RECEIVED
11-16-2015
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Court of Appeals case no.:
2015AP001243 – CR

v.

ALI GARBA,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION OF THE
CIRCUIT COURT FOR WAUKESHA COUNTY, BRANCH 9,
THE HONORABLE MICHAEL APRAHAMIAN, PRESIDING

Andrew Mishlove, Esq.
State Bar Number: 01015053

MISHLOVE & STUCKERT, LLC
4425 N. Port Washington Road, Suite 110
Glendale, WI 53212
(414) 332-3499
Fax: (414) 332-4578

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES

1. Did the trial court err in excluding exculpatory evidence that refuted the reliability of the blood test result?

   a. Did the trial court apply a prohibited mandatory presumption?

   b. Did the trial court wrongly shift the burden of proof to Garba?

   c. Did the trial court err in applying Wis. Stat. §907.02?

   d. Did the trial court err in applying Wis. Stat. §904.03?

   e. Was Garba denied his constitutional right to present a defense?

   The trial court answered, no, and excluded the evidence.

2. Does the language of Wis. Crim. JI 2669 go beyond a permissive inference, and create an unlawful presumption against a defendant?

   The trial court answered, no, and gave the instruction.

3. Were the errors harmless?

   The trial court did not address the issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues involved are significant factually complex, involving a discussion of the law of forensic analytic chemistry and laboratory quality control. The issues are also legally complex. There has been substantial public interest in these issues. Thus, oral argument and publication are appropriate.

INTRODUCTION

This case concerns the defendant's right to present evidence attacking the reliability of test results purporting to show that he had an illegal amount of alcohol in his blood while driving.

During that time that Garba's blood was tested, the same lab tests, processes, and instruments produced a number of abnormal results, the so-called "jagged humps." Garba's experts explained that those abnormalities (which the state and the Lab chose to ignore) reflected that the processes or instruments were not acting properly, rendering the results unreliable.

Garba did not seek to exclude the test results; he merely sought to present the evidence to the jury that rendered those results unreliable. The state, however, sought to conceal evidence of the defects in its test results and the circuit court agreed. For the reasons that follow, the circuit court erred and Garba is entitled to a new trial.

STATEMENT OF THE CASE

Ali Garba was charged with operating a motor vehicle under the influence of an intoxicant (OWI) and operating a motor vehicle with a prohibited alcohol concentration (PAC), third offenses. The state introduced the result of a blood test conducted by the Wisconsin State

Laboratory of Hygiene (the Lab). Garba sought to refute the reliability of that result through evidence of abnormalities in the blood testing process that occurred during Garba's test batch, both before and after Garba's sample was tested. By virtue of their unusual appearance in the blood test chromatogram, these abnormalities are colloquially known as jagged humps. In a pretrial hearing, Garba elicited testimony from two experts that these abnormalities in surrounding tests cast doubt upon the reliability of his blood test result, and that the Lab improperly ignored the problem. The trial court, however, held that Garba had the burden to prove that the jagged humps cause false alcohol test results, and excluded the evidence under Wis. Stat. §907.02 and Wis. Stat. §904.03. Garba argued that the trial court based its ruling on an unconstitutional mandatory presumption that the test was reliable, impermissibly shifted the burden of proof to the defense, and denied him the right to present a defense.

After delays relating to similar proceedings in another case[1], the state filed a *motion in limine* in Garba's case to preclude testimony regarding the jagged hump abnormality, attaching an unsigned press-statement from the Lab to the Wisconsin Law Journal, denying the

[1] *State v. Marie Kunde,* Waukesha co. 2014CF000749.

significance of the phenomena. R:16, exh. A. Garba filed a written response, attaching additional material from the Wisconsin Law Journal. R:18. The state then requested discovery, to which Garba agreed. R:39A, p.6. Thus, on what would have been the second day of trial, Garba elicited the testimony of two experts: Jimmie L. Valentine, Ph.D. and Janine Arvizu, CQA. R:39A. Oral argument was held on March 4, 2015, at which time Garba asserted his constitutional right to present a defense. R:49, p.37. The trial court issued a written Decision and Order granting the state's *motion in limine* excluding the jagged hump testimony. R:21. Garba moved for reconsideration, challenging the court's application of the so-called presumption of reliability of the test. R:22. Garba also filed an objection to Wis. Crim. JI 2669 on similar grounds. R:23. The motion and objection were denied. The matter proceeded to a jury trial, where Garba was found guilty of the OWI charge and the PAC charge. R:26. The PAC charge was dismissed on the state's motion. R:32. R:52, p. 96.

Garba appeals the trial court's decisions granting the state's *motion in limine* to exclude jagged hump testimony, denying Garba's motion for reconsideration, and denying Garba's objection to Wis. Crim. JI 2669.

STATEMENT OF FACTS

On June 29, 2013, Ali Garba was stopped by the police for traffic violations, in the City of Waukesha. As a result of this stop, Garba was investigated and arrested for operating a motor vehicle while under the influence of an intoxicant. Garba was taken to the Waukesha Memorial Hospital, where he consented to a blood draw. R:6.

The blood was shipped to the Wisconsin State Laboratory of Hygiene (the Lab) for testing. On July 3, 2013, Garba's blood was included in a blood test batch, by lab analyst Amy Miles. Miles reported Garba's blood test result to be .206 g/100mL of blood. Garba was then charged with operating a motor vehicle with a prohibited alcohol concentration. R: 6.

During the batch in which Garba's blood was tested, the blood testing device experienced abnormalities, known as jagged humps. These abnormalities had been appearing in batches at the Lab for several months, on all of their instruments. R: 16, exh. B, p1. Garba maintained that the jagged hump abnormalities undermined confidence in the reliability of the test result. The state maintained that they were insignificant. The significance of these abnormalities is the central dispute in this case.

Basic Principles of Blood Alcohol Testing

Blood alcohol tests are done using a process called headspace gas chromatography with flame ionization detection (GC-FID). It is a complex process, involving multiple pieces of equipment that must all interact with each other. R: 39A, p. 31. The basic principles, however, can be simplified.

The GC-FID Must First Separate the Sample into its Component Substances, and Only Then Can It Measure the Substances

GC-FID is a process that must first separate the component parts of a subject's blood; and then, once separated, these component parts are measured. R:39A, p.28.

The portion of the equipment that performs the separation is called a column. It is a long hollow tube, about as thick as a piece of wire. Pressurized gas continuously flows through the column. Periodically (e.g, once every 2.5 minutes) a sample is injected into the column. The sample separates while traveling through the column and the various component parts exit (elute) from the column at different times. The component substances are identified by the amount of time that it takes for them to elute from the column. It is critical that the substances fully separate from each other before they are measured. R:39A, pp. 28-31.

The measurement of the component parts is done by the flame ionization detector. If a flammable substance, such as ethanol, elutes from the column, it is burned, and the electrical signal emitted by the flame is measured. The quantity of the substance is determined by the strength of the electrical signal. R:39A, p.30.

Blood alcohol tests are done in batches. Usually there are eighty-eight unknown samples, together with calibrators and controls in a batch. R:39A, pp. 30-33.

The Result of the Blood Testing Process is a Chromatogram

The result of the blood testing process is a graph called a chromatogram, from which the alcohol content of the subject's blood is calculated. The vertical axis of the chromatogram represents the signal strength of the flame. The horizontal axis of the chromatogram represents the time of elution. R:39A, pp. 32-33.

When the process is working properly, a chromatogram will have a flat baseline with discrete peaks, each representing a substance in the sample. A peak indicates the presence of a substance (such as ethanol) in the blood sample. These peaks must be distinct from each other, indicating adequate separation of substances. Figure 1 shows the output of one of the

GC-FID instruments at the Lab. These are normal chromatograms, two for every sample, because the instrument has two columns, into which the sample is divided. R:39A, p. 36, R:19, exhibits 4A and 4B. R:16 exhibits; R:18 attachments.

Looking at the top chromatogram from left to right, there are three visible peaks. The first peak is very small, and it appears on every chromatogram. It is caused by the pressure fluctuation of the injection itself. It is not actually a substance in the sample. It is called T-zero (t0). t0 represents the time that it takes for the carrier gas itself to travel through the column. In the top chromatogram on Figure 1, t0 is at .57 minutes. Nothing will travel through the column faster than the carrier gas. Thus, no peaks should appear in the chromatogram to the left of t0 (.57 minutes in the top chromatogram). R:39A, pp. 32-38. R:16 exhibits. R:18 attachments.

The middle peak is ethanol, eluting in .86 minutes.

The peak on the right, eluting in 1.40 minutes, is 1-propanol, called the "the internal standard," a known amount of a known substance. The amount of ethanol in a sample is calculated as a ratio to the internal standard. Thus, the ethanol measurement is actually a comparison of the

amount of ethanol with the known amount of 1-propanol. R: 39A, pp. 32-38. R:19, exhibit 4A and 4B.

Figure 1 shows proper chromatography. There is nothing on the chromatograms to the left of, or earlier than, t0. The peaks are separate from each other and symmetrical, representing a clear signal from the flame ionization detector. The baseline is flat. e.g, R39A, p.36.

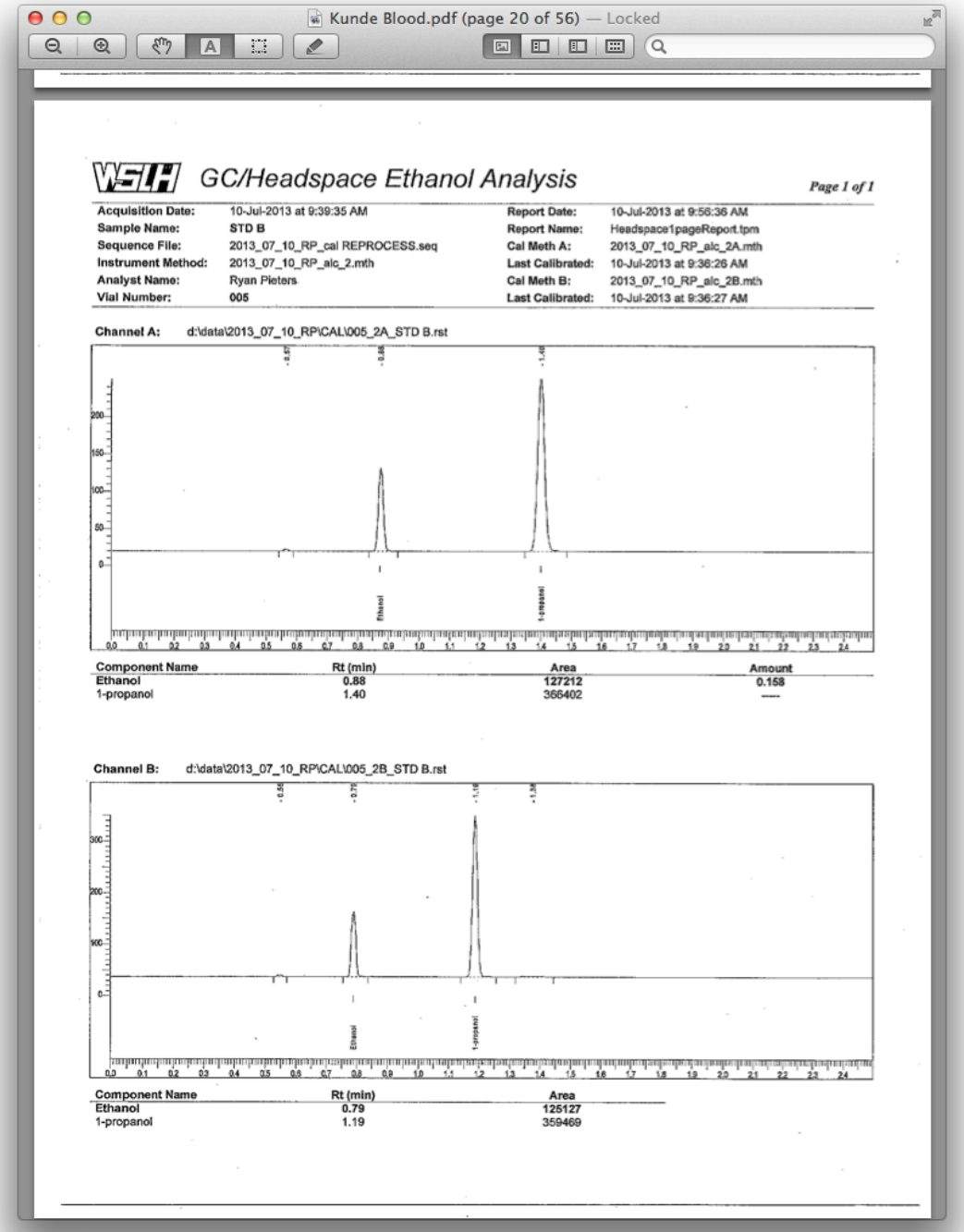

Kunde Blood.pdf (page 20 of 56) — Locked
GC/Headspace Ethanol Analysis
Page 1 of 1
Acquisition Date: 10-Jul-2013 at 9:39:35 AM
Sample Name: STD B
Sequence File: 2013_07_10_RP_cal REPROCESS.seq
Instrument Method: 2013_07_10_RP_alc_2.mth
Analyst Name: Ryan Pieters
Vial Number: 005
Report Date: 10-Jul-2013 at 9:56:36 AM
Report Name: Headspace1pageReport.tpm
Cal Meth A: 2013_07_10_RP_alc_2A.mth
Last Calibrated: 10-Jul-2013 at 9:36:26 AM
Cal Meth B: 2013_07_10_RP_alc_2B.mth
Last Calibrated: 10-Jul-2013 at 9:36:27 AM
Channel A: d:\data\2013_07_10_RP\CAL\005_2A_STD B.rst
Ethanol
1-propanol
Component Name Rt (min) Area Amount
Ethanol 0.88 127212 0.158
1-propanol 1.40 366402 ----
Channel B: d:\data\2013_07_10_RP\CAL\005_2B_STD B.rst
Ethanol
1-propanol
Component Name Rt (min) Area
Ethanol 0.79 125127
1-propanol 1.19 359469

Figure 1

The Jagged Hump Abnormalities Appear on Chromatograms from Garba's Test Batch

There were a series of mysterious, abnormal events in blood alcohol tests done at the Lab. The abnormalities appeared in all three instruments used by the Lab, over a long period of time. They appeared in tests done in the same batch in which Mr. Garba's test occurred, before and after Garba's tests. R:19, exh. 4, vials 21 and 81. These abnormalities are called jagged humps,[2] describing their visual appearance. Although these abnormalities occurred frequently in tests on all three of the Lab's instruments, similar phenomenon are not known to have occurred at any other laboratory. The cause is unknown. R: 39A, p. 64. R:16 exh. B; R:18 attachments.

The parties disagreed on the implications of this mystery. Garba maintained that evidence of the jagged hump abnormalities undermined the reliability or trust that should be placed in the blood tests results. The state argued that these abnormalities were unimportant, since they were not proven to affect specific ethanol test results.

[2] Although articles appearing in the press have popularized the term "jagged hump," it was not coined by counsel or the authors, as the state and trial court have suggested. The term was first used by an analyst with the Lab, in a conversation with counsel.

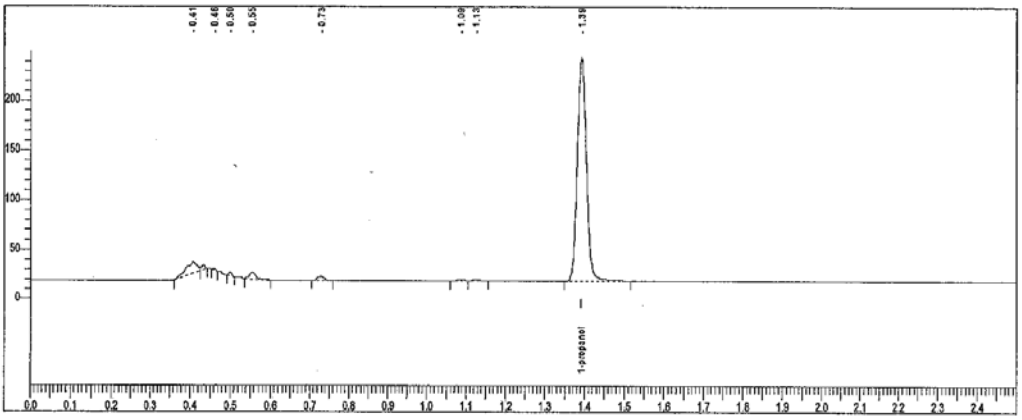
Figure 2 is an example of an abnormal set of chromatograms from the same batch as Garba's test.[3] The jagged humps are at the lower left portion of each graph. Note the uneven baselines at the humps, the indistinct shape of the humps, their lack of separation from each, and their position in the chromatograms. All of this is abnormal. The position of a jagged hump prior to t0 (.57 minutes) also indicates an abnormality; since nothing can travel through a column faster than the carrier gas. While the effects of the abnormities are unknown, Garba maintained that the instrument was clearly not in proper working order. R:39A, pp. 39-42.

[3] This chromatogram was attached as an exhibit in various pleadings in the case. R: 16, and R:18. It is vial 81, a test that occurred after Garba's sample was tested. In the hearing on January 28, 2015 (R:39A) a different jagged hump chromatogram was introduced, vial 21 of the same batch, occurring prior to Garba's test. Both chromatograms illustrate the same phenomenon.

WSLH GC/Headspace Ethanol Analysis

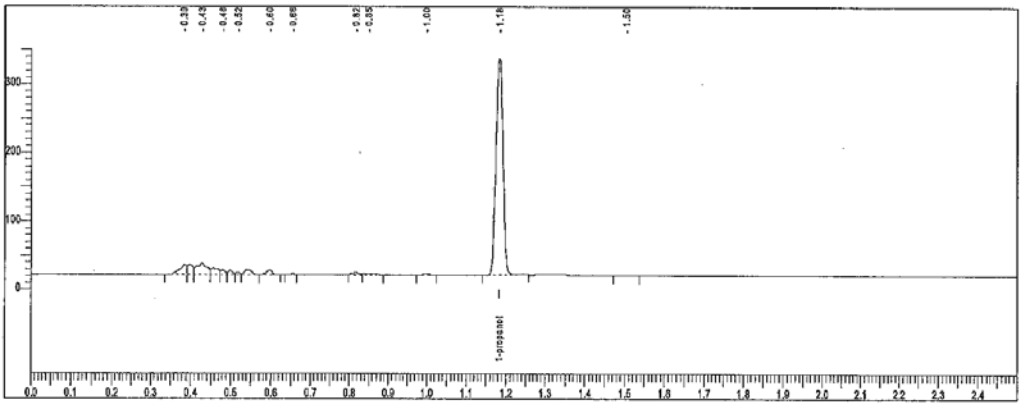
Acquisition Date:	03-Jul-2013 at 3:13:19 PM	**Report Date:**	03-Jul-2013 at 3:16:10 PM
Sample Name:	**13FX010244**	**Report Name:**	Headspace1pageReport.tpm
Sequence File:	2013_07_03_AKM.seq	**Cal Meth A:**	2013_07_03_AKM_alc_1A.mth
Instrument Method:	2013_07_03_AKM_alc_1.mth	**Last Calibrated:**	03-Jul-2013 at 10:17:00 AM
Analyst Name:	Amy K. Miles	**Cal Meth B:**	2013_07_03_AKM_alc_1B.mth
Vial Number:	**081**	**Last Calibrated:**	03-Jul-2013 at 10:17:01 AM

Channel A: d:\data\2013_07_03_AKM\AM\AM_081_1A_13FX010244.rst



Component Name	Rt (min)	Area	Amount
1-propanol	1.39	368225	-----

Channel B: d:\data\2013_07_03_AKM\AM\AM_081_1B_13FX010244.rst



Component Name	Rt (min)	Area
1-propanol	1.18	375371

Figure 2

Garba Disputed the Lab's Claim that the Abnormalities were Unimportant

The Lab professed confidence in the integrity of its test results, despite the abnormality. Garba referred to testimony of lab analyst Ryan Pieters conceding that the abnormalities "shouldn't be there," are contrary to the manufacturer's protocols, and are unexplained. Nevertheless, because the jagged humps appeared in locations distinct from the ethanol peaks, and because the ethanol control results were within specification, the Lab maintained that ethanol tests were unaffected by these abnormalities. R:12, Attachment B, Pieters transcript.

Garba maintained that the confidence of the Lab in their test results was mistaken; because the unseen effects of the jagged hump abnormality could not be known unless the cause was also known. The field of analytic chemistry has formal procedures for handling such abnormalities, which were ignored. As the Hygiene Lab did not conduct a formal root cause analysis, nor determined what caused these abnormalities, it could not conclude that its test results were reliable. It was unscientific to assume that all ethanol tests results were reliable because no results had been disproved. e.g., R:39A, p.46. The trial court, however, held that these abnormalities did not fit the criteria for a root cause analysis. R:21, p. 22.

Whether or not Garba's position may be argued to the jury is the central issue in this appeal.

Accepted Scientific Standards and the Lab's Accreditation Require a Root Cause Analysis and Corrective Action

The International Standards Organization (ISO) is a voluntary organization that sets standards for various industries and human endeavors. In the field of analytic chemistry, ISO has promulgated the ISO 17025 laboratory standard, which is accepted as the consensus standard of the scientific community for the conduct of analytic chemistry. R:39A, p. 21 ; R;19, exh. 3. The Wisconsin State Crime Laboratory and the Wisconsin Occupational Health Laboratory, which is another department of the Hygiene Lab, have explicitly adopted the ISO 17025 standard. R: 16, exh. B, p.2. ISO 17025, sec. 5.5.7, requires that any analytic instrument that repeatedly displays "suspect results" should be removed from service until a root-cause analysis is completed and the problem is resolved. R:19, exh. 3. Root Cause analysis is not merely an investigation; it is a formal procedure. R: 39A, pp. 56-60. R: 12.

The trial court refused to consider ISO 17025. R: 49, pp.27-30. Although generally accepted, ISO 17025 has not been adopted by the Forensic Toxicology Section of the Lab. The American Board of Forensic

Toxicology (ABFT), whose standards are less demanding, accredits the Toxicology Section. R: 16, exh. B, p.2; R:39A, p.22. The Lab has adopted the ABFT standards, which still require a formal root-cause analysis and corrective action for "repeated failures beyond that statistically expected." R:19, exh. 2: ABFT Criteria E-9. R:39A, p.61. ; and R:49 pp.27-30.

The Lab did neither a root cause analysis of the jagged hump phenomena, nor take any corrective action. R:39A:

Garba Maintained that a Root Cause Analysis Was Required

Garba made an offer of proof with two experts: Jimmie L. Valentine, Ph.D. and Janine Arvizu, CQA. Dr. Valentine is a Professor of pharmacology, with extensive experience in analytic chemistry and the equipment used in this case. R:39A; R19, exh. 5, Valentine CV. Ms. Arvizu is a certified quality auditor, a professional whose function is to audit analytic chemistry laboratories for quality assurance and quality control. R:39A; R; 19, exh. 5, Arvizu CV. Neither expert's qualifications were challenged.

Both experts testified that the jagged hump abnormality was unusual and significant. R:39A, p.42; R:39A, p.78. Both experts said that although it was unknown whether or not the ethanol results were affected, that

abnormality created a level of uncertainty that undermined confidence in the test results. The results may or may not have been accurate, but they were unreliable. R: 39A, p.46; R:39A, p. 87. Both experts testified that the abnormalities constituted suspect results and repeated failures, as those terms are used in the ISO 17025 sec. 5.5.7, and ABFT E-9 standards. Hence, a formal root cause analysis was required, but was never done. R39A pp. 62-64; R:39A, R:39A, p.78.

The state declined to cross-examine either Dr. Valentine or Ms. Arvizu. Nor did the state present any evidence to refute their testimony. R:39A.

The Lab's Explanation was False

In its *motion in limine,* the state attached an unsigned statement issued by the Lab, in response to an article that appeared in the Wisconsin Law Journal. R16, exh A.

The Lab argued:

> "the unidentified peaks have nothing whatsoever to do with the ethanol determination and are due to other substances sometimes present in biological samples such as blood."

This explanation was demonstrably false, as the jagged hump abnormality appeared in some of the known control samples prepared by

the Lab. R:39A, pp.47-48. R:18, attachment. Thus, the Lab's explanation was impossible. Figure 3 is a set of chromatograms produced by the Lab, made on July 13, 2013, a known control sample, Blood 263. R39A, pp 47-48, R:18, attachment.

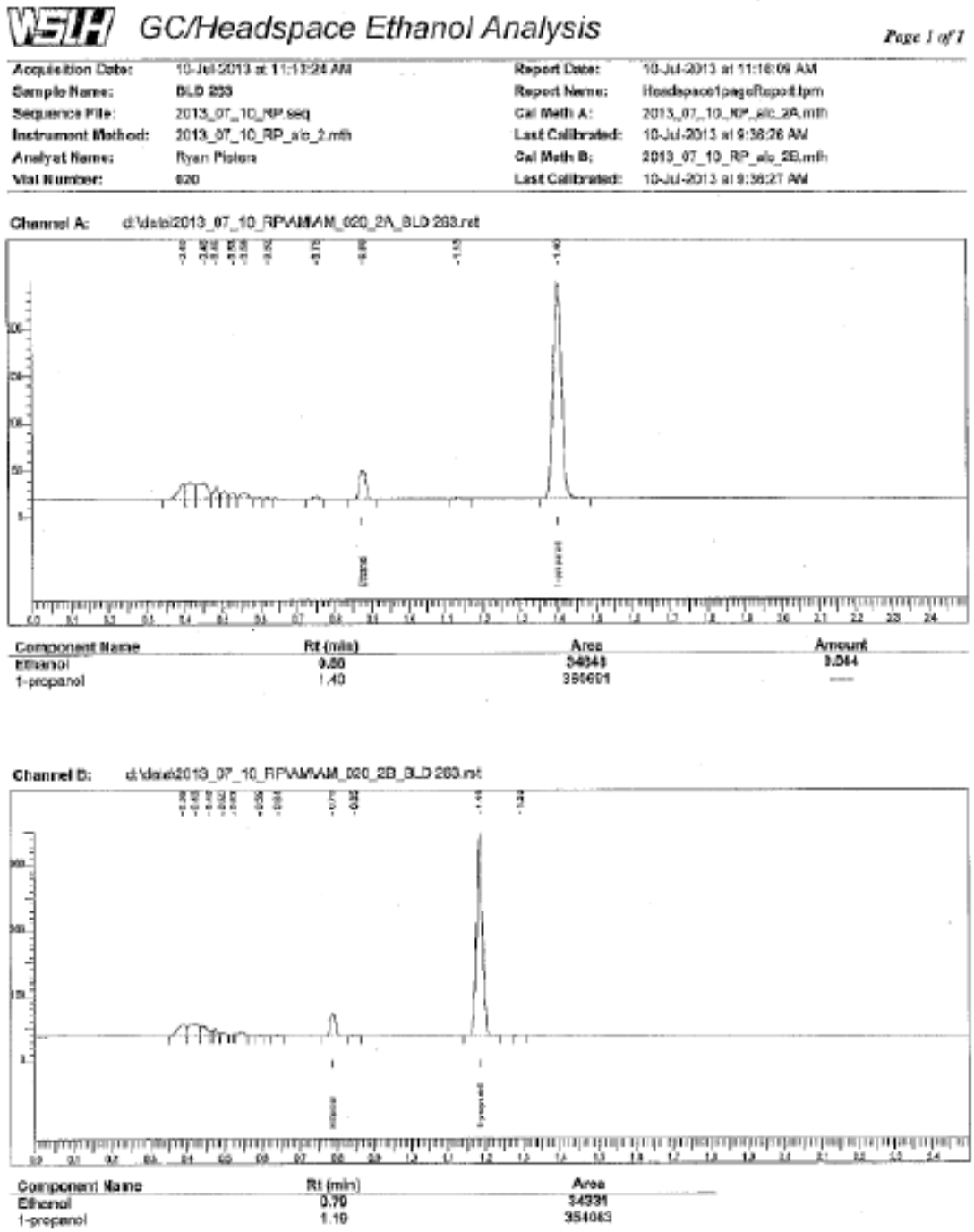

GC/Headspace Ethanol Analysis
Page 1 of 1
Acquisition Date: 10-Jul-2013 at 11:13:24 AM
Report Date: 10-Jul-2013 at 11:16:09 AM
Sample Name: BLD 293
Report Name: Headspace1pageReport.fpm
Sequence File: 2013_07_10_RP.seq
Cal Meth A: 2013_07_10_RP_alc_2A.mth
Instrument Method: 2013_07_10_RP_alc_2.mth
Last Calibrated: 10-Jul-2013 at 9:38:26 AM
Analyst Name: Ryan Pistora
Cal Meth B: 2013_07_10_RP_alc_2B.mth
Vial Number: 620
Last Calibrated: 10-Jul-2013 at 9:38:27 AM
Channel A:
Component Name
Rt (min)
Area
Amount
Ethanol
0.80
34049
0.044
1-propanol
1.40
350691
Channel B:
Component Name
Rt (min)
Area
Ethanol
0.79
34331
1-propanol
1.19
354083

Figure 3

ARGUMENT

I.

THE TRIAL COURT ERRED IN EXCLUDING EXCULPATORY EVIDENCE THAT REFUTED THE RELIABILITY OF THE TEST RESULT

Garba was whipsawed between the unconstitutional mandatory presumption that the blood test was reliable, and the wrongful exclusion of the evidence rebutting that presumption. The jury was only told that the equipment was in proper working order. The truth, that they were not allowed to hear, was that the blood testing equipment was acting very strangely that day.

A. Background

The unexplained "jagged humps" reflected that something was not working properly on either the process or the instrument used to analyze Garba's blood alcohol level, and the state had done nothing to determine what caused the problem or what impact that problem could have on the results produced. The circuit court nonetheless granted the state's motion to exclude evidence of the defects and the defense expert testimony regarding to the effect that those unexplained anomalies rendered the analysis and its results unreliable.

First, the court held that the evidence would not be reliable or helpful to the jury as required by Wis. Stat. §907.02. The court construed Wis. Stat. §885.235(1g) and Wis. Crim. JI 2669[4] as requiring that,

> if the State is able to show that the testing device here, the State Lab's Perkin Elmer Instruments used to test Mr. Garba's blood sample were in proper working order and correctly operated by a qualified person, then the testing results are entitled to a *prima facie* presumption of reliability and accuracy.
>
> R:21, pp. 19-20

The court assumed that the state would satisfy these prerequisites. R21, p.20-21. Based on the assumption that the state would provide such evidence, the court assumed further that the state would satisfy its burden for the "presumption of reliability and that the burden will then shift to Mr. Garba to proffer evidence that the testing results on his sample are unreliable and/or inaccurate." R: 21, p.20-22.

The court then held that, because neither defense expert could opine that the results in Garba's case were, in fact, inaccurate, the evidence did not satisfy that shifted burden, and thus was neither relevant nor helpful to the jury. R: 21p., 21-22.

[4] See p. 44, *infra*

Second, the court disputed the scientific principles and methods used by the experts in questioning the reliability of the Lab's processes and instruments, finding that the evidence did not satisfy the reliability standards of Wis. Stat. §907.02. The court dismissed the expert testimony, objecting that the jagged hump abnormalities were first reported by defense lawyers, that the experts did not explain why such abnormalities should be viewed as failures, and, again, that the experts did not opine that Garba's or any other test results in fact were inaccurate. R:21, p.22-23.

Finally, the court held that the relevance of such evidence was substantially outweighed by the danger of unfair prejudice under Wis. Stat. §904.03. R:21, p.23.

B. The Trial Court Erroneously Exercised Its Discretion in Excluding Exculpatory Evidence

The circuit court's analysis suffers from a number of fatal defects. Although admission of evidence generally is left to the trial court's sound discretion, the court erroneously exercises its discretion, as here, by ruling unreasonably or applying the wrong legal standard. *State v. Miller*, 231 Wis.2d 447, 467, 605 N.W.2d 567 (Ct. App. 1999).

First, while Wis. Stat. §885.235(1g) provides that a chemical test taken within three hours and showing an alcohol concentration of 0.08 or

more "is *prima facie* evidence" that the defendant had that alcohol concentration, it does not, and constitutionally cannot, create a mandatory presumption shifting the burden to the defendant to prove that the test result is in fact inaccurate. Nothing about Wis. Stat. §885.235(1g) supports that burden shifting, or renders evidence questioning the reliability of the tests irrelevant.

Second, assuming that the state would satisfy its burden of showing the prerequisites for the *prima facie* case, the circuit court overlooked the fact that the defense experts' testimony, if believed by the jury, established that the processes and instruments were not, in fact, in proper working order, such that even a permissive inference would not apply.

Third, the circuit court simply missed the distinction between accuracy and reliability. It was the failure to recognize this distinction that misled the court into believing that the expert testimony was irrelevant and not scientifically supported. The trial court's erroneous conclusion arose from its misplaced assumption that the defense experts were presenting a new and unproven scientific theory. Rather, the experts were conducting the accepted scientific process of assessing and critiquing the state's theory

that the processes and instruments that produced unexplained anomalies were trustworthy and reliable.

Fourth, the circuit court's application of Wis. Stat. §904.03 was an erroneous exercise of the court's discretion, given that its underlying assumptions were both unreasonable and wrong.

Finally, the unreasonable exclusion of the evidence denied Garba his constitutional rights to present a defense, to present witnesses, and to confront his accusers.

1. The trial court improperly applied a prohibited mandatory presumption that the blood test was accurate and reliable.

A mandatory presumption is one that establishes a fact *prima facie*, and requires the opposing party to produce more than merely "some" or "any" evidence in rebuttal. Mandatory presumptions against a defendant, as to essential facts, are prohibited in criminal cases. In excluding Garba's defense, the trial court violated that prohibition.

a. Mandatory presumptions violate due process.

The presumption of innocence is an essential component of due process. See *Taylor v. Kentucky*, 436 U.S. 478 (1978) (reversing a criminal conviction resulting from a trial in which the judge refused to give a

requested jury instruction on the presumption of innocence); *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial.").

In a criminal case, due process requires that the state must prove every fact necessary to constitute an element of the offense by evidence that satisfies the jury beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (striking down a New York law allowing a juvenile to be found to be delinquent on less than proof beyond a reasonable doubt).

In the landmark case of *Sandstrom v. Montana*, 442 U.S. 510 (1979), the Court struck down a Montana jury instruction that the law "presumes that a person intends the ordinary consequences of his voluntary acts." The Court identified and analyzed three types of presumptions that may exist in a criminal case: conclusive presumptions, mandatory presumptions, and permissive inferences.

If the inference is irrebuttable, the presumption is conclusive. Conclusive presumptions conflict with the overriding presumption of innocence. Conclusive presumptions invade the fact-finding function of the

jury. Due process prohibits a conclusive presumption as to an element of a criminal offense. *Sandstrom, supra*, 442 U.S. at 521-522.

If the presumption is rebuttable, it is said to be mandatory. This type of presumption, although not conclusive, has the effect of shifting the burden of persuasion from the state to the defendant. Due process prohibits a mandatory presumption as to an essential fact of an element of a criminal offense. *Sandstrom, supra*, 442 U.S. at 524.

Permissive inferences are not actually presumptions, as they merely allow, but do not require, a conclusion to be drawn from the premises. Permissive inferences may require a defendant to produce "some" evidence to rebut the conclusion, and may place upon a defendant a burden of production of some evidence. Permissive inferences, however, do not place upon a defendant any burden of persuasion. Permissive inferences are allowed as to an element of the offense in a criminal case, only if the inference is rationally related to the premises, and there is evidence to support a conviction beyond a reasonable doubt. If, however, a burden of persuasion is placed upon a defendant, or if a quantum of evidence more than "some" is required to rebut the conclusion, then it does not fall into the allowed category of permissive inference, but rather falls into the prohibited

category of mandatory presumption. *Sandstrom, supra,* 442 U.S. at 515; *Francis v. Franklin*, 471 U.S. 307, 325, 105 S.Ct. 1905, 85 L.Ed.2d 344 (1985), (striking down a Georgia jury instruction that stated an impermissible mandatory presumption, as to the element of intent to kill). A leading Wisconsin case is *State v. Vick*, 104 Wis.2d 678, 312 N.W.2d 489 (1981), which adopted the analysis of *Sandstrom* that mandatory and conclusive presumptions are unconstitutional.

Due process prohibits a mandatory presumption as to facts that are essential to an element of an offense. Whether a presumption applies to an essential fact or an element of the offense, or a related fact, is an area, as Professor Weinstein says, that is murky. 303 *Weinstein's Federal Evidence* §303.06(1) (2010). It is clear, though, that whether a fact is essential to an element of an offense is a matter of state law. *Cole v. Young*, 817 Fed.2d 412 (7th Circ. 1987). State law, however, may encompass more than merely the statutory language. *Kirby v. State*, 86 Wis.2d 292, 272 N.W.2d 113 (Ct.App. 1978) ("great bodily harm" is an element of mayhem).

Case law broadly construes the meaning of "element of the offense." In *State v. Dyess* 124 Wis.2d 525, 370 N.W.2d 222 (1985), a vehicular homicide case, the court rejected a standard jury instruction implying that

speeding was negligent, as that factual dispute was essential to an element of the offense. In *State v. Jensen*, 2007 WI APP 256, 306 Wis.2d 572, 743 N.W.2d 468 (2007), the court rejected a standard jury instruction relating to the meaning of the term "dishonest advantage" in a misconduct in public office case, that was essential to the element of "intent" to obtain a dishonest advantage. See also, *State v. Schultz*, 2007 WI APP 257, 306 Wis.2d 598, 743 N.W.2d 823 (2007) (rejecting a jury instruction that created a mandatory presumption as to the elements of duty and intent in misconduct in public office).

Whether the presumed fact (the scientific soundness of the blood testing machine) is essential to an element of the offense, presents no difficulty on the PAC charge. The scientific soundness of the method used by the testing devices is inherently essential to the critical element of the offense. It is a paradigmatic example of a presumed fact that forms an essential basis for an element of the offense.

b. Wisconsin's presumption of reliability of test results derives from civil, not criminal cases, and fails to consider due process implications.

The history of the presumption of reliability of the chemical test does not support its application to a criminal case; as Wisconsin has never addressed the constitutional issue of impermissible presumptions.

Under Wis. Stat. §885.235, a test under Wis. Stat. §343.305, taken within three hours of operation of a vehicle, is presumed to be admissible. Nothing in either statute states that a chemical test is presumed to be accurate or reliable. That doctrine is derived from *State v. Trailer Service*, 61 Wis.2d 400, 212 N.W.2d 683 (1973).

Trailer Service was a civil forfeiture action regarding the accuracy of the highway scales used to weigh trucks. The court held that since the weighing procedure was mandated by statute, the scales were presumed to be accurate. *Trailer Service* was a civil case that preceded *Sandstrom* by six years; so, it did not consider the constitutional implications of such a presumption.

Trailer Service was followed by *In the Matter of the Suspension of the Operating Privileges of Bardwell*, 83 Wis.2d 891, 266 N.W.2d 618 (1978). *Bardwell* was a civil action relating to the refusal of a chemical test

under Wis. Stat. §343.305. In *Bardwell*, the court applied the presumption of reliability of a breath testing device. Since *Bardwell* was a civil action that preceded *Sandstrom*, the court did not address the issue of impermissible presumptions.

State v. Neitzel, 95 Wis.2d 191, 289 N.W.2d 828 (1980), held that there is no right to counsel at the breath test, which is presumed accurate, as the results can be fairly questioned at trial. *Neitzel* was yet another civil refusal case, with no consideration of the constitutional principle prohibiting mandatory presumptions in a criminal case.

Trailer Service, *Bardwell* and *Neitzel* do not apply to criminal cases; as, the standards for application of presumptions in a criminal case do not exist in civil cases.

State v. Disch, 119 Wis.2d 416, 351 N.W.2d 492 (1984) first applied the presumption of accuracy of blood tests results in a criminal case. *Disch* reversed an order suppressing blood test results on the grounds that the state failed to preserve the blood sample for retesting. Relying on *Trailer Service* and *Bardwell*, the court stated that blood alcohol tests performed under Wis. Stat. §343.305 are presumed to be reliable. *Disch*, however, was concerned with the admissibility of test results, rather than the presumption

of reliability of those results. *Disch* did not address the constitutional implications of *Sandstrom*; as the case was concerned only with a pretrial suppression order. Thus, the court's language concerning a presumption of reliability was mere *dicta.* Moreover, *Disch* used self-contradictory language in describing the nature of the presumption: "The *prima facie* presumption of accuracy accorded recognized tests authorized by statute is a permissive inference or rebuttable presumption." *Disch*, 119 Wis.2d at 477. Under *Sandstrom*, however, it cannot be both. If interpreted in its most favorable light, therefore, *Disch* may stand for the proposition that the presumption of alcohol test accuracy ought to be an allowable permissive inference.

In *State v. Busch*, 217 Wis. 2d 429, 576 N.W.2d 904(1998) the court considered the issue of whether the approval of the Intoxilyzer 6400 breath testing device encompassed a later model of the device, the Intoxilyzer 6600. The court held that the 6600 was an approved device, and thus was "afforded a presumption of accuracy and reliability." *Busch* again failed to consider any of the constitutional prohibitions against a mandatory presumption.

In fact, there is no Wisconsin precedent that considers whether the presumption of accuracy and reliability of chemical testing is constitutional under *Sandstrom*.

c. The trial court applied a prohibited presumption.

In this case, the trial court explicitly applied a prohibited mandatory presumption as to an essential fact of an element of the offense. This was stated by the trial court in its Decision and Order:

> "Comments to the Jury Instructions establish that this instruction is based upon Chapter Trans 311 of the Wisconsin Administrative Code, and the presumption it embodies "is sometimes referred to as ***a 'prima facie presumption of reliability (or accuracy).'*** See, for example, *City of Madison v. Bardwell*, 83 Wis. 2d 891,900, 266 N.W.2d 618(1978); *State v. Trailer Service*, 61 Wis.2d 400, 407, 212 N.W.2d 683 (1973); and *State v. Neitzel*, 95 Wis.2d 191, 203, 289 N.W.2d 828 (1980)."
>
> Therefore, if the State is able to show that the testing device – here, the State Lab's Perkin Elmer instruments used to test Mr. Garba's blood sample – were in proper working order and correctly operated by a qualified person, then ***the testing results are entitled to a prima facie presumption of reliability and accuracy."***
>
> Decision and Order. R:21, p.20. (emphasis added).

The foundation upon which the court based its analysis of the evidence was, therefore, constitutionally flawed. The trial court improperly placed the burden on the defense to prove that the blood testing device was

not in proper working order – and then excluded that evidence under Wis. Stat. §907.02. The burden of proof should have remained with the state to show that the device was actually in proper working order; and Garba had a constitutional right to elicit evidence of the appearance of abnormal test results in the blood test batch in question to challenge the state's proof.

2. The trial court wrongly shifted the burden of proof to Garba to prove the test was inaccurate, and ignored evidence that the test was unreliable.

The trial court was explicit in shifting the burden of proof to Garba.

> "Assuming the State meets its burden and obtains the presumption of reliability, ***the burden will then shift to Mr. Garba*** to proffer evidence that the testing results on his sample are unreliable and/or inaccurate."
>
> Decision and Order, R:21 p.21. (emphasis added).

This is a misunderstanding of the law, which permits only a permissive inference regarding the chemical test. Instead, the trial court confused the issue, and wrongly required Garba to prove that his test was inaccurate, an impossible burden.

The crux of the matter is the distinction between the scientific terms, reliability of the test, and accuracy of the test, explained by Dr. Valentine and Ms. Arvizu. R: 39A, p.70; R:39A, pp.83-86. The trial court acknowledged, but confused the different concepts. Reliability refers to the

trustworthiness of the device, or the repeatability of its function. Accuracy refers to the relationship of the results to the truth, which is an entirely different concept. The old analogy of the broken clock is illustrative. A broken clock is always unreliable, but it is perfectly accurate twice a day. [5]

The trial court confused these concepts, holding that Garba failed to prove that the test result was unreliable, because he did not show that the test was inaccurate. R:21, p.21. To continue the analogy, the state had to prove that the clock was in proper working order. The jury was not allowed to hear that the clock was making a horrible noise, because Garba could not prove that the actual time reading was inaccurate.

The trial court took up the clock analogy:

> "A better analogy is one involving a clock one knows to be accurate, because its accuracy is tested every ten minutes with no errors. If the clock made an aberrant and unexplained ticking sound, according to Dr. Valentine, the clock is not in proper working order, and one should not properly rely upon the times presented by the clock during the day even though they were confirmed accurate"
>
> Decision and Order, R:21, p.22.

[5] A third concept, that Dr. Valentine explained is precision. That is, the closeness of different results to each other. A precise and reliable series of measurements may, nevertheless, be inaccurate. For example, my yardstick may be precisely 35 inches long. It is a precise, repeatable, but inaccurate measurement. Conversely, a perfectly accurate measurement may be imprecise, e.g., the University of Wisconsin is located on the planet Earth. R:39A, pp. 83-86.

The trial court ignored the reasonable possibility that this mythical clock moved in an erratic but regular pattern, accurate every ten minutes, but inaccurate otherwise, speeding up and then slowing down. Without knowing why the clock was making the aberrant noise, no one can say whether the clock is always accurate; but, it is surely unreliable. Accuracy, even repeated accuracy, does not demonstrate reliability, if there are unexplained abnormalities or suspect results in the readings.

One Lab analyst testified that the abnormality "shouldn't be there," is contrary to the manufacturer's protocols, and is unexplained. [6] Nevertheless, because the jagged hump appeared on chromatograms in different locations than the ethanol peaks, and because the control ethanol test results were within specification, the Lab believes that ethanol tests were unaffected. Garba should have been allowed to challenge that belief.

As the cause of the jagged hump phenomena is unknown, the effect on test results is also unknown. The Lab failed to conduct a root-cause analysis, and determine what caused the repeated abnormality. So, it cannot conclude that its test results were reliable.

[6] R:12, attachment B, Pieters' transcript.

The jagged hump phenomena may be only the tip of the iceberg: the visible symptoms of a larger, unknown problem. For example, they may be the result of a problem with the interface between the Lab's hardware and the software that runs the system. This could also cause other problems, such as transposed, mixed up test results, or misreported test results.

No analysis was done to determine whether the jagged hump appears randomly or in a known pattern. This cannot be merely assumed without an analysis; as, e.g., even the number Pi appears on its face to be a random. The control samples were placed in a specific pattern in the run. The jagged hump may simply have appeared in a different pattern from the control samples.

Conversely, if the jagged hump appeared randomly, it may simply have not affected the ethanol reading of a control sample, by chance. The Lab's contrary conclusion is unsupported by data; as, no analysis was done regarding the frequency or timing of the phenomena, as it relates to the placement of control samples.

The abnormality appeared in results from all three of the Lab's instruments; so, it may have been caused by some other part of the process,

such as sample preparation, that systematically excluded the manner in which control samples were handled.

Ignoring these abnormal phenomena violated the scientific method. Analytic chemistry, like the law, required proof that the testing device was not only accurate, but also reliable. The jagged hump abnormality introduced an unacceptable, unknown variable into the process. It could not be assumed that this unknown variable was unimportant. Scientific due diligence required a proper investigation of the jagged hump phenomena. The ISO 17025 standard, the accepted consensus standard in the field of analytic chemistry, required a root cause analysis. The trial court erred in ignoring that standard, simply because it was not adopted by the Lab. Even so, the Lab's own ABFT accreditation standard also required a root cause analysis. ABFT E-9.

The entire foundation of the trial court's analysis was built upon the unfirm notion that Garba bore the burden to prove his innocence, and that burden included proof that the testing device was inaccurate. In truth, the state had the burden to prove that their device was in proper working order – a burden that it never had to shoulder, and which it could not sustain.

3. The trial court erred in applying Wis. Stat. §907.02

The trial court based its analysis of Wis. Stat. §907.02 on a mistaken view of the nature of the so-called "presumption of reliability" of the blood testing device. Since the presumption may only be correctly applied as a permissive inference, and Garba bears no burden of proof to rebut any presumption, we must revisit the Wis. Stat. §907.02 analysis.

Wis. Stat. §907.02 embodies the United States Supreme Court decision, *Daubert v. Merrill Dow Pharmaceuticals*, Inc. 509 U.S. 579 (1993). When *Daubert* is correctly applied to this case, the unrefuted conclusion is that evidence of the jagged hump abnormality is admissible. Just as the clock may have been accurate six times an hour, the defense is still entitled to show that it was making a racket. No witness testified, no evidence was offered, and no cross-examination took place; nothing refuted Garba's position.

Wis. Stat. §907.02 sets out a number factors that must be met for scientific evidence to be admissible: first, it must assist the trier of fact; second, the witness must be qualified; third, the testimony is based upon sufficient facts or data; fourth, the testimony is the product of reliable

principles and methods; and fifth, the witness has applied the principles and methods reliably to the facts of the case.

Daubert, *supra*, outlines four factors that the court may consider in making the its determination: first, whether a theory or technique has been tested; second, whether a theory or technique has been subject to peer review; third, whether the technique has a known error rate; and fourth, whether there is "general acceptance" of the theory or technique within the scientific community.

Garba agrees with Ryan Pieters that the jagged hump abnormalities "shouldn't be there", are contrary to the manufacturer's protocols, and are unexplained. They appeared in tests done on all three of the devices at the Lab; but, Garba's experts had never encountered anything like it in their previous decades of experience. The jagged hump abnormalities are problematic and unusual. The cause of the problem is a mystery; and the effects of the problem, whether seen or unseen, cannot be known. These abnormalities constitute "suspect results." Under ISO 17025 sec. 5.5.7, all three of the Lab's GC-FID devices should have been removed from service while a formal root cause analysis was conducted. The trial court, however, failed to consider ISO 17025, solely because the Lab did not adopt it, even

though it is the generally accepted scientific standard. That, itself, was error in the trial court's reasoning. Moreover, the ABFT E-9 standard adopted by the Lab also required a formal root cause analysis for repeated failures beyond those statistically expected.

The trial court opined that the jagged hump abnormalities were not suspect results or repeated failures. Those conclusions, made from whole cloth, were without basis. There was no testimony, no evidence whatsoever to support those conclusions. The only evidence came from Garba's scientific experts, whose qualifications to render that opinion were unchallenged, and the foundation of their opinions unrefuted.

Would knowledge of the jagged hump abnormalities assist the trier of fact in determining whether the Lab's equipment was in proper working order, and the test results were, therefore, reliable? The only possible answer is, yes. If the trier of fact was actually considering purchasing the GC-FID device, and the Lab hid the fact that it was generating jagged hump abnormalities, it would be a basis for a fraud claim against the Lab. Yet, in this case, the jury was similarly deceived by the exclusion of important information.

Were the opinions offered by Garba's experts the product of reliable principles and methods? Garba's experts relied on the generally accepted principles and methods of analytic chemistry – and the standards promulgated by the most accepted authority in the field, ISO, as well as a lesser-known authority that accredited the Lab, the ABFT.

The trial court misunderstood the nature of the evidence, and regrettably resorted to *ad hominem* reasoning. "Here, the jagged hump theory originated from lawyers in Wisconsin, not any scientific study." R:21, p. 22. First, the jagged hump is not a theory; rather, it is an observed abnormal phenomenon, a fact. A theory, by definition, would be a proposed explanation for the phenomena. The lab's theory was easily refuted. Second, the jagged hump did not "originate" with lawyers; it originated in the devices operated by the Lab. The fact that it was noticed by lawyers, who sought expert opinions, is not germane. The state's *ad hominem* reference to a "lawyer created defense," echoed by the trial court's comment, is unseemly. What is important is that the Lab's processes were producing abnormal results, not who first questioned those results.

More to the point, as a rare (indeed, isolated to the Wisconsin Lab) phenomenon, it was not the sort of thing that would be the subject of a study, unless it was a study conducted by the Lab itself. Rather, it was an abnormality that was observed in the testing process. The authorities for the manner in which such abnormalities ought to be considered are ISO 17025, Sec. 5.5.7, and ABFT E-9.

Did the witnesses apply the principles and methods reliably to the facts? In this question, the trial court, again, conflated the scientific terms "reliable" and "accurate," shifting the burden of proof to Garba to prove inaccuracy, when all the law requires is that Garba show "some" or "any" evidence of unreliability. The trial court stated:

> Both experts attempted to characterize the jagged humps as "repeated failures" justifying a root cause analysis of the phenomenon under standards promulgated by the American Board of Forensic Toxicology ("ABFT") the organization that accredits the Stat Lab. (H'rg Tr. At 21,65) Neither expert, however was able to explain why the jagged hump phenomenon constitutes a "failure" in light of the undisputed evidence that the instruments were tested with controls and were within tolerances …

Both Ms. Arvizu and Dr. Valentine explained at length why the GC-FID result was unreliable, even if no specific result could be definitely found to be inaccurate. The jagged hump abnormality introduced an unacceptable, unknown variable into the process. It could not be assumed

that this unknown variable was unimportant. Unless the cause of the jagged hump is determined, it cannot be known whether it affected the accuracy of test results. That uncertainty was scientifically unacceptable in analytic chemistry. Although the control samples were within tolerances, it failed to dispel the doubt. The control samples were placed in the batch in regular intervals; while the abnormality may have affected test result accuracy at different intervals, avoiding the control samples. Another strong possibility is that the abnormality was the result of an error in the preparation of the unknown subject samples, and that the separate preparation of the control samples avoided the error (most of the time). Under accepted standards of analytic chemistry, it was incumbent upon the Lab to determine what was happening. It was scientifically invalid to merely assume that the control sample results negated the problem. ISO 17025 and ABFT E-9 apply.

While the trial court chose to give little weight to the significance of the abnormality, and give more weight to the control results, the trial court should not have substituted its own judgment for that of the unchallenged expert testimony. That was over-stepping the trial court's role as gatekeeper of the evidence.

Positive, uncontradicted testimony as to the existence of a fact cannot be disregarded by the court unless the testimony or evidence is somehow discredited. *Duffy v. Duffy*, 132 Wis. 2d 340, 346, 392 N.W. 2d 115, 118 (Ct. App. 1986). The state offered no evidence or testimony to challenge, discredit or contradict the defense experts' opinions. The state did not even cross-examine Garba's experts. Expert testimony by the state is required if the issue to be decided by the trier of fact is beyond the general knowledge and experience of the average finder of fact. *State v. Whitaker*, 167 Wis. 2d 247, 255, 481 N.W.2d 649, 652 (Ct. App. 1992).

The subject of quality control in analytic chemistry, and the functioning of GC-FID processes are beyond the general knowledge and experience of a layperson. There is no record that the trial court had any scientific training in the fields of GC-FID, laboratory quality control, or abnormalities in the GC-FID process. Indeed, it would be problematic if the trial court had such knowledge and failed to disclose it. The trial court erroneously disregarded the testimony of the only two experts to testify, and inappropriately substituted its own non-scientific opinion for that of the experts.

Although the jagged hump phenomenon is a problem unique to the Lab, there is a strikingly similar case from Arizona. *Arizona v. Bernstein (Herman),* 234 Ariz. 89, 317 P.3d 630 (App. 2014). In *Bernstein*, the trial court consolidated eleven cases and held seventeen days of hearings concerning abnormalities in the blood test results at the Scottsdale Crime Laboratory. In that case, the Scottsdale lab's Perkin Elmer Clarus 500 GC-FID device[7] was displaying a number of different abnormalities. Like this case, the abnormalities called into question the reliability of the test results, but did not prove that any specific result was inaccurate. The Arizona trial court held that the blood test results failed to meet the threshold for admissibility under Arizona's Rule 702, and excluded all eleven blood tests. The Arizona supreme court, reversed, holding that the test results were admissible. *Bernstein* emphasized, however, that the adversary system allowed for confrontation and cross-examination at trial; and that all eleven defendants would be allowed to present evidence at trial of unreliability, including failure of the Scottsdale lab to adhere to ISO 17025 standards. So should it be here.

[7] The Perkin Elmer Clarus 500 device is the same make and model device at issue in this case.

4. The trial court erred in applying Wis. Stat §904.03

In excluding the jagged hump abnormality evidence, under Wis. Stat. §904.03, the trial court, again, conflated the concepts of reliability and accuracy, and misplaced the burden of proof onto Garba. The issue before the trier of fact was whether the state could prove that its testing device was in proper working order. The court stated:

> Having two experts testify that a supposedly abnormal phenomenon may undermine the reliability of Mr. Garba's test results, when there is no evidence that the jagged hump correlates to any errors in testing, and was not even present in the testing performed on Mr. Garba's samples, would clearly be, in the Court's view, prejudicial, misleading, and a waste of judicial time and resources.

Another trite, but apt analogy is in order. A used car lot is selling a car. It seems to run well; it accelerates, steers, and stops just fine. The tires are good. It usually runs smooth and quiet. Occasionally, though, it makes a horrible screeching sound. It has done it many times, and no one has bothered to figure out why, because it still runs fine. No reasonable person would want to buy that car, nor blithely assume that nothing was wrong despite the noise.

The Lab's GC-FID device appeared to be running fine; but it was, in an electronic sense, occasionally making a occasional horrible screeching sound. The state had the burden to prove that the blood testing systems

were in proper working order; just as Garba had a right to tell the jury about that horrible noise.

5. Garba was denied his constitutional rights to present a defense, present witnesses, and confront his accusers.

Evidentiary rules have limits. While the courts have discretion to exclude scientific testimony under some circumstances, that discretion must be viewed in the light of a defendant's due process right to present a defense, compulsory process right to call witnesses, and the right to confront and cross-examine his accusers. *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). When an evidentiary or procedural rule results in an outright denial or significant diminution of the right to present a defense, this calls into question the integrity of the fact finding process and requires close examination. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297(1973). Wisconsin recognized this rule in *State v. St. George*, 2002 WI 50, 252 Wis.2d 499, 643 N.W.2d 777(2002).

These rights, of course, are not without limit. Unreliable evidence under Wis. Stat. §907.02, or prejudicial evidence under Wis. Stat. §904.03, may still be excluded. The constitutional issue, however, is whether the

exclusion of the evidence abridges a defendant's right to present a defense. If the rules are applied in a manner that is arbitrary, or disproportionate to the purposes they were designed to serve, then the defendant's constitutional rights have been violated, even if the rules of evidence have been properly applied. *Scheffer v. United States,* 523 U.S. 303 (1998). The exclusion of evidence is arbitrary and disproportionate if it infringes on the weighty interest of the accused to present the fundamental elements of his defense. *St. George, supra,* 252 Wis. 2d at 527.

St. George outlines a two-part test. In the first part of the inquiry, the defendant must show:

1) The testimony of the expert witness met the standards of Wis. Stat. §907.02. This is an issue that we have already addressed. Dr. Valentine and Ms. Arvizu, were qualified, based their opinions on sufficient facts, used reliable principles, and applied the principles reliably.
2) The expert witness's testimony was clearly relevant to a material issue in this case. The reliability of the blood testing device was an essential fact to the central elements of the offenses charged.
3) The expert witness's testimony was necessary to the defendant's

case. The opportunity to challenge the reliability of the blood test device was necessary to Garba's defense to the charge of operating a motor vehicle with a prohibited alcohol concentration. It is, in fact, a paradigm of necessity to the defense – especially when the state enjoys the presumption of admissibility under Wis. Stat. §885.235, and is, thus, exempt from *Daubert* scrutiny.

4) The probative value of the testimony of the defendant's expert witness outweighed its prejudicial effect. Contrary to the trial court's opinion, there was no unfair prejudicial effect. The inherent prejudice to the state would have been proper: establishing reasonable doubt.

After the defendant successfully satisfies these four factors to establish a constitutional right to present the expert testimony, a court undertakes the second part of the inquiry by determining whether the defendant's right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence. There was no compelling state interest in excluding evidence of abnormalities in the blood testing device on the same day that it was used to

test Garba's sample. The state already enjoys a presumption of admissibility of the test result; and if the test result is, as the state would like to believe, reliable, then the state should have no qualms about allowing the jury to make a determination based on a complete disclosure of the evidence.

Consideration of the *St. George* two-part test is not, however, the end of the inquiry. *St. George* considered only the right to call witnesses in order to present a defense. This case certainly deals with that; but it also goes much farther. Garba was denied his right to confront and cross-examine the state's lab analyst. So, while the analyst testified that the device was in proper working order since the control sample values were all within tolerances, Garba was prohibited from cross-examining her on the abnormal behavior that the device was exhibiting on that very day. R: 51, pp. 120-130. This was particularly egregious, since the state's *motion in limine* referenced a demonstrably false statement by the Lab, concerning the origin and nature of the jagged hump abnormality. R: 16, exh. A. That statement may have been written or approved by that analyst before its publication – or acknowledged by that analyst as authoritative; and if so, it was critical impeachment material that was placed off-limits to the defense.

The fundamental elements of Garba's defense included a challenge to the reliability of the blood test, that he was not allowed to present by way of two qualified experts, cross examination of the state's expert, or argument to the jury. In short, the state enjoyed an improper presumption that the blood test was reliable, while Garba was precluded from challenging that evidence.

II.

The Language of WI Crim JI 2663 Goes Beyond a Permissive Inference, and Creates an Unlawful Presumption Against a Defendant

The prohibition against mandatory presumptions applies to jury instructions that may reasonably be construed by the jury to imply such a presumption. *Sandstrom, supra; Francis, supra; Vick, supra, Dyess, supra*.

A jury instruction has persuasive value, but is not binding. *State v. Saturnus*, 127 Wis.2d 460, 381 N.W.2d 290 (1986). In assessing whether a jury instruction is unconstitutional, the inquiry is not whether the instruction is undesirable, erroneous, or even universally condemned, but rather the question is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. *State v. Vick*, 104 Wis.2d 678, 691, 312 N.W.2d 489 (1981).

Nevertheless, whether the meaning of a jury instruction is constitutionally impermissible is a matter of the "reasonable juror standard." That is, if a reasonable juror could view the meaning of the jury instruction in a manner that is improper, the instruction is tainted. If an instruction is subject to misinterpretation by a reasonable juror, it is improper. *Sandstrom, supra.*

Wis. Stat. (Rule) §903.03(3) provides further insight into the limitations of instructing a jury on a presumption:

> (3) INSTRUCTING THE JURY.
>
> Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.
>
> HISTORY: History: Sup. Ct. Order, 59 Wis. 2d R1, R56 (1973).

The instruction in question, Wis. Crim JI 2669 provides in part as follows:

> The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The state is not required to prove the underlying scientific reliability of the method used by the testing device. However, the state is required to prove that the testing

> device was in proper working order and it was correctly operated by a qualified person.

Garba objected to Wis. Crim. JI 2669 on constitutional grounds, and under Wis. Stat. §903.03. R: 23. That this language is reasonably subject to misinterpretation as a mandatory presumption cannot be denied; since the trial court itself interpreted the language in that fashion. The problematic term is "recognizes;" and the failure of the instruction to say that "the jury is not required to do so."

"Recognize" is defined as follows:

> "1. to acknowledge formally: as *a* **:** to admit as being lord or sovereign *b* **:** to admit as being of a particular status *c* **:** to admit as being one entitled to be heard **:** give the floor to *d* **:** to acknowledge the de facto existence or the independence of
> 2. to acknowledge or take notice of in some definite way: as *a* **:** to acknowledge with a show of appreciation <*recognize* an act of bravery with the award of a medal> *b* **:** to acknowledge acquaintance with <*recognize* a neighbor with a nod>
> 3. to perceive to be something or someone previously known <*recognized* the word> *b* **:** to perceive clearly **:** modification of Anglo-French *reconois-*, stem of *reconoistre*, from Latin *recognoscere*, from *re-* + *cognoscere* to know — more at cognition First Known Use: circa 1532."
>
> Merriam-Webster Dictionary, 2010.

The Jury Instruction Committee may have chosen the word "recognizes" in order to avoid the many pitfalls of the word "presumes." It was, nevertheless, a poor choice. The word "recognizes" is a directive, as it

implies the indisputable existence of fact. Thus, to say, "The law recognizes…" implies that the scientific soundness of the methods used by the testing devices are established facts that are "recognized", and are not subject to dispute.

Even if the word "recognizes" allows for rebuttal, the instruction was not so qualified, as required by Wis. Stat. §903.03(3). JI 2669 improperly creates a presumption, (whether mandatory or conclusive) rather than a permissive inference. This places a burden upon the defendant to disprove the reliability of the test. Even a rebuttable presumption is improper if it places a burden of proof upon the defendant. Wis. Stat. §903.03(3) allows a jury to infer that blood testing is reliable, but it requires that the jury be instructed that this is merely an allowable inference, not a rebuttable presumption.

The language of JI 2669, "the law recognizes…" fails to satisfy the limiting requirements of Wis. Stat. §903.03. Standard jury instructions, unlike rules of evidence, do not have the force of law. Therefore, standard jury instructions that fail to satisfy Wis. Stat. §903.03, no matter how entrenched in custom, are invalid. Further, the Constitution prohibits mandatory presumptions that are essential to an element of the offense.

The soundness of the testing method is essential to an element of both the OWI and PAC offenses. Hence, the jury instruction was invalid.

The jury instruction, for example, could validly read as follows, avoiding the use of the word, "recognize":

> You may infer that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual, but you are not required to do so. The state is not required to prove the underlying scientific reliability of the method used by the testing device. However, the state is required to prove that the testing device was in proper working order and it was correctly operated by a qualified person.

III.

Harmless Error Analysis Does Not Apply, and Even if Applied, the Errors Were Not Harmless

The errors in this case involved a prohibited presumption against Garba, as to facts that were essential to the elements of the offense. This error vitiated all of the jury's findings, and permeated the entire trial process. Thus, harmless error analysis should not even be applied. Even if such an analysis were applied, the errors were not harmless, as they went directly to Garba's ability to challenge the most important piece of evidence in the state's case, the blood test.

Wisconsin's harmless error rule appears in Wis. Stat. §805.18, and is applicable to criminal proceedings under Wis. Stat. §972.11(1). It is to be

interpreted as identical to the federal rule. *State v. Nelson*, 2014 WI 70, ftnt. 8. For purposes of a harmless error analysis, Wisconsin has adopted the dichotomy analysis of error types: trial errors subject to harmless error analysis, and structural errors that are not subject to harmless error analysis, and require reversal. *Nelson, supra*, at p. 12. *Arizona v. Fulminante*, 499 U.S. 279 (1991).

Trial errors are those that are discreet problems with the trial, whose impact on the trial are capable of assessment. Thus, whether or not a trial error is, in fact, harmless may be determined. Structural errors are those that permeate the trial, and whose impact, therefore, cannot be assessed. Structural errors are not subject to the harmless error analysis. *Nelson, supra*; *Fulminante, supra*.

An error in the presumption of innocence, and burden of proof beyond a reasonable doubt, cannot be a trial error. Such an error is structural, because it permeates the entire trial, and vitiates all of the jury's findings. An error that erects a prohibited presumption regarding an element of the offense is a structural error. *Sullivan v. Louisiana*, 508 U.S. 275, 280-281 (1993).

Structural errors, as described above, are precisely what occurred in this case. Rather than being protected by the presumption of innocence, Garba was subjected to a prohibited presumption that his blood test was accurate and reliable. Rather than requiring proof beyond a reasonable doubt that the testing device was in proper working order, the trial court assumed as much. Rather than allowing Garba to even challenge the blood test, evidence of the equipment malfunctions was concealed from the jury. The trial court applied and the jury was read an instruction that explicitly tainted the structure of the trial. Under *Sullivan*, this court should not even reach a harmless error analysis.

If, however, the court deems the errors as trial errors, then a harmless error analysis also requires reversal. The jury was instructed, pursuant to Wis. Crim. JI 2669, that it could find that Garba operated a motor vehicle under the influence of an intoxicant, or that Garba operated a motor vehicle with a prohibited alcohol concentration, solely based on the test result. No other evidence of either impairment or alcohol concentration was required.[8] Thus, the test result, that Garba was wrongfully prohibited

[8] Wis. Crim. JI 2669, provides in part: If you are satisfied beyond a reasonable doubt that there was .08 grams of more of alcohol in 100 milliliters of the defendant's blood at the time the test was taken, you may find from that fact alone that the defendant was under the influence of an intoxicant at the time of the alleged (driving) (operating) or that the

from challenging, could have provided the sole basis for conviction, with no other evidence. Moreover, each and every other item of the state's case was strenuously challenged at trial. In all fairness, it must be conceded that the blood test result was essential to prosecution and to Garba's conviction. The trial court's prohibition on a valid challenge to that test result cannot be said to be harmless beyond a reasonable doubt.

CONCLUSION

Garba was denied his right to present a defense to the blood test result, and his right to challenge the reliability of state's evidence. All the while, the state enjoyed an improper presumption of the reliability of the blood test device, with the burden of proof improperly shifted to Garba to disprove the reliability of the blood testing device.

Garba did not have a proper opportunity to confront and cross-examine the state's lab analyst. Nor was he allowed to call his own qualified experts to rebut the state's testimony regarding the blood test. In sum, he was denied his due process right to defend himself, his compulsory process right to call witnesses, and his confrontation right to impeach the state's witness.

---

defendant had a prohibited alcohol concentration at the time of the alleged (driving) (operating), or both, but you are not required to do so.

In doing so, the trial court relied on an impermissible mandatory presumption of reliability of the blood test device; and the trial court improperly instructed the jury that the device was scientifically sound. This was the foundation of the trial court's misconstruction of Wis. Stat. §907.02, and Wis. Stat. §904.03.

Therefore, Ali Garba, the defendant-appellant respectfully prays that this court reverse the decision and order of the trial court, and find as follows:

1. Garba should have been allowed to elicit testimony regarding the jagged hump abnormality from his experts;
2. Garba should have been allowed to cross-examine and impeach the state's expert regarding the jagged hump abnormality; and,
3. Wis. Crim. JI 2669 created an impermissible mandatory presumption against Garba.

Garba respectfully prays that this court remand the matter back to the trial court for proceedings consistent with the foregoing findings.

Signed and dated at Glendale, Wisconsin this 13th day of November, 2015.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

/s/
BY: Andrew Mishlove
Attorney for the Defendant
State Bar No.: 1015053

CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stats. §809.19(3)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 10,956 words.

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. Stats. §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, with a

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

Additionally, I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Signed and dated this 13th day of November, 2015.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____
BY: Andrew Mishlove
Attorney for the Defendant
State Bar No.: 1015053

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. §809.19 (2) (a) and that contains: (1) a table of contents; (2) relevant 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.

Signed and dated this 13th day of November, 2015.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____
BY: Andrew Mishlove
Attorney for the Defendant
State Bar No.: 1015053