***Jones*** as well, still evaluated her observations at the time of the offense on the issue of reliability. The court's observations in this regard are as follows:

> We think the record shows Mrs. Golimowski's in-court identification was based on her personal knowledge and observations gained at the time and place of the offense and was untainted by her identification at the police station as claimed by Brown. She had sufficient opportunity to

> observe Brown on the night of the robbery; she was the only employee behind the check-out counter when the two armed men came into the store. Brown stayed near the door as the other came near the case register and took money from the drawer. She scuffled with this man and Brown came over and grabbed her. There was sufficient opportunity for her to get a good look at her assailants. This is borne out by the fact she did not make an erroneous identification at the lineup and her immediate recognition of Brown as he came off the elevator.

Brown at 571.

As one court noted, "Although some exclusions are based on constitutional considerations, many are founded on the common law or statute." ***Commonwealth v. Jones***, 666 N.E.2d 994, 999 (1996). The court noted that, "The common law gives a trial judge discretion to exclude evidence that is more prejudicial than probative...and to exclude an expert's proffered opinion if the process or theory underlying the expert's opinion lacks reliability...." *Id.* Moreover, relevant evidence may be excluded "where surprise would require an unduly long continuance...." ***State v. O'Connor***, 77 Wis. 2d 261, 268, 252 N.W. 2d 671 (1977).

The necessity for scrutinizing pretrial identifications has gained additional importance in light of the increasing number of DNA exoneration cases, 85 percent of which involved misidentifications. *See* Lisa Steele, *Trying Identification Cases: An Outline For Raising Identification Issues*, Champion Magazine, November 2004, at p. 8. Wisconsin has not been immune from this trend and has had least two DNA exoneration cases since the events of this case. The more recent one involved a Washington County prosecution where a young girl identified her grandfather as her assailant and the case was dismissed prior to trial after DNA testing implicated the former boyfriend of the girl's mother. Mike Nichols, *Grandpa Exonerated After 5 Long Months*,

Milwaukee Journal Sentinel, January 16, 2005. The case of greater notoriety involved Steven Avery whose conviction for sexual assault and eighteen years of incarceration was invalidated by DNA testing and led to a review of police identification practices by the Avery Task Force, which issued the report entitled *Eyewitness Identification Procedure Recommendations*. *See* Avery Task Force, *Eyewitness Identification Procedure Recommendations,* January, 2005

The criminal justice system has been forced to acknowledge the reality of wrongful convictions based in part on misidentifications and to utilize fair pretrial eyewitness identification procedures, especially in cases such as the instant one, which do not involve scientific evidence such as DNA. This requires courts, as the trial court did in this case, to carefully evaluate pretrial identification procedures involving state action previously found not to involve due process violations in cases such as ***Brown, Jones, and Marshall***, and ***Streich***, supra, and the instant case.

Other courts have considered pretrial identifications so unreliable as to require exclusion where no state action, either police or prosecutor, was directly involved. *See* ***United States v. Bouthot***, 878 F. 2d 1506, 1516 (1st Cir. 1989). In ***Commonwealth v. Jones***, the court, referring to the cases cited in ***Bouthot***, noted:

> If a witness is involved in a highly suggestive confrontation with a defendant and that witness' in-court identification of the defendant is not shown to have a basis independent of that confrontation, the admissibility of the witness's proposed testimony identifying the defendant should not turn on whether government agents had a hand in causing the confrontation. The evidence would be equally unreliable in each instance.

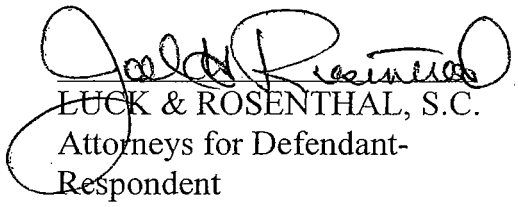
Commonwealth v. Jones at 1000. These cases recognize that, "It is the reliability of identification

evidence that primarily determines its admissibility." ***Watkins v. Sowders***, 449 U.S. 341, 347, 101 S.Ct. 654, 66 L.Ed. 2d 549 (1981), citing ***Manson v. Brathwaite***, 432 U.S. 98, 113-114, 97 S.Ct. 2243, 53 L.Ed. 2d 140 (1977). This Court under these facts should uphold the trial court and court of appeals rulings on the unreliability of Stuller's identification independent of due process considerations.

CONCLUSION

The evidence in this case justified the court of appeals determination that an unnecessarily suggestive pretrial confrontation had occurred between Stuller and Hibl and that the State had not satisfied its burden of showing by clear and convincing evidence that there was an independent basis for the identification. Under these facts, the court of appeals was correct in affirming the suppression of the identification of Hibl by Stuller and Hibl requests that this court affirm that order.

Respectfully submitted,



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CERTIFICATION

In accord with Wis. Stats. § (Rule) 809.19(8), I certify that this brief satisfies the form and length requirements for a brief and appendix prepared using a 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 line, and a length of 10,521 words.

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STATE OF WISCONSIN

SUPREME COURT

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
WAUKESHA CO. JUDGE P. REILLY

APPENDIX OF DEFENDANT-RESPONDENT
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2005 WI App 228

COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2936-CR

Cir. Ct. No. 2003CF115

STATE OF WISCONSIN

IN COURT OF APPEALS

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

BRIAN HIBL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: PAUL F. REILLY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 SNYDER, P.J. The State appeals from an order suppressing the pretrial and in-court identification of Brian Hibl by Alan R. Stuller, a witness for

the prosecution. The State contends that the circuit court erred in holding that the eyewitness identification of Hibl was impermissibly suggestive and unreliable. Although we employ a different analysis, we affirm the order of the circuit court.

FACTS

¶2 On June 25, 2002, at 2:53 p.m., Detective Lieutenant Steven Kukowski of the City of Muskego Police Department was driving southbound on Racine Avenue in the City of Muskego. Kukowski noticed a red pickup truck and a white van speeding northbound. He watched the two vehicles jockey for position as they traveled toward a portion of the road that narrows from two northbound lanes to one. He estimated that the two vehicles were going fifty miles per hour where the speed limit was thirty-five miles per hour. After the vehicles passed him, Kukowski continued to watch them in his rearview mirror and he observed the van pull ahead of the pickup truck. The pickup truck then pulled into the southbound lane, apparently attempting to pass the van. Then, although Kukowski did not see the actual collision, he suddenly noticed dust and vehicle parts in the air and saw that the pickup truck was spinning. The white van was no longer in sight.

¶3 Stuller witnessed the accident. Detective Paul Geiszler took a brief statement from Stuller at the scene and asked him to go to the police station to give a more complete statement. Stuller complied. At that time, Stuller identified the van driver as a white male; Stuller was unable to describe the driver in any other way. Stuller was not asked to make an identification of the van driver from any photo array or lineup procedure.

¶4 Two days later, Scott Anderson of Anderson Flooring, Inc. informed the police that one of his employees, Brian Hibl, reported witnessing the accident.

Detective James Kaebisch interviewed Hibl and took a statement from him. Hibl told Kaebisch that he had been driving a white cargo van northbound on Racine Avenue on June 25 at approximately the same time the accident occurred. Kaebisch reported that at one point Hibl admitted that he did see the accident and may have been a contributing factor. Hibl told Kaebisch that he had accelerated at a high rate of speed going north on Racine Avenue and had increased his speed as a red pickup truck attempted to pass him.

¶5 The State charged Hibl with one count of causing great bodily harm to another by reckless driving contrary to WIS. STAT. § 346.62(4) (2003-04),[1] and two counts of causing bodily harm by reckless driving contrary to § 346.62(3).

¶6 Prior to Hibl's November 18, 2003 trial date, Stuller received a subpoena to appear as a witness. On the day of trial, prior to commencement of the trial, Stuller identified Hibl in the hallway outside of the courtroom. He subsequently identified Hibl in the courtroom during the trial. Hibl moved for a mistrial, the State did not object, and the circuit court declared a mistrial.

¶7 Hibl then filed a motion to suppress the pretrial and in-court identifications made by Stuller. The circuit court held evidentiary hearings on June 4 and August 9, 2004, and granted Hibl's suppression motion. The State appeals.

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

DISCUSSION

¶8 We review a motion to suppress using a two-step analysis. *See* ***State v. Dubose***, 2005 WI 126, ¶16, ___ Wis. 2d ___, 699 N.W.2d 582. First, we review the circuit court's findings of fact. "In reviewing an order suppressing evidence, appellate courts will uphold findings of evidentiary or historical fact unless they are clearly erroneous." ***Id.*** (citations omitted). Next, we independently review the application of relevant constitutional principles to those facts. ***Id.*** This review presents a question of law for our de novo review, but we benefit from the analysis of the circuit court. ***Id.***

¶9 We begin with the circuit court's rationale for granting Hibl's suppression motion. The court used the analytical framework presented in ***State v. Wolverton***, 193 Wis. 2d 234, 533 N.W.2d 167 (1995), *abrogated by* ***Dubose***, which requires a two-step analysis. First, the defendant must demonstrate that the pretrial identification occurred in an impermissibly suggestive manner. ***Id.*** at 264. If the defendant meets this burden, the State must then show that the identification was reliable despite the manner in which it occurred. ***Id.***[2]

¶10 Since the circuit court's order, our supreme court has revisited the ***Wolverton*** test. In ***Dubose***, our supreme court provided a substantial history of the evolution of the relevant law and articulated the new legal standard to be applied in matters of pretrial witness identification. *See* ***Dubose***, 699 N.W.2d 582,

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[2] We note that the circuit court suppressed both the pretrial and in-court identification evidence offered by the State. The State offered no independent basis for Stuller's in-court identification of Hibl; therefore, if the pretrial identification was tainted, the in-court identification was properly suppressed. *See* ***State v. Mosley***, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981) ("where a subsequent *in*-court identification is also challenged as tainted by the prior one, the state must show the in-court identification derives from an independent basis").

¶¶17-27. It tracked, through several key cases, the United States Supreme Court's concern about the reliability of out-of-court identification evidence. The ***Dubose*** court explained:

> After the Supreme Court's decisions in [***Neil v. Biggers***, 409 U.S. 188 (1972)] and [***Manson v. Brathwaite***, 432 U.S. 98 (1977)], 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.

Dubose, 699 N.W.2d 582, ¶31. Departing from ***Biggers*** and ***Brathwaite***, and turning to ***Stovall v. Denno***, 388 U.S. 293 (1967), as a guide, our supreme court stated:

> [W]e now adopt a different test in Wisconsin regarding the admissibility of showup identifications. We conclude that evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible 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.

Dubose, 699 N.W.2d 582, ¶33 (footnote omitted). The supreme court further observed that "[s]tudies have now shown that … it is extremely difficult, if not impossible, for courts to distinguish between identifications that were reliable and identifications that were unreliable." ***Id.***, ¶31. Accordingly, our supreme court withdrew "any language in ***Wolverton*** … and in cases cited therein, that might be interpreted as being based on the Wisconsin Constitution. Those cases were based on the United States Constitution and focused more on the reliability of the identification than on the necessity for a showup." ***Dubose***, 699 N.W.2d 582, ¶33 n.9.

¶11 The question of necessity will only arise in situations where police procedure is involved. Hibl insists that the courthouse hallway encounter was not merely random chance, but occurred under circumstances suggesting a planned confrontation. He asserts that "[t]he State knew or should have know[n] that Stuller would confront Hibl either in or around the courtroom." Had the police or prosecutor arranged a confrontation, ***Dubose*** would require us to affirm suppression of the identification evidence because the State has not demonstrated that such a procedure was necessary.[3]

¶12 The State argues that Stuller's courthouse encounter with Hibl was not the result of police or prosecutor action. The circuit court observed that "[t]here is no evidence that the police or District Attorney's office intentionally or unintentionally suggested the identification" of Hibl to Stuller. Based upon our review of the record, we accept the characterization of the encounter as free from police or prosecutor manipulation; in other words, it was an accidental confrontation. Consequently, the ***Dubose*** analysis regarding necessity is not applicable here.

¶13 The remaining issue is whether, in the absence of police involvement, Stuller's identification of Hibl was properly suppressed. "Preliminary questions concerning ... the admissibility of evidence shall be

[3] "A showup will not be necessary ... unless the police lacked probable cause to make an arrest or ... could not have conducted a lineup or photo array." ***State v. Dubose***, 2005 WI 126, ___ Wis. 2d ___, ¶33, 699 N.W.2d 582. Here, Hibl's own statement, together with the testimony of the police detectives, established probable cause for his arrest. Detective Kaebisch acknowledged that he never arranged a lineup or presented a photo array to determine whether Stuller could identify Hibl. By way of explanation, Kaebisch stated that Stuller's statement on the day of the accident gave no indication that Stuller had any ability to identify the driver of the white van. He stated that he looked at Stuller's statement and could not "see where any additional follow-up would be required."

determined by the judge ...." WIS. STAT. § 901.04(1). A circuit court may, at its discretion, exclude evidence that is unfairly prejudicial. WIS. STAT. § 904.03. A circuit court's decision to admit or exclude evidence is a discretionary determination and will not be upset on appeal if it has "a reasonable basis" and was made "in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983) (citation omitted).

¶14 Our supreme court has stated that proffered evidence must be "reliable enough to be probative." ***State v. Walstad***, 119 Wis. 2d 483, 519, 351 N.W.2d 469 (1984) (citation omitted) (discussing the admissibility of expert opinion testimony). The supreme court turned to ***Stovall*** to demonstrate that the reliability of pretrial identifications is a question of admissibility, not credibility. ***Dubose***, 699 N.W.2d 582, ¶17 n.3. "The overwhelming majority of American courts have always treated the evidence question not as one of admissibility but as one of credibility for the jury. Law enforcement authorities fairly relied on this virtually unanimous weight of authority, *now no longer valid*, in conducting pretrial confrontations in the absence of counsel." ***Stovall***, 388 U.S. at 299-300 (citation omitted; emphasis added).

¶15 Courts have split on the question of whether suppression of witness identification evidence must be predicated on pretrial police conduct or if suppression is appropriate following other types of confrontations also. "The majority of courts require that an allegedly suggestive pretrial encounter be the result of either police or prosecution action to have an effect on the admissibility of in-court identification. These courts reason that without government involvement there is no violation of a defendant's constitutional due process rights." Lynn M. Talutis, Annotation, *Admissibility of In-Court Identification as*

Affected by Pretrial Encounter That Was Not Result of Action by Police, Prosecutors, and the Like, 86 A.L.R.5th 463, § 2(a) (2001). "Other courts have, however, done away with the government action requirement. These courts typically reason that the deterrence of police conduct is not the basic purpose for excluding identification evidence. Rather, it is the likelihood of misidentification that violates a defendant's right to due process." ***Id.***

¶16 In ***Dubose***, our supreme court aligned itself with the latter view, focusing on the likelihood of misidentification as the purpose for scrutinizing identification evidence. ***Dubose***, 699 N.W.2d 582, ¶¶31-32.[4] Although ***Dubose*** addressed a police showup procedure, concerns about misidentification are not limited to those situations where the police arranged the confrontation.[5] Principles of fairness dictate that identification evidence, even absent police involvement,

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[4] The supreme court cited several studies that document the problems associated with eyewitness identification evidence. ***Dubose***, 699 N.W.2d 582, ¶29.

[5] Referencing Samuel H. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 435 (1987), one commentator observed that

> [c]ourts have struggled with the question of whether to engage in exclusion when, by chance, an eyewitness encounters or sees the defendant. Professor Gross calls this a "spontaneous identification," and in his study he found "many reported misidentifications originated in this manner," but he was chagrined that persons writing about identification procedures had failed to acknowledge these are prone to errors, and had instead credited their reliability.

Marger Malkin Koosed, *The Proposed Innocence Protection Act Won't—Unless It Also Curbs Mistaken Eyewitness Identifications*, 63 OHIO ST. L.J. 263, 300 (2002).

must be scrutinized to determine whether suppression is required.[6] Here, the circuit court, citing ***Wolverton***, considered the following factors in its rationale:

> [1] the opportunity of the witness to view the [accused] at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of his [or her] prior description of the criminal, [4] the level of certainty demonstrated at the confrontation, and [5] the time between the crime and the confrontation. (Alterations added.)

It proceeded with the following analysis:

> Mr. Stuller first identified the defendant in the hallway outside of the courtroom with approximately nine other people in the hallway; this occurred on the day Mr. Stuller knew he would see the alleged defendant.... Just prior to identifying the defendant, Mr. Stuller spoke with the police officer assigned to the case and to the Assistant District Attorney assigned to the case.... There is no evidence that the police or District Attorney's office intentionally or unintentionally suggested the identification of the Defendant to Mr. Stuller; however, Mr. Stuller's juxtaposition in the courtroom hallway with the ADA, anticipating the alleged defendant in court in a few minutes, constitutes an identification that occurred in an impermissibly suggestive manner....
>
> Mr. Stuller observed the driver/defendant on June 25, 2002, from 50 feet away while he was traveling 35 to 40 miles per hour, and the driver/defendant was traveling toward him in a white van at a high rate of speed.... On the day of the alleged offense, Mr. Stuller could not identify the driver's facial features, height, weight, or whether or not he wore glasses.... Mr. Stuller could only identify the driver as a "white male." Mr. Stuller's identification of Defendant occurred fifteen months after he witnessed the incident.

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[6] *See, e.g.*, ***Commonwealth v. Jones***, 666 N.E.2d 994, 1000-01 (Mass. 1996) (holding that although no governmental action contributed to the eyewitness identification and no due process rights were implicated, fairness required preclusion of the evidence); ***People v. Walker***, 411 N.Y.S.2d 156, 159 (N.Y. County Ct. 1978) (holding that identification process conducted by nonpolice is subject to the same reliability and suggestiveness analyses as those traditionally imposed on procedures conducted by law enforcement personnel).

¶17 The circuit court's rationale is sound. Proffered evidence must be "reliable enough to be probative." ***Walstad***, 119 Wis. 2d at 519 (citation omitted). Because the circuit court's order to suppress was made in accordance with accepted legal standards applied to the record facts, we will not disturb it. *See* ***Pharr***, 115 Wis. 2d at 342.

CONCLUSION

¶18 In ***Dubose***, our supreme court turned the focus from the reliability of eyewitness identification to that of necessity in cases where police procedure is involved. ***Dubose***, 699 N.W.2d 582, ¶33. Here, where necessity is not an issue, the only consideration left for the circuit court is that of reliability. The circuit court's analysis demonstrates that Stuller's courthouse hallway identification of Hibl was not reliable; therefore, we affirm the court's order granting Hibl's motion to suppress the pretrial and in-court identification evidence.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

¶19 BROWN, J. (*dissenting*). I disagree with the majority opinion for several reasons. First, I think it is essential that we establish what this case is about. This case regards the admissibility of an in-court identification following a pretrial encounter that did *not* result from government action. Thus, this case is different from those where the pretrial identification results from either a police or prosecution procedure such as a showup or a lineup or photo array. In shorthand, this is what the law calls an "accidental confrontation" or an unplanned or "spontaneous identification." *See generally* Lynn M. Talutis, Annotation, *Admissibility of In-Court Identification as Affected by Pretrial Encounter That Was Not Result of Action by Police, Prosecutors, and the Like*, 86 A.L.R.5th 463, § 14 (2001).

¶20 I understand the central position of the majority to be as follows: Other jurisdictions are divided about whether accidental identifications may be deemed inadmissible as a matter of law. Most courts adhere to the proposition that, without government involvement, there is no "suggestive procedure" used to obtain an identification; since there is no "procedure," there can be no state-sponsored manipulation which may affect the reliability of the identification. Thus, the law does not need the circuit court to act as "gatekeeper" on the question of manipulation prior to testimony before the trier of fact. Rather, it is for the trier of fact, usually a jury, to assess the reliability of the spontaneous identification. A minority of courts have held that police conduct is not the basic purpose for excluding identification evidence. Rather, it is the likelihood of misidentification

that violates a defendant's right to due process. Therefore, circuit courts possess gatekeeper responsibility to assess the reliability of the spontaneous identification, just as they have similar responsibility with regard to state-sponsored identification procedures. The majority concludes that, in ***State v. Dubose***, 2005 WI 126, ___ Wis. 2d ___, 699 N.W.2d 582, our supreme court sided with the minority view.

¶21 I take issue with the majority's expansive interpretation of ***Dubose***. I read ***Dubose*** as being limited to the context of pretrial showups, thus leaving prevailing rules intact with respect to other pretrial encounters. One of those prevailing rules, not even acknowledged by the majority, is the rule announced in ***State v. Marshall***, 92 Wis. 2d 101, 117-18, 284 N.W.2d 592 (1979), *abrogated on other grounds by* ***State v. Dean***, 103 Wis. 2d 228, 307 N.W.2d 628 (1981), *superceded in part by statute*, 1995 Wis. Act 440. In ***Marshall***, our supreme court first reiterated the two-part test that existed at the time to determine admissibility of identification evidence under federal due process standards. First, the courts were to decide whether the confrontation procedure was unnecessarily suggestive. ***Marshall***, 92 Wis. 2d at 117. If so, then they were to turn to whether the evidence was nonetheless reliable. ***Id.*** Only when the pretrial encounter was *both* unnecessarily suggestive and unreliable did the court exclude the evidence. ***Id.***

¶22 Of particular importance to this case, the ***Marshall*** court then made clear that when the government has not deliberately employed a suggestive technique in order to obtain an identification, the two-part test is inapplicable. The court stated:

> Before this [two-part] analysis is applied ... it must first be determined whether the confrontation was *deliberately contrived* by the police for purposes of obtaining an eyewitness identification of the defendant. [***Stovall v.***

> ***Denno***, 388 U.S. 293 (1967)], [***Neil v. Biggers***, 409 U.S. 108 (1972)] and [***Mason v. Brathwaite***, 432 U.S. 98 (1977)] ... all involved planned confrontations between a suspect and a supposed witness to a crime orchestrated by the police for the sole purpose of having the witness identify the suspect as the perpetrator of that crime.... Where the confrontation is not part of a police procedure directed toward obtaining additional evidence, but occurs as a result of mere chance or for some other reason not related to the identification of the defendant, the rule announced in those cases does not apply.

Marshall, 92 Wis. 2d at 117-18 (emphasis added). By definition, the State does not design or "deliberately contrive" accidental and unplanned confrontations. Thus, when faced with an allegedly suggestive encounter between an identification witness and the defendant, ***Marshall*** requires, as a condition precedent, that we first determine whether the relevant actor was a government actor. ***Marshall*** cited ***Jones v. State***, 63 Wis. 2d 97, 216 N.W.2d 224 (1974), and ***State v. Brown***, 50 Wis. 2d 565, 185 N.W.2d 323 (1971), *overruled on other grounds by* ***State v. Walker***, 154 Wis. 2d 158, 453 N.W.2d 127 (1990), as examples of cases in which, although the circumstances were suggestive, the court nonetheless upheld the use of identification testimony derived from an unplanned confrontation.[1] ***Marshall***, 92 Wis. 2d at 118.

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[1] In ***State v. Brown***, 50 Wis. 2d 565, 185 N.W.2d 323 (1971), *overruled on other grounds by* ***State v. Walker***, 154 Wis. 2d 158, 453 N.W.2d 127 (1990), police had summoned the witness to the safety building to identify the defendant. ***Id.*** at 567. But before the police procedure could take place, the witness observed the defendant emerging from an elevator in the company of police officers. ***Id.*** at 567, 571. She identified the defendant immediately. ***Id.*** at 571. ***Jones v. State***, 63 Wis. 2d 97, 216 N.W.2d 224 (1974), involved similar facts. Police were guiding the defendant to the district attorney's office when the victim, who was sitting in the corridor with a detective, observed the group. ***Id.*** at 101. The victim identified the defendant at that time. ***Id.*** In both cases, the court reasoned that these identifications were unplanned and spontaneous. *See* ***id.*** at 101-02; ***Brown***, 50 Wis. 2d at 570.

¶23 In my view, ***Marshall*** controls this case and indeed is factually similar. In that case, a neighbor gave a man directions to the victim's apartment and later heard an argument and gunshots coming from that direction. ***Id.*** at 108-09. The victim had been murdered. ***Id.*** Although the neighbor was unable to pick out the man to whom he gave directions from a photo array, the State still considered him to be an important witness and subpoenaed him to testify at Marshall's trial. ***Id.*** at 109, 118. Before the case was called, the neighbor observed the man to whom he had given directions. ***Id.*** at 119. The man was one of several seated in the courtroom and was sitting with a woman roughly three rows ahead of him. ***Id.*** Nobody had asked the neighbor to make an identification or suggested that the man was the defendant. ***Id.*** The neighbor summoned a detective into the courthouse hallway and told him that he recognized the man who had come to his door on the night of the murder. ***Id.*** The supreme court held that the use of the pretrial identification was admissible because it was unplanned and "was as much a surprise to the State as it was to the defendant." ***Id.*** at 118.

¶24 Here too, the witness, Stuller, appeared pursuant to a subpoena to testify about matters other than the defendant's identity. The record does not reveal that anybody asked Stuller to identify Hibl. Nor is there any evidence that either the police or the assistant district attorney suggested that Hibl was the defendant. Rather, Stuller spontaneously identified Hibl among several people he saw in the hallway. Of particular importance, the trial court *found* that "there is no evidence that the police or District Attorney's office intentionally or unintentionally suggested the identification of the Defendant to Mr. Stuller." Indeed, the circumstances surrounding Stuller's identification were, if anything, probably less suggestive than the identification made in ***Marshall*** because there, the neighbor had seen Marshall's face in the photo array at some point before.

Here, however, nothing suggests that Stuller had ever seen Hibl's face anywhere prior to the trial date—except perhaps in the white van he observed on the day of the accident.

¶25 We are bound by prior decisions of the supreme court unless or until those prior decisions are overruled by that court. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). The ***Dubose*** holding in no way overruled ***Marshall***. In fact, ***Marshall*** is never mentioned in ***Dubose***.

¶26 The ***Dubose*** opinion must be limited to "showups." Reading the opinion, it is quite evident that the ***Dubose*** majority disapproved of the widespread use of state-sponsored showups because of their "inherent unreliability" and set out to do something about it. Basically, the court held that the State may not use a showup as a procedure for obtaining an identification of a defendant if there are other, fairer means available to obtain the identification. In pertinent part, the ***Dubose*** majority wrote:

> [W]e now adopt a different test in Wisconsin regarding the admissibility of *showup* identifications. We conclude that evidence obtained from an out-of-court *showup* is inherently suggestive and will not be admissible 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. *A lineup or 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, 699 N.W.2d 582, ¶33 (emphases added; footnote omitted). Thus, with respect to showups, the court changed the test in state-sponsored identification procedures. The ***Dubose*** test is limited, by its very words, to showups.

¶27 Indeed, the rationale ***Dubose*** gave for the newly announced rule in showup cases further supports the notion that it left ***Marshall*** intact. It stated that its strict necessity requirement helps "ensure that the police would *take precautions* when considering the use of a showup," a procedure the court deemed "inherently suggestive." ***Dubose***, 699 N.W.2d 582, ¶¶32-33 (emphasis added). Both parts of that rationale are inapposite to unplanned encounters. First, it would be absurd to announce a categorical rule that accidental encounters are "inherently suggestive." Second, I do not see how the courts could reasonably expect the State to guard against unplanned encounters. Even if the courts were to impose such a duty with respect to only unplanned confrontations factually similar to the one here, I cannot envision any logical stopping point to the rule. I can think of no standard that logically distinguishes among encounters in a courtroom or courthouse hallway and those that occur outside the courthouse, in a donut shop across the street from the courthouse, or at an intersection just blocks away from the courthouse. I simply cannot believe that ***Dubose*** provides authority for courts to prohibit identifications made based on fortuity.

¶28 Although the majority appears to acknowledge in one breath that the ***Dubose*** analysis does not apply, *see* majority op. ¶12, in the next it relies on ***Dubose*** as authority for allowing courts to independently assess the reliability of even unplanned encounters. I acknowledge it to be true that the ***Dubose*** majority opinion did discuss the extensive studies conducted on the issue of identification evidence and did comment how the research supports the conclusion that eyewitness identification is now the greatest source of wrongful convictions in the United States and is responsible for more wrongful convictions than all other causes combined. *See* ***Dubose***, 699 N.W.2d 582, ¶30. But it is unwarranted for the majority in this case to make the leap that the ***Dubose*** court was implementing

a new rule allowing trial courts to exercise gatekeeper responsibility with regard to *all* identifications. One need only look at the ***Dubose*** court's language to determine that this is not the case. The ***Dubose*** court, in referring to the recent studies, said that "[i]n light of such evidence," it was changing its approach in the area of "suggestive procedures." *See* ***id.***, ¶31 (citation omitted). To read ***Dubose*** to say anything more than that is grave error.

¶29 This point brings me to my next complaint about the majority opinion. The majority appears to assert, either as an alternative argument or as a means to buttress its ***Dubose*** interpretation—I am not sure which—that this case is merely a review of the circuit court's exercise of discretion in deciding not to admit this identification evidence. The majority seemingly claims that, under WIS. STAT. § 901.04, the trial court in this case and, by extension, any circuit court in this state, has the authority to keep evidence out if it deems the evidence to be unreliable. Therefore, even if this is not a police procedure case, since the circuit court in this case relied on the facts of record and gave a reasoned explanation for why it believed the spontaneous identification to be impermissibly suggestive, the majority feels that we must defer to this judgment and affirm. In my view, this is a serious misunderstanding of the law.

¶30 First, I need to state the obvious. The circuit court kept the evidence out because it thought that the spontaneous encounter was "impermissibly suggestive." As I have already explained, the only time a court considers whether an identification was "impermissibly suggestive" is if the suggestiveness was brought about by state action. That is what ***Marshall*** holds. A court does not validly exercise discretion based on a misunderstanding of the law and that is what has occurred here. As the court in ***Jarrett v. Headley***, 802 F.2d 34, 42 (2d Cir. 1986), stated, if the *procedures* are not impermissibly suggestive, independent

reliability is not a constitutionally required condition of admissibility and the reliability of the identification is simply a question for the jury. The circuit court thus had no business deciding this case under the rubric of an "impermissibly suggestive" procedure.

¶31 Second, what the majority fails to understand is that the usual role of the circuit court is to act as only a limited gatekeeper with regard to admissibility issues. Only when due process concerns come into play has our jurisprudence given circuit courts a greater gatekeeping function. As we wrote in ***State v. Peters***, 192 Wis. 2d 674, 689, 534 N.W.2d 867 (Ct. App. 1995), the role of trial judges is "oblique." Certainly, evidence must be relevant to be admissible. And just as certainly, someone must have the job of deciding whether the evidence is admissible. This is the job of the circuit court. The circuit court must determine under WIS. STAT. § 904.01 only whether there is "*any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ***Id.*** (emphasis added). This is an extremely low threshold. If relevant, the circuit court still has the authority to exclude the evidence for other reasons, including, to name a few, statutory considerations such as hearsay, the superfluous nature of the evidence, waste of judicial time and resources, or the court's determination that the evidence is inherently improbable or that its probative value is outweighed by its prejudice to the defendant. *See* ***Peters***, 192 Wis. 2d at 689. Once these considerations have been analyzed by the circuit court, the limited gatekeeper role is finished. As Professor Blinka has stated, "If the evidence has any tendency to prove (or disprove) a consequential proposition, it should be admitted." DANIEL D. BLINKA, WISCONSIN PRACTICE: WISCONSIN EVIDENCE § 401.102 (2d ed. 2001). The weight of such evidence is for the trier of fact. ***Id.***

¶32 But there are certain areas of the law where our supreme court has given circuit courts more responsibility. One such area is where identification was made pursuant to a specified police procedure. ***State v. Wolverton***, 193 Wis. 2d 234, 533 N.W.2d 167 (1995), *abrogated by* ***Dubose***, 699 N.W.2d 582 (new test applicable to showup procedures), is a case in point. There, our supreme court recognized that certain police identification procedures might be orchestrated or manipulated by the State. *See* ***Wolverton***, 193 Wis. 2d at 264. If such manipulation and orchestration by the State is shown to be present, it may seriously affect the credibility of the identification. To test the state procedure, the court directed circuit courts to exercise the power to assess (1) the witness' opportunity to view the criminal at the time of the offense, (2) the degree of attention the witness paid, (3) the accuracy of prior descriptions, (4) the time elapsed between the crime and the confrontation, and (5) the level of certainty demonstrated at the confrontation. ***Id.*** at 264-65. In sum, the supreme court expressly authorized greater gatekeeping authority in this area.

¶33 It is my view that because ***Marshall*** does not employ this kind of reliability test in the context of an unplanned encounter, the State need only meet the very low threshold test for reliability that WIS. STAT. § 904.01 requires all types of evidence to meet. Nothing in the circuit court's analysis or the facts convinces me that Stuller's identification of Hibl had *no tendency whatsoever* to support the proposition that Stuller recognized Hibl as the individual who drove the van on the day of the accident. What the circuit court's opinion really does is call into question any identification made in the halls of our courthouses, no matter

how spontaneous and free from police or prosecutorial suggestion it may be. I cannot abide by this result and dissent.[2]

[2] Even in light of recent data calling into question the veracity of some spontaneous identifications, I see no great problem in continuing to allow the juries to test the credibility of this type of identification rather than leave it to the circuit courts. It bears repeating that "cross-examination has been described as the greatest legal engine ever invented for the discovery of truth." ***State v. Stuart***, 2005 WI 47, ¶26 n.7, 279 Wis. 2d 659, 695 N.W.2d 259 (quoting ***California v. Green***, 399 U.S. 149 (1970). The solution is to allow defendants greater latitude in bringing this data, and the expert witnesses who can testify to this data, to the attention of the jury. In the past, circuit courts have been reluctant to allow such evidence by defendants. But, should that change, juries would be well equipped to decide the credibility of these identifications.