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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2011AP002548-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LUIS M. ROCHA-MAYO,

Defendant-Appellant-Petitioner.

BRIEF & APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

APPEAL FROM AN APRIL 24, 2013 DECISION OF THE COURT OF APPEALS, DISTRICT II
REVIEWING A JUDGMENT OF CONVICTION DATED NOVEMBER 5, 2010 IN KENOSHA CIRCUIT COURT
The Honorable Wilbur W. Warren, III, Presiding
Trial Court Case No. 2008CF000660

Respectfully submitted:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Cases Cited :

TABLE OF AUTHORITIES (Cont.)

TABLE OF AUTHORITIES (Cont.)

Federal Cases:

Wisconsin Statutes Cited :

TABLE OF AUTHORITIES (Cont.)

Wisconsin Administrative Code Provisions Cited :

Other Authorities Cited :

ISSUES PRESENTED

I. WHETHER WISCONSIN'S BREATH TESTING REGIMEN ALLOWS THE STATE TO PRESENT EVIDENCE OF A PBT RESULT IN AN OWI PROSECUTION TO QUANTITATIVELY PROVE THE DEFENDANT WAS UNDER THE INFLUENCE OF AN INTOXICANT, SIMPLY BECAUSE THE PBT WAS NOT ADMINISTERED BY LAW ENFORCEMENT.

The trial court answered: Yes.

The court of appeals answered: Yes.

II. WHETHER IT WAS ERROR TO INSTRUCT THE JURY IT COULD FIND, BASED SOLELY ON A *QUALITATIVE* TEST RESULT, THAT ROCHA MAYO WAS INTOXICATED AT THE TIME OF THE ACCIDENT.

The trial court answered: No.

The court of appeals answered: No.

III. WHETHER AN EMERGENCY ROOM DOCTOR SHOULD BE ALLOWED TO OPINE, TO A REASONABLE DEGREE OF MEDICAL CERTAINTY, THAT THE DEFENDANT WAS INTOXICATED AND IMPAIRED, WHEN SUCH WAS AN ULTIMATE FACT EMBRACING A LEGAL CONCEPT FOR WHICH A DEFINITIONAL INSTRUCTION WAS REQUIRED.

The trial court answered: Yes.

The court of appeals answered: Yes.

STATEMENT OF THE CASE

On June 12, 2008, the defendant-appellant-petitioner, Luis Rocha Mayo, was involved in an auto accident, rear-ending a suddenly-braking motorcycle. (R136-25). The motorcyclist died as a result of the accident. (R133-5). On June 23, 2008, the plaintiff-respondent, State of Wisconsin, filed a criminal complaint charging Rocha Mayo with: (1) first degree reckless homicide; (2) first degree recklessly endangering safety; and (3) operating without a valid license resulting in the death of another person. (R1). Conspicuous by its absence, given the course this case took thereafter, was a charge of Homicide by Intoxicated Use of a Motor Vehicle, contrary to section 940.09(1)(a), Stats. (*Id*.). Then again, evidence suggesting Rocha Mayo was impaired by alcohol was scant, while evidence suggesting the death would have occurred even had Rocha Mayo not consumed intoxicants, per section 940.09(2)(a), appeared preponderant.

On February 11, 2009, however, the State requested leave to amend the Information to add a count of Homicide by Intoxicated Use of a Motor Vehicle. (R29). This prompted Rocha Mayo to seek recusal of Judge Bruce Schroeder who had invited the additional charge by asking the State why it had not charged Rocha Mayo under section 940.09, Stats. (R30: R31; R141-10-14). Judge Schroeder had further opined a Preliminary Breath Test (PBT) taken from Rocha Mayo would be admissible because it had been administered by hospital personnel rather than police. (*Id*.). The judge recused himself and Rocha Mayo moved to suppress the PBT result. (R31; R35).

On April 23, 2009, the court granted the State's motion to amend the information, conditioned upon the State presenting expert testimony as to Rocha Mayo's state of intoxication, whether with or without a PBT result. (R123-80-82). The State amended the Information (R37). On June 29, August 4, and August 12, 2009, the court conducted hearings on whether the State would be permitted to introduce evidence of the PBT result. (R124; R125; R126). At the end of the hearings, the court ruled the PBT result admissible. (R42; R126-35).

On July 26, 2010, a jury trial began, the evidentiary portion of which lasted four days, (R131; R132-R135), the same number of days the jury ended up deliberating. (R136-R139-5-6). On August 5, 2010, after truly arduous deliberations, the jury delivered guilty verdicts. (R139-5-6). On November 4, 2010, the court sentenced Rocha Mayo to ten years of initial confinement. (R140-68-69; App. A). Rocha Mayo appealed and on April 24, 2013, the court of appeals affirmed the conviction in all respects. (R112; App. B).

STATEMENT OF THE FACTS

A. Operative Facts Surrounding A Fatal Accident.

On June 12, 2008, at about 7:00 p.m., Rocha Mayo was relaxing at home with his cousins, enjoying a couple of beers. (R136-10-11). At about 9:00 p.m., they all headed to El Rodeo Bar. (R136-11-12). Rocha Mayo drove himself and arrived just after 9:00 p.m.; his cousins went in a separate vehicle. (R136-11-12, 32). El Rodeo was at the corner of 14th Avenue and 52nd Street in Kenosha. (R136-14). Rocha Mayo remained there until shortly after 2:00 a.m., consuming five more beers over those five hours and ordering a sixth. (R136-13). At 2:00 a.m., he bought two six packs of beer to take home and left the bar. (R136-14, 32). He put the packaged beer in the back seat of the green Ford Taurus he had parked in the bar's lot, and placed the last, partial beer he had ordered at the bar in the cup holder of his car. (R136-14).

Rocha Mayo exited the parking lot and turned westbound onto 52nd Street, a main Kenosha thoroughfare running from Lake Michigan to I-94 and consisting of two lanes of travel in each direction. (R136-15). Rocha Mayo turned into the left lane of westbound 52nd Street then moved to the right lane. (R136-40). He did not feel intoxicated and Rosie Finley, who operated El Rodeo and knew him, testified she did not notice any signs of intoxication when she saw him leave at bar time. (R134-189-200; R136-26). Rocha Mayo, however, traveled just six blocks before, as they say, the trouble began. As he neared 20th Avenue, three motorcycles emerged from the Coins Tavern parking lot on the north side of 52nd Street (to his right). (R114-6, 23; R132-153; R136-16). The first cycle out of the lot was a 2008 Harley Street

Glide carrying two individuals, a man and a woman, and it merged into the right lane directly *in front of* Rocha Mayo. (R132-147-148; R136-16). The male operating the cycle was Curtis Martin. (R114-8). The woman seated behind Martin was Shaunna Bestwick (hereinafter, "Shaunna"). (*Id*.).

The two other cycles then emerged *behind* Rocha Mayo. (R136-16). One was driven by Shaunna's brother, Travis Bestwick (hereinafter, Bestwick). (R132-145). Bestwick was on a Harley Road King belonging to Martin. (R132-205). Bestwick was riding Martin's Road King because Martin was driving Bestwick's Street Glide. (R132-148). The swap had been made because Martin was carrying Bestwick's sister, and the Street Glide had a backrest better suited for two riders. (R132-148).

The third cyclist, who also came out *behind* Rocha Mayo with Bestwick, was Jason Walters. (R132-147-149, 202). Walters was riding a Suzuki Hayabusa 1300, a kind of cycle often referred to as "a crotch rocket." (R132-147-149, 202). Walters, the dark figure in this story, was proud of his cycle's speed, and would later make sure the jury knew it had been recognized by the *Guinness Book of World Records* as the fastest production bike in history. (R132-237). Tucked into Walter's waistband was an expandable metal baton. (R132-238). Officer Dusty Nichols would later testify the collapsible baton was classified as a weapon, and was a "friction" baton, meaning it opened with a flick of the wrist. (R134-96-97).

The three cycles had been riding as a group and, as fate had it, Rocha Mayo happened by at precisely the wrong moment, breaking the group into two. (R136-16-17). Walters perceived

this as a slight and quickly pulled alongside the driver's window of Rocha Mayo's car and began yelling at him, and furtively gesturing for him to pull over. (*Id*.). Walter's shouting was loud and caused Martin and Shaunna, still westbound in front of Rocha Mayo, to look back and see their compatriot yelling at Rocha Mayo. (R136-19). Shaunna conceded she heard someone from their group yell "what the F-U-C-K . . . is [your] problem." (R132-172). Rocha Mayo noticed that Martin and Shaunna turned their heads to look back. (*Id*.). Rocha Mayo also noticed Martin reacted by slowing and turning right onto 25th Avenue, but then using the avenue's width to maneuver his Harley back onto 52nd Street *behind* Rocha Mayo. (R136-19). At trial, Martin confirmed he made this maneuver so Rocha Mayo would pass him, allowing him to get *behind* Rocha Mayo. (R132-183; R136-109-111).

At this point, Rocha Mayo testified, he sensed Walters and his group were looking for trouble and the situation felt threatening. (R136-18). Realizing he now had three cycles around him, and believing them all in a mood to harm him, Rocha Mayo did not pull over as Walters demanded. (R136-18). Instead, he resolved to continue home, which required he remain on 52nd Street and turn right at 40th Avenue. (R136-19). He therefore continued westbound at the approximate speed limit, just hoping to get home. (R136-19-21).

Walters, however, who by now had dropped back behind Rocha Mayo, had other plans. He reached into his jacket with his right hand, pulled out his collapsible baton, and flicked it open with his wrist. (R132-233-234). Walters then accelerated his "world record" speed bike toward Rocha Mayo's car to pass him on the left side. (R132-233-234; R136-19). As he came up on

Rocha Mayo's vehicle, Walters launched the metal baton at the car's rear window while traveling at a high rate of speed. (*Id.*). The baton was thrown with such force it pierced and shattered the rear window and ended up on the front passenger seat floorboard. (R134-86, 93). A hail of glass fragments blew through the front and back of the car. (R134-93). Bestwick and Walters simultaneously flew past Rocha Mayo's vehicle on the left side. (136-19, 79).

From Rocha Mayo's perspective, his premonition of danger suddenly became a rude reality when his rear window exploded as two cycles roared by him on the left. (R136-19). The explosion caused Rocha Mayo to momentarily duck and he was convinced he was going to get hit. (R123-56; R136-20). When he regained his wits, he instinctively accelerated because another cycle was behind him, in addition to the two cycles now in front of him, and he was scared. (R136-20). He feared another assault from the rear. Although still in the right lane and somewhere near 30th and 33rd Avenues, he resolved not to turn off on 40th Avenue so the cyclists would not learn where he lived. (R136-22, 42, 45).

These events must have occurred at approximately 2:05 a.m. because at 2:06 a.m., City of Kenosha Police Officer Shaun Morton was stationed in a parking lot on the south side of 52nd Street near 43rd Avenue and saw two motorcycles and a green Ford pass westbound at an estimated speed of 70-80 MPH. (R133-46-50, 62). The cycles were traveling in single file and the Ford was 3-4 car lengths behind them, traveling at the same speed. (R133-49-53). Traffic was light to medium. (*Id.*). Officer Morton notified dispatch, turned on his lights and siren, and took off in pursuit. (R133-51-52).

As the cycles and the Ford continued speeding westbound, Rocha Mayo believed the Harley Street Glide, with Martin at the helm, was still pursuing him from behind. (R136-20). In fact, Martin and Shaunna had turned off at 39th Avenue, likely because they witnessed Walters shatter the car window. At trial, Shaunna confirmed they turned off at 39th Avenue, but denied it was related to anything unusual that had transpired. (R132-168-169). Instead, she claimed, they had simply stopped for a red light, saw her brother's taillights, heard his loud tail pipes, and decided everything was fine. (R132-168-169). In either event, their departure at 39th Avenue explains why Officer Morton did not see a third cycle pass by him. (*Id*.).

As the three vehicles continued speeding westbound on 52nd Street, something bad was bound to occur at some point. That point turned out to be the intersection with North Green Bay Road. As the vehicles approached that intersection, the stop light for westbound traffic was red, although fortunately, no cross traffic was immediately coming. (R133-170). The two westbound lanes, that were also free of traffic, widened first to three lanes (a dedicated left turn lane) and then to four lanes (a shorter dedicated right turn lane). (*Id*.; R135-20). Once again, Rocha Mayo believed he still had a third cycle behind him, (R136-224), and had just been attacked from the rear moments earlier.

As the vehicles neared the intersection, Bestwick and Walters, via hand signals (but unbeknownst to Rocha Mayo), decided to attempt a right turn onto North Green Bay Road, a maneuver the State's accident investigator agreed would have been impossible at their speed. (R132-218-219; R134-79). Rocha Mayo was still in the right hand lane and from his perspective,

Walters and Bestwick were off to the left in front of him. (R136-22). Suddenly Walters braked, but realized a turn would be impossible, and wound up sliding into and stopping in the middle of the intersection. (R136-23). Bestwick, however, attempted the turn and moved to the right, directly in front of Rocha Mayo's vehicle, while braking. (R136-22-24). Rocha Mayo could not react fast enough to avoid striking Bestwick. (R136-25). Trooper Michael Smith, the State's accident reconstruction expert, testified that if Rocha Mayo was 75-125 feet behind the motorcycles, and traveling at 70 MPH, he would have had between 0.75 and 1.25 *seconds* to react to this unexpected development.[1] (R135-66-68).

Officer Morton did not witness the collision, but upon arriving at Green Bay Road (having traversed about 20 blocks), realized a collision had occurred. (R133-53, 75). The Ford was in a ditch off the northwest corner of the intersection and Rocha Mayo was lying in the nearby grass, while Bestwick lay prone in the street. (R133-54-55). Rocha Mayo was conscious and breathing, but unable to respond to questions. (R133-56-57). Bestwick, however, was not responsive and both motorists were transported to the hospital. (R133-56-58). Officer Morton was instructed to get a blood sample from Bestwick to determine his level of intoxication, but was unable to do so. (R133-68-69).

[1]There was some dispute over whether Bestwick suddenly turned in front of Rocha Mayo, or was already there, when he suddenly braked. (R133-171-173; R136-25).

Meanwhile, Motorist Matthew Schultz *had* witnessed the accident, albeit from two blocks back. (R133-157-187). Schultz had just turned westbound onto 52nd Street when he noticed, in his rearview mirror, the vehicles approaching at a high rate of speed. (R133-157-160). Two cycles passed him driving erratically, moving about in their lanes, at about 70-80 MPH, followed by a car at roughly the same speed. (R133-161-162, 165-166, 184). Schultz confirmed Bestwick attempted a right turn, but not from the dedicated right turn lane, but instead, from in front of the car. (R133-171-173). Schultz further testified that after the accident, Walters came to a complete stop in the intersection, then looked around from a vantage point where he could see both vehicles at a complete rest, and Bestwick lying in the street. (R133-183, 190-192). Schultz testified Bestwick then took off and fled southbound on Green Bay Road. (R133-183, 190-192).

Sadly, the accident proved fatal for Bestwick. Forensic pathologist Dr. Mary Mainland testified Bestwick, who had not been wearing a helmet, died of blunt force trauma to the head, and was pronounced dead at 8:08 a.m. (R133-5, 15, 20). While *post mortem* toxicology reports revealed no alcohol in Bestwick's system, Dr. Mainland agreed a complete and massive blood transfusion foreclosed saying whether he had had alcohol in his system that evening.[2] (R133-26-39).

[2]The paramedic who attended Bestwick at the accident scene agreed there could have been an odor of intoxicants on Bestwick that he would not have noticed because he was busy attending to his injuries. (R133-75-76, 92).

Rocha Mayo was transported to St. Catherine's Hospital and taken into the emergency room on a backboard and wearing a cervical collar, with blood on his face from facial injuries and severe bruising of his chest wall. (R133-107,138). Dr. William Falco suspected a head injury, noting memory loss and poor recall of the accident. (R133-115). Rocha Mayo advised Dr. Falco he had consumed alcohol which, coupled with an odor of alcohol about Rocha Mayo's breath, caused the doctor to direct Nurse Steven Edwards to take a Preliminary Breath Test (PBT). (R133-108-110). Nurse Edwards took a single sample which registered 0.086. (R133-111). Rocha Mayo was eventually discharged and later waived his *Miranda* rights and provided a full statement to Officer Gonzalez mirroring his trial testimony and consistent with the facts set forth above. (R133-116, 226-239).

B. Delayed And False Reporting By The Cyclists.

In the accident's aftermath, not one of the three surviving cyclists advised police they had witnessed the accident, or the events leading up to it. Walters, as noted, fled the scene, although he called and advised Shaunna of the accident. Consequently, both Martin and Shaunna were on the accident scene within five minutes, but both also then left without telling police what they had observed moments before the accident. (R132-172-188). Whether it was because they were all intoxicated or, as the aggressors, first needed to get their stories straight, they waited nearly 20 hours before deciding to contact police. (R132-176-189). By that time, they told much different versions of the encounter with Rocha Mayo and yet, their versions were still wildly inconsistent and over time would be subject to change.

The cyclists' trial testimony, in general terms, positioned Rocha Mayo as lying in wait and springing out to engage Shaunna and Martin in a game of "cat and mouse," blocking them

from turning right, and then trying to run Bestwick off the road. (*See*, *e.g.*, R132-159). In her statement to police, however, Shaunna had said nothing any game of "cat-and-mouse." (R132-192). And while she testified at trial that Walters and Bestwick were *behind* her and Martin during the "cat-and-mouse" game, she had told police Walters and Bestwick were *ahead of them* during the encounter with Rocha Mayo. (R132-194). Nor, of course, had they been coming from Coins Tavern, or otherwise drinking. (R132-151-158). They had just been riding around for five hours doing something on which the record is silent. (*Id*.). One can reasonably infer the jury, given its protracted deliberations, multiple questions, deadlocks (needing *Allen* instructions), had serious reservations about the cyclists' trial testimony.[3]

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[3]The jury reported a deadlock the third day of deliberations. (R138-2-3). The court read the *Allen* instruction and advised the parties it would declare a mistrial absent a verdict in 45 minutes. (R138-3-5). Forty-five minutes later the foreperson confirmed a firm deadlock. (R138-7). However, one juror opined their hard work had yielded some progress, and the court thus sent the jury back to continue deliberating, which led to more questions, followed by more deliberations, followed by more questions, and then more deliberations for the remainder of the day. (R138-7-33). On the fourth day, the court again advised the parties that if any juror indicated there would be no consensus, it would declare a mistrial. (R139-2). After more deliberations, during which one juror complained she was drained, the jury finally returned guilty verdicts. (R139-5-6). Roughly half the jurors cried as the verdicts were read, (R139-9), and at least one later questioned why Walters had not been charged with some offense. (R140-56).

1. Flight from the accident scene.

There were good reasons to doubt the veracity of the cyclists' stories. Contradicting the citizen witness who saw Walters come to a complete stop, survey the scene, and then leave, Walters testified he never completely stopped, just slowed way down and turned left. (R132-241). Walters testified that after turning left he heard a crash and saw, in his rearview mirror, a car going over the median. (R132-221). In the next breath, however, he claimed he kept going because he was unaware there had been a collision. (R132-222). He then testified he learned of the collision from Shaunna during a cell phone call, but did not return because he was scared, without revealing what had scared him. (R132-222). He later testified, however, that after driving south, he stopped and *he* called Shaunna, (R132-242), strongly suggesting he knew exactly what had happened, though he claimed to have merely asked Shaunna if she had heard from Bestwick. (R132-243).

Shaunna arrived on the scene five minutes after the accident, saw the cycle her brother had been riding lying in a ditch, and learned he was in an ambulance. (R132-172-173). She also saw the vehicle Rocha Mayo had been driving in the ditch. (R132-174). Nevertheless, neither Shaunna nor Martin stayed to give the police a statement, and when asked why, Shaunna stated "I don't know," and passed it off as a failure of the police to ask them any questions. (R132-174).

2. Walters never told police he launched a metal baton through Rocha Mayo's window.

Walters also blamed the police for a bombshell omission from his initial police statement. When he finally spoke with Detective Riesselman, he never mentioned he had launched a metal baton through the rear window of Rocha Mayo's vehicle. (R132-250). When asked why he left out that detail, Walters insisted he *had* reported that fact, and blamed Detective Riesselman for omitting it from his statement. (R132-253-254). Walters also testified he simply tossed the baton "underhand" at the car, and could not even remember at what part of the vehicle he aimed it.[4] (R132-216, 238).

3. The myth of Rocha Mayo running Bestwick off the road.

No motive was ever offered for why Rocha Mayo, who had no criminal record, would decide to pursue, with his car, motorcyclists he did not know, and then try to run one of them off the road. Strongly suggesting the State offered no such motive because Rocha Mayo never engaged in such conduct is the fact Walters never reported such conduct to Detective Riesselman, when he finally got around to giving a statement. (R132-255). The claim of such conduct never emerged until the preliminary hearing, and was repeated, in yet a different incarnation, at trial.

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[4]Walters was a reluctant trial witness who had to be threatened with a warrant before agreeing to appear, (R132-248-249), and later hung up the phone on the PSI preparer. (R140-56).

At trial, Walters claimed Rocha Mayo had merged Bestwick so far left that both cycle and car actually passed completely through the two lanes of oncoming traffic and into the curb. (R132-214). According to Walters, with Bestwick up against the curb, Rocha Mayo suddenly slammed on his brakes causing Walters to nearly rear-end the car. (R132-216). Walters further claimed that when the car suddenly braked, he tried to pass it *on the left* (i.e., the sidewalk), but that Rocha Mayo then swerved *to the left* (i.e., the sidewalk) and so he (Walters) went around the car to the right and accelerated. (R132-216). This egregious driving, Walters claimed, is what prompted him to toss the metal baton "underhand" at Rocha Mayo's car. (*Id*.).

By stark contrast, Shaunna testified Rocha Mayo's car remained in the right hand lane of 52nd Street the entire time. (R132-164). Since Shaunna also testified she and Martin stopped for the light at 39th Avenue, gazed west and saw nothing alarming, Walters' fanciful story of events transpiring in oncoming traffic would have occurred somewhere west of 40th Avenue. That Officer Morton saw nothing of this sort at 43rd Avenue makes Walters' story impossible.

4. The myth Rocha Mayo was "parked" when the cyclists passed him.

The effort to demonize Rocha Mayo included the claim he was "parked" (lying in wait) when *they passed him* whereupon, for reasons unknown, he decided to pull out and target them. Shaunna claimed Rocha Mayo was parked on the right side just past Coins Tavern, and pulled out just as they passed him. (R132-153-159). Walters offered several versions, the strangest being his

trial testimony that Rocha Mayo was "parked" *in the middle of the road*, straddling the two westbound lanes. (R132-206, 208). At the preliminary hearing, however, Walters had testified Rocha Mayo was parked along the curb, while in his statement to police, Rocha Mayo had not been parked at all. (R132-226-227).

5. Phantom red stop lights.

All three cyclists (though not Rocha Mayo) incorporated red stop lights along westbound 52nd Street, to try to patch their stories together. According to Kenosha Traffic Engineer Randall LeClaire, however, by 2:00 a.m. all westbound traffic lights were "flashing yellow," and as of 9:00 p.m. at 35th and 42nd Avenues. (R135-88-91). None of the cyclists would have encountered a red stop light anywhere along westbound 52nd Street. (*Id*.). This included Shaunna and Martin, who claimed to have stopped for a red light at 39th Avenue (from where they saw everything was fine). (R132-164-168, 186).

Walters testified to a red light at the preliminary hearing, but only after it was pointed out that his claim of tailgating so severe they had to let Rocha Mayo pass them signified they were then *behind* Rocha Mayo and could not have ended up getting run off the road unless *they* had thereafter pursued *Rocha Mayo*. (R114-28-29). Walters suddenly interjected a red stoplight into his story ("we actually hit a light"), which conveniently brought them back into proximity with Rocha Mayo's car. (R114-29-30). Walters claimed that when the light turned green:

> We proceeded forward and the vehicle merged over. So we just kept going straight and that is when he made the first initial swipe at the light.

(R114-31). This required Walters to characterize Rocha Mayo's initial swerve at Bestwick as happening at a fairly slow speed. (R114-33). While maintaining he already knew there was a problem, and conceding an opportunity to get away, Walters "wasn't fearing for [his] life." (R114-33-34).

Also problematic was Walters' testimony that they encountered the red light *after* Shaunna and Martin turned off to go home, (R114-30), which would have been *after* 39th Avenue, from where the Street Gliders looked west and saw nothing unusual. (R132-164-168, 186). The next stop light was at 42nd Avenue, and had gone into a flashing yellow program at 9:00 p.m. (R135-88-91). And *west* of 42nd Avenue was Officer Morton's territory, (R133-46-62), who surely would have witnessed this and caught the vehicles.

6. Shaunna and Martin's disengagement from Walter's road rage.

If it were true Rocha Mayo engaged in aggressive driving by Coins Tavern at 20th Avenue, such would beg the question of why Martin and Shaunna would have simply turned off at 39th Avenue and gone home. Rocha Mayo rather plausibly suggested it was because they witnessed Walters launch the metal baton through Rocha Mayo's window, and wanted no part of that trouble. (R136-225). Shaunna, however, rather implausibly claimed that after witnessing Rocha Mayo swerve at her brother at 29th

Avenue, they did not see any further abnormal driving for the next ten blocks, at which point they turned off on 39th Avenue to go home. (R132-164-168, 186).

ARGUMENT

I. WISCONSIN'S BREATH TESTING REGIMEN DOES NOT ALLOW THE STATE TO PRESENT EVIDENCE OF A PBT RESULT IN AN OWI PROSECUTION TO QUANTITATIVELY PROVE THE DEFENDANT WAS UNDER THE INFLUENCE OF AN INTOXICANT, REGARDLESS OF WHO ADMINISTERS THE PBT.

On June 22, 2008, Rocha Mayo was brought into St. Catherine's Hospital on a backboard, semi-conscious and with facial injuries. (R125-7-9). Dr. Falco ordered a PBT. (R125-10, 13). Nurse Edwards complied, Rocha Mayo consented and cooperated, and a PBT test result of 0.086 was taken. (R133-134-143; R134-218). It was a single sample test. (*Id*.).

The device used was the Alco-Sensor IV, one of two components which together comprise the RBT IV ("Roadside Breath Tester" IV). (R124-15-22). The second component, which Nurse Edwards did *not* use, is a printer/microprocessor that attaches via cable to the Alco-Sensor IV and drives a testing protocol. (*Id*.). The Alco-Sensor IV is approved for law enforcement use in Wisconsin. (R124-23, 62). It is not, however, certified by the Department of Transportation (DOT) for evidentiary use in Wisconsin courts. (R124-58-66). Nor was it particularly new technology, having been put into use in Wisconsin in 1996. (R134-164).

The legislatively approved use of a PBT in OWI cases is found in section 343.303, Stats., which states, in pertinent part:

> If a law enforcement officer has probable cause to believe that the person is violating or has violated s. 346.63 (1) . . . the officer, prior to an arrest, may request the person to provide a sample of his or her breath for a preliminary breath screening test using a device approved by the department for this purpose. The result of this preliminary breath screening test may be used by the law enforcement officer for the purpose of deciding whether or not the person shall be arrested for a violation of s. 346.63 (1) . . . . and whether or not to require or request chemical tests as authorized under s.343.305 (3). **The result of the preliminary breath screening test shall not be admissible in any action or proceeding except to show probable cause for an arrest,** if the arrest is challenged, or to prove that a chemical test was properly required or requested of a person under s. 343.305(3).

(Emphasis added). While the above-emphasized prohibition is germane to this appeal, it should be noted section 343.303 is essentially an enabling statute, authorizing specific governmental use of PBTs in the context of an OWI investigation and prosecution, while prohibiting others.[5]

Wisconsin courts have examined the contours of section 343.303, Stats., and interpreted it to mean that while PBT results

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[5]Prosecutorial reference to a PBT result in an OWI trial was first held improper by *State v. Albright*, 98 Wis. 2d 663, 675, 298 N.W.2d 196 (Ct. App. 1980).

are inadmissible in motor vehicle prosecutions, they may be admissible in other criminal prosecutions. In *State v. Beaver*, 181 Wis. 2d 959, 970, 512 N.W.2d 254 (Ct. App. 1994), for example, the defendant was precluded from introducing evidence of a PBT result in a sexual assault prosecution. On appeal, Beaver argued the PBT result, taken at the county jail following his interrogation, was relevant to the trustworthiness of his inculpatory statements. *Beaver* agreed:

> The PBT result was not barred by § 343.303, STATS. That statute provides that a PBT is not admissible in any action or proceeding subject to certain stated exceptions. While this language, viewed in isolation, is broad enough to support the trial court's ruling, we must bear in mind that the statute is part of the motor vehicle code governing the administration of the PBT and the results of such a test. . . . Considering the entire subject matter of § 343.303, STATS., we conclude that **the legislature intended the statutory bar against PBT evidence to apply only in proceedings relating to arrests for the offenses contemplated under that statute.**

Beaver at 969. (Emphasis added). Interestingly, *Beaver* still affirmed the conviction, reasoning the low probative value of a test result generated by a relatively inaccurate instrument (i.e., the

PBT) was easily outweighed by other considerations. *Id*. at 970-972, *citing* section 904.03, Stats.[6]

More recently (while this case was pending), the court of appeals decided *State v. Fischer*, 2008 WI App 152, 314 Wis. 2d 324, 761 N.W.2d 7. The issues were: (1) whether section 343.30s creates an absolute bar on the admission of PBT results in OWI prosecutions, even when used as the basis for an expert's opinion per section 907.03; and (2) if so, whether such a bar would violate a defendant's constitutional right to present a defense. The court of appeals upheld the bar in OWI prosecutions, stating:

> Inherent in . . . § 343.303 . . . is the legislature's decision that PBT results are sufficient information to determine only whether an officer has probable cause to arrest. But, it appears that the legislature has also determined that **the results are not sufficiently reliable for jury consideration in determining guilt or innocence.** Unlike the Intoximeter, the PBT is not tested for accuracy either immediately before or after a test. . . . **[T]he testing mechanism for the PBT is simply not designed so the result obtained during the investigation of a possibly intoxicated driver is accurate enough that it can be used to help a jury**

[6]*State v. Doerr*, 229 Wis. 2d 616, 622-627, 599 N.W.2d 897 (Ct. App. 1999), later affirmed the principle by agreeing the statutory bar on PBT results did not apply during a trial for battery and resisting an officer, but deemed it error, albeit harmless, to have allowed evidentiary use of the results without a proper scientific foundation.

> **determine the driver's guilt or innocence.** . . . The reason applies whether it is the State that wants to use the PBT results or the defendant who wants to use it.

Fischer, 2008 WI App 152 at ¶¶13-17. (Emphasis added).

The appellate court contrasted the Intoximeter (ECIR II) and the PBT, observing the former is a "quantitative" test while the latter is a "qualitative" test. *Id.* at ¶14. It noted the Wisconsin Administrative Code defines a *quantitative* breath alcohol analysis as "a chemical test of a person's breath which yields a specific result in grams of alcohol per 210 liters of breath," while, by contrast, a *qualitative* breath alcohol analysis is defined as "a test of a person's breath, the results of which indicate the presence or absence of alcohol." *Id*., *citing* Wis. Admin. Code § TRANS 311.03(12) and (13). Thus, the ECIR II was designed to accurately "measure" the amount of the substance, while the PBT was designed primarily to detect its presence.[7] *Id.* at ¶15.

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[7]The appellate court analyzed the issues using the two-prong test of *State v. St. George*, 2002 WI 50, ¶ 52, 252 Wis. 2d 499, 643 N.W.2d 777: (1) whether defendant can establish a right to the evidence with an offer of proof addressing the standards, relevance, necessity and probative value of the evidence; and (2) whether defendant's right to present the evidence is nonetheless outweighed by the State's compelling interest to exclude it. While signaling a compelling State interest in excluding PBT results due to their unreliability, the court based its decision on the first prong, finding the probative value of defense expert's testimony low, since it was based on a test result that could not be accuracy tested at the time of the test, and thus could not assist the trier of fact. *Fischer* at ¶24.

This case was still pending when this Court accepted review of *Fischer* and affirmed:

> Fortunately . . . the legislature's policy decision regarding the absolute inadmissibility of the PBT results under these circumstances simply could not be clearer. Reading the statutes together to create an exception to Wis. Stat. § 907.03 by excluding expert evidence to the extent that it is based on prohibited PBT results comports with our obligation to give effect to the legislature's intent.

State v. Fischer, 2010 WI 6, ¶25, 322 Wis.2d 265, 778 N.W.2d 629. This Court disagreed, however, that the legislature had barred PBT results in OWI cases because of reliability concerns. *See id.* at ¶¶7, 16, 31.

To be sure, this Court still acknowledged potential reliability issues - "[t]he accuracy of this type of test may be subject to dispute." *Id*. at ¶34. Those words were uttered, however, only after this Court had gone straight to the second prong of *St. George* and reasoned the state's interest in excluding the evidence outweighed the defendant's interest in presenting it. *Id*. at ¶29. That state interest, this Court declared, was not prohibiting the use of inaccurate test results, but instead, the promotion of efficient OWI investigations, and therefore public safety. This Court reasoned such interest was promoted by increasing the likelihood suspected drunk drivers would submit to a PBT (ostensibly out of awareness of its inadmissibility in court),

thereby securing cooperation when an officer has reasonable basis to stop, but not probable cause to arrest.[8] *Id*. at ¶32.

While it is true a majority of the Court in *Fischer* rejected the idea that section 343.303's limitation on PBT use arose from legislative concern over its reliability, it would be wrong to read *Fischer* as an endorsement of a PBT's reliability. *Fischer* did not deem PBT results reliable or otherwise reason the legislature viewed them as reliable. On the contrary, this Court expressly stated the legislative history of section 343.303 contained nothing to indicate the legislature regarded the PBT as reliable or unreliable. *Id*. at ¶31. Moreover, the concurring opinion, authored by Justice Ziegler (and joined by Justices Roggensack and Gableman) felt strongly the PBT is not an instrument of sufficient reliability for deciding guilt or innocence in such serious cases:

> I conclude that as a matter of law PBT results are neither reliable nor admissible for the purpose of confirming or dispelling a defendant's specific alcohol concentration in an OWI or PAC trial.

Id. at ¶37. (J. Ziegler, concurring).

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[8]While Rocha Mayo recognizes the precedential value of this Court's reading of legislative intent, he remains skeptical of that portion of this Court's reasoning wherein a hypothetical motorist's refusal to submit to a PBT could cause police to release a driver reasonably believed to be intoxicated, *id*, at ¶26, given the strong consciousness of guilt police routinely attach to a PBT refusal.

In either event, all of the Justices of this Court agreed that if the mere use of expert testimony could circumvent what the legislature had barred, one unintended consequence would be that: "PBT results could routinely be used against defendants in spite of a statute to the contrary." *Id*. at ¶26. The dissent explained:

> What is good for the goose is good for the gander. Just as the defense should not be allowed to admit PBT results in an underlying OWI or PAC trial, **the State should not be able to rely on those test results either.** Merely because an expert may opine that he or she relied upon PBT results in order to form an opinion does not render the underlying test results admissible. As we have seen in other scenarios, an expert's opinion does not transform inadmissible evidence into admissible evidence.

Id. at ¶40, *citing* Wis. Stat. § 905.065; *State v. Davis*, 2008 WI 71, ¶ 20, 310 Wis. 2d 583, 751 N.W.2d 332; *State v. Shomberg*, 2006 WI 9, ¶ 39, 288 Wis. 2d 1, 709 N.W.2d 370. Thus, all members of this Court appeared to agree that any ruling that would allow the State to use PBT results against a defendant in an OWI prosecution would be highly suspect.

Now before this Court is what appears to be the first case wherein a higher court has approved the State's use of a PBT result during an OWI prosecution to prove the defendant's level of intoxication and impairment, and therefore his guilt. The circumstances of the case raise the novel question of whether such a result can slip through the back door simply because the PBT

was administered by someone other than law enforcement. The irony of answering that question affirmatively, as the two lower courts have now done, is that it sanctions the use of PBT results despite the fact (or precisely because) the test was administered by someone the State does not train, (*see* R134-148), using a device the State does not certify for evidentiary purposes. (R134-173). At its very core, such an outcome flies in the face of the larger breath testing framework, comprised of statutes and administrative code provisions, that regulates evidentiary breath testing for OWI purposes in Wisconsin. Section 343.303 is but one piece of this framework and accordingly, not the sole word on the matter.

Section 343.303, in fact, is peppered with references to other statutory sections such as 343.305, 346.63, and 940.09 (under which Rocha Mayo was prosecuted), revealing it as one part of a larger, interconnected breath testing framework in this state. Indeed, section 343.303 also authorizes the use of a PBT to "decide . . . whether or not to require or requests chemical tests as authorized under s. 343.305(3)," (including breath samples for purposes of section 940.09). *Fischer* found this idea in the origins of section 343.303, the legislative history of which included a Legislative Reference Bureau analysis stating the PBT "*would give the officer a basis to decide if further chemical analysis would be necessary." Fischer* at ¶31. (Emphasis in original). Thus, regardless of *why* the legislature made the PBT

inadmissible at trial, it clearly viewed the PBT as a prelude to a different kind of breath test that *would be* admissible.[9]

Indeed, while section 343.303, Stats., identifies the type of breath test that *is not admissible* in OWI trials (i.e., a PBT), section 343.305(5)(d) identifies the type of breath test that *is admissible* in such trials:

> At the trial of any . . . criminal action . . . arising out of the acts committed by a person alleged to have been driving or operating a motor vehicle while under the influence of an intoxicant . . . to a degree which renders him or her incapable of safely driving . . . the results of a test **administered in accordance with this section are admissible on the issue of whether the person was under the influence of an intoxicant** . . . .

(Emphasis added). Here, legislative intent could not have been clearer. The legislature intended that breath tests administered *in accordance with section 343.305* are the breath tests that *will be admissible* on the question of whether a defendant was under the

[9]As Chief Hackworthy testified, the PBT "generally occurs on the side of the road, but it can occur anywhere in the police department, in the vehicle . . . but it's ***before*** **the evidential test** . . . ."(R134-155)(emphasis added). By "evidential" test, Chief Hackworthy confirmed she meant "a test that you can bring into court and put before a jury." (R134-171).

influence of an intoxicant to a degree rendering him incapable of safely driving.[10]

To that end, section 343.305(6)(b) requires the DOT to approve techniques and methods for performing chemical analysis of the breath and to:

> (1) approve training manuals and courses for law enforcement in the chemical analysis of a person's breath;
>
> (2) certify the qualifications and competence of individuals conducting the analyses;
>
> (3) have trained technicians, approved by the secretary, test and certify the accuracy of the equipment to be used by law enforcement officers for chemical analysis of a person's breath **under 343.305(3)** before regular use of the equipment and periodically thereafter at not more than 120 day intervals; and

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[10] As this Court alluded to in *Fischer*, the legislative prohibition on the use of the PBT in OWI trials was originally found together in the same statutory section where the legislature authorized for use in OWI trials breath tests conforming to the rigors of section 343.305. *Fischer* at ¶31. *See* section 343.305(2)(a), Stats. (1979-80)("[n]either the results of the preliminary breath test nor the fact that it was administered shall be admissible in any action of the proceeding in which it is material to prove that the person was under the influence of an intoxicant . . .).

(4) Issue permits to individuals according to their qualifications.

If the legislature was not concerned about the reliability and accuracy of breath tests when enacting section 343.303, it clearly *was* so concerned when enacting section 343.305(6)(b). And such concern was warranted, particularly when section 343.305(5)(d) further confers on test results taken under section 343.305 the presumptive effect set forth in section 885.235, Stats.

Nor did the legislature remain entirely silent on the protocol to be followed for the type of breath test it did intend be used for evidentiary purposes. Section 343.305(6)(c) mandates that the breath test administered using an infrared breath testing instrument shall:

(1) . . . consist of analyses in the following sequence: one adequate breath sample analysis, one calibration standard analysis, and a 2nd, adequate breath sample analysis.

(2) A sample is adequate if the instrument analyzes the sample and does not indicate the sample is deficient.

This legislative mandate has understandably been interpreted to reflect a legislative objective of "insur[ing] an accurate and reliable test" as a *quid pro quo* for a driver's implied consent. *State v. Grade*, 165 Wis. 2d 143, 148-49, 477 N.W.2d 315 (Ct. App. 1991).

Rounding out the breath testing regimen are numerous administrative code provisions, not all of which need be examined here. One important example, however, is the provision wherein the DOT promulgated techniques and methods for performing chemical analyses of the breath pursuant to the authority granted it by section 343.305(6)(b), Stats.:

> (1) Only methods approved by the department may be used to perform quantitative breath alcohol analysis.
>
> (2) Techniques used in performing quantitative breath alcohol analysis shall be those which are **designed to assure accuracy**, detect malfunctions and to safeguard personnel and equipment.
>
> (3) Procedures for **quantitative** breath alcohol analysis shall include the following **controls** in conjunction with the testing of each subject:
>
> (a) Observation by a law enforcement person or combination of law enforcement persons, of the test subject for a minimum of 20 minutes prior to the collection of a breath specimen, during which time the test subject did not ingest alcohol, regurgitate, vomit or smoke.
>
> (b) Instrument blank analysis.

(c) An analysis utilizing a calibrating unit, the results of which analysis shall fall within 0.01 grams of alcohol per 210 liters of gas of the established reference value.

(d) Consecutive breath alcohol analysis results in a test sequence within .02 grams of alcohol per 210 liters of breath shall be deemed to be an acceptable agreement. Breath sample analysis failing to meet this criteria shall be deemed deficient.

(e) If the first test sequence is deficient, a second test sequence shall be administered.

(4) The results of an analysis of breath for alcohol shall be expressed in grams of alcohol per 210 liters of breath.

Wis. Admin. Code TRANS 311.06. Rocha Mayo's PBT result, most assuredly used in a *quantitative* manner, did not, of course, follow this protocol or otherwise conform to these controls.[11]

[11]Nor does the PBT have the ECIR II's infrared sensor capable of real-time monitoring of the breath sample as it enters the instrument, which examines the waveform and, at the end of the sample, acquires and analyzes the gas sample with a fuel cell. (R124-30-31). The Alco-Sensor IV uses only flow and volume measurements to determine when deep lung air is present to actuate the sampler. (R124-31).

Administrative rules promulgated pursuant to a power delegated by the legislature "should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason." *State v. Busch*, 217 Wis. 2d 429, 576 N.W.2d 904 (1998)(construing Trans. 311.04 together with 343.305(6)). As the court of appeals in *Fischer* observed, the DOT distinguishes between quantitative and qualitative breath tests. This dual paradigm was confirmed by Susan Hackworthy, the Chief of the Chemical Test Section (which is in the Division of the State Patrol in the DOT), when she testified: "[t]he qualitatives are PBT and the quantitative are evidential." (R134-148)("the evidential breath test instrument [is] the desk-top model"). And while it appears the DOT, in the wake of *Busch*, chose to stop publishing, in Trans. 311.04, the list of instruments it approves for quantitative breath analyses, the list was available to this Court in *Busch*:

> Note: The following quantitative breath alcohol test instruments are approved for use in Wisconsin:
>
> Intoxilyzer Model 5000
>
> Intoxilyzer Model 1400
>
> Intoxilyzer 5000 Model 000568

Busch, 217 Wis. 2d at 443, *citing* Trans. 311.04. Conspicuously absent from this list, of course, is the Alco-Sensor IV, or any PBT instrument.

In other words, when it comes to the use of breath tests in OWI cases in Wisconsin, sections 343.303, 343.305, 346.63, 885.235, and 940.09, along with a variety of administrative code provisions, are all of a piece. Wisconsin has classified breath tests into quantitative tests admissible at trial and qualitative tests that are not, and instituted strict quality control protocols for the former, but not for the latter, and generated a list of approved instruments for each type of test. Indeed, Chief Hackworthy testified there are devices approved for evidentiary use in Wisconsin and devices not approved for evidentiary use. (R124-58-66). She further explained the rationale underlying the dichotomy noting, for example, the two-test protocol built into the ECIR II (but not the PBT) functions as a safeguard against mouth alcohol. (R124-67-68). Other features unique to the ECIR II include a sampling requirement for flow and volume, which ensures accuracy by ensuring deep lung air is sampled, and infrared monitors for mouth alcohol. (R124-45-46, 68-69).

When all of the statutes, rules and regulations are construed together into an effectual piece of legislation in harmony with common sense and sound reason, there emerges a clear intent to bar the State from using PBTs against defendants in OWI trials. Moreover, that intent derives from the relative reliability of the two types of breath tests due to a comprehensive set of safeguards pertaining to training, certification, maintenance, calibration and testing protocols characteristic of the type of test the legislature authorized for use in OWI trials. This legislative intent exists quite independently of the fact the legislature may have *also* believed barring PBT use during OWI trials might make a suspected motorist more likely to submit to a PBT. The one intent

in no way negates the other. They are, rather, completely compatible.[12]

The lower courts in this case, however, have largely ignored this larger framework and instead, narrowly focused on section 343.303. This has led to an outcome rather fraught with irony as language that *prohibits* the use of PBTs in OWI trials has been construed to *allow* the use of a PBT in an OWI trial. The construction derives from a strained application of the rule of *expressio unius est exclusio.* It requires imagining legislative reflection on PBTs administered by non-law enforcement types and then a conscious decision to permit them. As this Court has noted, however, the rule of *expressio unius,* like other maxims of statutory construction, requires caution in its application:

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[12]Any attorney experienced in OWI litigation could anecdotally cite numerous cases where PBT and subsequent chemical test results differed such that the disparity could not easily be explained by the natural processes of alcohol absorption or elimination. Such cases have also made their way to this Court. In *State v. Faust*, 2004 WI 99, 274 Wis. 2d 183, 682 N.W.2d 371, for example, (a case in which this Court, *inter alia*, affirmed the non-admissibility of PBTs in motor vehicle prosecutions), the PBT result of 0.13 *overestimated* the 0.09 Intoximeter result taken immediately thereafter in the due course of processing the defendant. *Id.* at ¶¶ 5, 26. For the reverse scenario (i.e., where the PBT *underestimated* blood alcohol content, which could cause police relying on the putative admissibility of a hospital PBT to forego a blood draw, to the State's detriment), *see City of West Bend v. Wilkens*, 2005 WI App 36, 278 Wis. 2d 643, 693 N.W.2d 324 (PBT of 0.13; blood test of 0.19).

> The goal of statutory interpretation is to determine the legislative intent. The application of the maxim in this case must rest on the premise that the legislature considered all the alternative[s] . . . and that all alternatives were rejected by the legislature except the ones set forth.

Whitaker v. State, 83. Wis. 2d 368, 374, 265 N.W.2d 575 (1978)(refusing to read section 971.29, which authorizes amendment of a criminal information *before* arraignment or *at trial*, to preclude amendment at any point in between).[13]

The trial court, in fact, began its decision with a lengthy discussion of section 343.303, Stats., and its reference to law enforcement officials whom, the court noted, did not conduct the PBT in this case. (R126-28-33; App. C-2-7). The trial court noted that because the PBT was taken for medical diagnostic reasons, the "purpose" for administering the test was not law-enforcement related, although it said little regarding the fact the operative "use" of the test was precisely for that purpose (i.e., law enforcement). (App. C-6-7). The court then went on to reason the State had presented enough evidence to show the PBT in question

[13]Such a reading would also set Wisconsin on a potentially absurd course as breath testing technology proliferates. Presumably, PBTs administered by bartenders, for example, before patrons leave an establishment would then likewise be admissible. Indeed, a self-administered PBT would be admissible at trial. A statute should not be interpreted to lead to absurd results. *State v. Grunke*, 2008 WI 82, ¶31, 311 Wis.2d 439, 752 N.W.2d 769.

was accurate enough - accurate enough, that is, for medical personnel to rely on for diagnostic purposes. (App. C-7-8). Such reasoning, however, is not responsive to the question of whether the legislature viewed the PBT as accurate enough for a jury to rely on in rendering a verdict that sends an individual to prison for ten years.

More problematic still was the trial court's analogy of the PBT to a hospital blood draw:

> [I]t was used for purposes not for arrest or for a finding of probable cause to arrest but for medical diagnostic purposes, and that **it is not different than any other type of blood test.** Given this Court's finding of its reliability from the testimony the test results for blood alcohol would be admissible for purposes appropriate to this action. It was medical, it wasn't legal, at the time it was taken. . . . and therefore, I think **just like any other blood test for diagnostic purposes**, it would be admissible.

(App. C-9-10). Here, by putting the PBT on par with the gold standard for alcohol testing (i.e., blood) for analytical purposes, the trial court strayed from the central issue: legislative intent regarding "breath" tests. The trial court appears to have relied on previous rulings addressing issues pertaining to the fourth amendment and section 146.82, Stats. (confidentiality of patient records) in the context of blood draws for diagnostic purposes. *See, e.g., City of Muskego v. Godec*, 167 Wis. 2d 536, 539, 482 N.W.2d 79 (1992)(allowing prosecutorial use of blood test results

obtained for diagnostic purposes). Rocha Mayo, however, did not raise either of these issues, and they were not before the court.

The court of appeals made relatively short shrift of the PBT's failure to conform to statutory and administrative code requirements:

> The test was not performed at the behest of law enforcement under the aegis of the implied consent statute. Further, the State did not invoke the presumption but instead presented expert testimony to establish scientific accuracy and reliability. It also put on evidence that the PBT was a quantitative test - i.e., that the device does not simply indicate the presence or absence of alcohol but actually quantifies the amount. The ER nurse testified that quantification is important because the alcohol level aids diagnosis and helps direct treatment.

(App. B-5). Thus, the court of appeals launched its reasoning from the same premise: sections 343.303 and 343.305 ought to be discounted entirely because the PBT was not administered by law enforcement under the aegis of the implied consent statute.

Implicit in such a facile disposition of the issue is the idea that the elaborate legislative scheme for breath tests in Wisconsin (training, certifications, protocols, etc.) was not primarily to preserve the overall integrity of breath test results that would be available to prosecute a defendant, merely breath tests *administered by law enforcement.* And implicit in that idea is an assumption the legislature considered PBTs administered by non-

law enforcement types and decided it could care less whether those tests met any evidentiary standards before they were used to convict and send Wisconsin citizens to prison.

To the extent the appellate court appreciated the bifurcated breath-testing regime established for Wisconsin, it then proceeded to water it down by turning 180 degrees away from its decision in *Fischer* and characterizing the PBT as a *quantitative* test, because it did more than merely determine the presence or absence of alcohol, noting further that medical personnel relied on the measurement. This rationale, however, oversimplifies and fails to appreciate the full breadth of the qualitative/quantitative dual classification of breath tests in Wisconsin. The regimen is not that malleable. The DOT has generated a list of quantitative instruments and a list of qualitative instruments. The Alco-Sensor IV is on the list of *qualitative* instruments. It is **not** on the list of *quantitative* instruments. It is true a *qualitative* test might be used *quantitatively*. It is also true a *quantitative* test might be used *qualitatively*. But that does not change the intrinsic nature of the instruments nor, more importantly, does it change the fact that, as Chief Hackworthy testified, *qualitative tests* are regarded and treated as *non-evidentiary* in Wisconsin.

The court of appeals opinion also seems to conflate accuracy and reliability, or at least disregard the difference. Assuming, *arguendo*, that the PBT is generally "accurate" in its ability to measure blood alcohol, it is nevertheless devoid of the safeguards Wisconsin has established for evidentiary tests. As Chief Hackworthy conceded, the absence of a 20 minute observation period, the two test protocol and the infrared technology signify, *inter alia*, that if a subject burps and brings up fresh mouth

alcohol from the stomach, the test result will be artificially elevated, without being either detected or corrected. (R134-185).

There is no meaningful distinction between a PBT administered by a police officer and a PBT administered by a nurse such that a nurse-administered PBT, but not a police-administered PBT, should be allowed in OWI prosecutions. Had the legislature ever contemplated this scenario (and there is no evidence to suggest it ever did), it would likely have regarded a law-enforcement-administered PBT as superior, in that it is at least administered by an individual trained and certified by the State with an instrument subject to state control. Moreover, if creating an incentive or disincentive for the individual to submit to a PBT is the touchstone for legislative intent, presumably the legislature would have wanted to create every incentive for an ER patient to also submit to a PBT. *Cf. Sawyer v. Midelfort*, 227 Wis. 2d 124, 163, 595 N.W.2d 423 (1999)(therapist duty of care to third parties would create incentive to compromise treatment to patient's detriment).

The State of Wisconsin never approved the instrument used in this case for evidential purposes. (R124-24-25, 42-43). State witness conceded it was never certified by the State of Wisconsin. (R126-17-18). There was no 20 minute observation prior to collection of the breath specimen. There was no instrument blank analysis. There was no analysis utilizing a calibrating unit, the results of which fell within 0.01 grams of alcohol per 210 liters of gas of the established reference value. There was no consecutive breath alcohol analysis resulting in a test sequence within .02 grams of alcohol per 210 liters of breath. Failure to meet this

criteria rendered the PBT **"deficient"** as a quantitative breath instrument. *See* Trans 311.06(3)(d).

Chief Hackworthy testified she would not be comfortable with a single sample test with no air blank and no calibration check on a machine not approved for evidentiary testing. (R134-175-176). She testified that a test without such safeguards "would not even come close" to the Wisconsin State Patrol guidelines for an evidentiary test. (R134-178). The use of such a test, devoid of the State established evidentiary protocol, was particularly prejudicial where the result - 0.08 - hovered right at the legal limit, barely (and erroneously, as discussed in the next section) invoking the statutory presumption.[14]

[14]A final observation that belongs in the discussion about "evidentiary use" of breath tests is that the PBT does not record or otherwise document its result while the ECIR both stores the results electronically and spits out the ubiquitous test card that is "admitted into evidence" during virtually every OWI trial involving a breath test. (R134-116).

II. IT WAS PREJUDICIAL ERROR TO INSTRUCT THE JURY IT COULD FIND, BASED SOLELY ON THE PBT RESULT, THAT ROCHA MAYO WAS INTOXICATED AT THE TIME OF THE ACCIDENT.

In light of the foregoing, it is particularly troubling that the trial court would imbue the PBT with a gravitas the legislature expressly reserved for what is now the ECIR II. The court did so in the form of a jury instruction patterned on statutory language created for a breath test taken under section 343.305, Stats. Whether a jury instruction is an accurate statement of the law presents a question of law this Court reviews de novo. *See State v. Neumann*, 179 Wis.2d 687, 699, 508 N.W.2d 54 (Ct.App. 1993).

The State requested Jury Instruction 1185 which is derived from the statutory presumptions associated with a chemical test under the Implied Consent Law. (R136-139). Rocha Mayo objected on the grounds that no statutory presumptions should attach to chemical tests taken from non-evidentiary breath instruments (e.g., PBT). (*Id.*). The trial court overruled the objection and instructed the jury as follows:

> If you are satisfied beyond a reasonable doubt that there was .08 grams or more of alcohol in 210 liters of the defendant's breath at the time the test was taken, **you may find that the defendant was under the operation of an intoxicant at the time of the alleged operating**, but you are not required to do so.

(R136-168-169)(emphasis added).[15]

Jury Instruction 1185 and the presumptions attendant thereto stems from section 885.235(1g)(c), Stats., and are meant to be used in the context of "quantitative" breath tests under section 343.305, Stats. The procedure for obtaining a quantitative breath test to be used in an OWI trial is found in section 343.305 which, is where the legislature stated that "[t]est results shall be given the effect required under s. 885.235." Section 343.305(5)d). No such statutory authorization for such prima facie use of breath tests was ever created for a PBT. Given the preceding discussion regarding Wisconsin's bifurcated breath testing scheme, and the quality controls absent from the PBT, it is not difficult to see why.[16]

The PBT result in this case should not have been given a prima facie effect. It was not a test under section 343.305, Stats. It was not a device approved for evidentiary use in Wisconsin. It did not comport with a method approved by the department for quantitative breath alcohol analysis. It did not employ a technique

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[15]Rocha Mayo also requested modification of the instruction to include that the Alco-Sensor IV was not an approved evidentiary device in Wisconsin. (R136-158). The trial court denied the request, reasoning it had already concluded it was an approved evidentiary device. (R136-158-159).

[16]Other parallels further bind section 885.235, Stats. to section 343.305. Section 343.305(3)(a), for example, authorizes the taking of a motorist's breath, blood or urine. Not by coincidence, Section 885.235(1g) confers the presumptions on precisely those tests: breath, blood or urine.

designed to assure accuracy, detect malfunctions and to safeguard the equipment. There was no 20 minute observation by law enforcement prior to the test. There was no instrument blank analysis. There was no analysis using a calibrating unit. There was no two-test protocol with an agreement of 0.02 or less. Before a jury instruction should confer a presumptive *quantitative* effect on a breath test result, the instrument in question must adhere to the control standards established by the legislature and the DOT.

It is not just that the PBT does not satisfy the approved techniques and methods for performing chemical analyses of the breath as required by Wis. Admin. Code Trans 311.06. Section 343.305(6), Stats., also sets forth the requirements for breath tests under the Implied Consent Law which, by extension, are the requirements that must be met before a breath test is entitled to any presumptions under section 885.235, Stats. A review of that section reveals the ECIR II meets those requirements, while a PBT does not, in the following respects:

(1) State certification of the qualifications and competence of the individual conducting the breath test;

(2) State certification of the accuracy of the breath instrument before initial use of the instrument and periodically thereafter at intervals of not more than 120 days;

(3) a test sequence of two breath tests with a calibration standard analysis in between.

Nurse Edwards was not State-certified to administer breath tests. The State did not certify the accuracy of the PBT used in the case before its initial use or periodically thereafter. Perhaps most importantly, the PBT in this case did not include a test sequence of *two* breath tests, and was devoid of any contemporaneous calibration standard analysis.[17]

III. THE TRIAL COURT ERRED WHEN IT ALLOWED DR. FALCO TO GIVE TESTIMONY AS TO AN ULTIMATE FACT THAT EMBRACED A LEGAL CONCEPT FOR WHICH A DEFINITIONAL INSTRUCTION WAS REQUIRED.

The trial court examined whether Dr. Falco would be allowed to testify Rocha Mayo was "under the influence." Rocha Mayo objected on the grounds it would be inappropriate to allow an expert to give an opinion on an ultimate issue of fact that is also a legal term of art. (R131-13). The trial court, however, overruled the objection and, citing 907.04, Stats., ruled Dr. Falco would be permitted to offer such testimony. (R131-14-15). Consequently, Dr. Falco testified at trial that Rocha Mayo was intoxicated and under the influence of alcohol. (R133-117-118). Moreover, he purported to be an expert in this area based on his experience and said his conclusion was "to a reasonable degree of scientific and medical certainty. (*Id.*).

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[17]The Alco-Sensor IV has some additional safeguards when it is attached to the RBT IV and the protocol is driven by that microprocessor. (R124-34-35). As previously noted, however, the Alco-Sensor IV used in this case was not so attached.

While it is true section 907.04, Stats., permits the admission of opinion testimony, it does not authorize testimony on the ultimate fact when that testimony embraces "a legal concept for which a definitional instruction was required." *Lievrouw v. Roth*, 157 Wis. 2d 332, 352, 459 N.W.2d 850 (Ct. App. 1990). *See also State v. Nieto*, 2009 WI App 95, ¶22, 320 Wis.2d 484, 769 N.W.2d 877. *Lievrouw* interpretation of § 907.04 is consistent with the federal courts' interpretation of Federal Rule 704. *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990); *Strong v. E.I. DuPont de Nemours Co.*,667 F.2d 682, 685-86 (8th Cir. 1981); *U.S. Information Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3*, 313 F. Supp 2d 213, 240-41 (S.D.N.Y. 2004).

Here, whether Rocha Mayo was "under the influence of an intoxicant" embraced a legal concept for which a definitional instruction was required and given. (R136-167-168). It was therefore error to allow the doctor responsible for obtaining Rocha Mayo's breath test to testify Rocha Mayo he was under the influence of an intoxicant. Said testimony greatly prejudiced Rocha Mayo by allowing an "expert" to assert, *to a reasonable degree of scientific certainty*, the very ultimate fact (and one contested element of the crime), the jury was supposed to determine based on the definition set forth in the jury instruction.

CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, Rocha Mayo respectfully requests this Court vacate his conviction and remand for a new trial with instructions that the PBT result not be used at trial or, in the alternative and at a minimum, that it not receive a judicial imprimatur of approval in the form of a jury instruction.

Dated this 22nd day of December, 2013.

/s/ Rex Anderegg
REX R. ANDEREGG
Attorney for the Defendant-Appellant-Petitioner

CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,940 words.

Dated this 22nd day of December, 2013.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATION OF APPENDIX

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 s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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, and a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 22nd day of December, 2013.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of the Brief and the Appendix, if available, in *State of Wisconsin v. Luis M. Rocha-Mayo,* Appeal No. 2011AP002548-CR, which complies with the requirements of s. 809.19 (12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of December, 2013.

/s/ Rex Anderegg
Rex Anderegg