

Responses of Louis B. Butler, Jr.
Nominee to the U.S. District Court for the Western District of Wisconsin
to the Written Questions of Senator John Cornyn

1. **You state in your Committee questionnaire that, during the appointment process, you were “asked about [your] personal views concerning a number of issues.” Were you asked, and did you answer, questions regarding your views on any of the following: the use of foreign law in American courts; the death penalty; abortion; the scope of Congress’s commerce power; affirmative action; the protections of the First Amendment; the meaning of the Second Amendment; the protections of the Fourth and Fifth Amendments; the application of the Eight Amendment; the scope of the Tenth Amendment; federal courts’ limited review of state *habeas corpus* petitions; the proper enforcement of immigration laws; the effect of arbitration provisions; or the permissible application of punitive damages? If yes, please provide the answer you gave at that time.**

Response: I believe it would be inappropriate for me to describe in any further detail my private conversations with United States Senators. As I have indicated throughout this process, any personal views that I might have would not control my decisions on the bench. My decisions would be based on governing law. No one involved in the process of selecting me as a judicial nominee discussed with me any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning my position on such case, issue or question.

2. **In *State v. DuBose*, 699 N.W.2d 582, 600 (2005), you wrote that one “cannot seriously argue that . . . eyewitness identifications are inherently reliable.” You noted: “What we have here is a legal fiction that is simply not borne out by the facts. Unless, and until, we improve eyewitness identification procedures so that the likelihood of irreparable misidentifications is significantly reduced, we can no longer proceed as though all is good in the Land of Oz.” *Id.* You also opined in *State v. Shomberg*, 709 N.W.2d 370, 394 n.2 (2006), that “[i]n general, people overestimate eyewitness accuracy and fail to understand the factors that affect it.”**

- a. **Do you agree with the United States Supreme Court’s ruling that eyewitness identifications are admissible unless “there is a very substantial likelihood of irreparable misidentification”? *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977) (internal quotations omitted).**

Response: If confirmed as a District Court Judge, I would have no difficulty following this Supreme Court precedent.

- b. **Likewise, do you endorse the Court’s opinion that “[j]uries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature”? *Id.***

Response: If confirmed as a District Court Judge, I would have no difficulty following Supreme Court precedent.

- c. **Under what circumstances would you, if confirmed as a federal judge, likely exclude eyewitness identifications as unreliable?**

Response: It would be inappropriate for a nominee to predict how future cases should be decided. I would follow controlling precedent of the United States Supreme Court and the Seventh Circuit Court of Appeals.

- d. **Do you agree with Justice Stevens’s view that “rules to minimize the danger of convicting the innocent on the basis of unreliable eyewitness testimony” are designed “more effectively by the legislative process than by a somewhat clumsy judicial fiat”? *Id.* at 117-18 (Stevens, J. concurring).**

Response: I do agree that legislative action in this area would be welcome. As a then Wisconsin Supreme Court Justice, my job was to resolve issues presented to the court in a given dispute. Under Wisconsin law, factors taken into account by the court in determining whether to adhere to precedent include whether there is a need to reach a decision that corresponds to newly ascertained facts, and whether prior decisions have become unsound, because they are based on principles that are no longer valid. The Court in *Dubose* and *Shomberg* was presented with evidence concerning wrongful convictions based on eyewitness misidentification. Our decision adopting earlier precedent from the United States Supreme Court regarding showups in *Dubose* was based on the Wisconsin Constitution as applied to the evidence received and considered by the court. I might add that Forrest Shomberg’s conviction was recently vacated because DNA evidence excluded him as the source of the evidence at the scene of the crime. Our decision in *Dubose* takes into account the fact that when an innocent person is convicted, the guilty party is free to prey upon society.

3. **In *State v. Knapp*, 666 N.W.2d 881 (2003) (*Knapp I*), the Supreme Court of Wisconsin concluded that a sweatshirt covered in a murder victim’s blood that a suspect voluntarily pointed out to police was inadmissible on account of a *Miranda* violation. The United States Supreme Court vacated and remanded, concluding “that the fruit of the poisonous tree doctrine does not extend to derivative evidence discovered as a result of a defendant’s voluntary statements obtained without *Miranda* warnings.” *State v. Knapp*, 700 N.W.2d 899, 901 (2005) (*Knapp II*); see also *Wisconsin v. Knapp*, 542 U.S. 952 (2004). Writing for a majority of the Supreme Court of Wisconsin on remand, see *Knapp II*, 700 N.W.2d at 901-21, you reinstated the holding of *Knapp I*, interpreting *sua sponte* a provision of the Wisconsin Constitution to provide more protections against searches and seizures than the identical provision of the federal Constitution on which the Supreme Court based its ruling. In doing so, you addressed an argument that was not presented in *Knapp I*, and you broke with the Supreme Court of Wisconsin’s longstanding tradition of**

interpreting provisions of its constitution in concert with the federal Constitution. Your opinion has been criticized as “pure unvarnished result-orientation,” and Wisconsin law enforcement officials have emphasized that it “could potentially impact many areas of police decision-making in the future, increas[ing] confusion among officers.” Lt. Victor Wahl, *Legal Update*, Madison Police Dep’t (2005).

Do you acknowledge that, if you are confirmed as a federal district judge, it will not be within your power to go beyond the rulings of the United States Supreme Court?

Response: Yes.

Do you agree with Justice Wilcox of the Supreme Court of Wisconsin that departing from, or evading, precedent “seriously undermines the prestige, influence, and function of the judicial branch”? *Knapp II*, 700 N.W.2d at 926.

Response: In *Knapp II*, the Wisconsin Supreme Court did not depart from or evade precedent. With respect to *Knapp II*, there was no controlling precedent from the United States Supreme Court. Two decisions by the United States Supreme Court issued the same day, *United States v. Patane* and *Missouri v. Seibert*, were both plurality decisions with different voting blocks that led to different results with respect to the fruit of the poisonous tree doctrine. Justice Kennedy was the deciding vote in each matter. He concluded in *Patane* that derivative physical evidence should not be suppressed for a non-deliberate *Miranda* violation, but concluded in *Seibert* that derivative testimonial evidence should be suppressed if there was a deliberate *Miranda* violation. *Knapp I* and *II* involved a deliberate *Miranda* violation and derivative physical evidence, a situation not presented in either *Patane* or *Seibert*. Regardless, as a District Court Judge, if confirmed, I would have no such authority for departing from or evading precedent.