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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.

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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

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INTRODUCTION

Ali Garba Should Have Enjoyed a Presumption of Innocence. Instead, the State Had an Unfair Advantage.

Ali Garba and his family immigrated to the United States from their native northern Nigeria in 1997. Although the name Ali Garba is Islamic, his family converted to Christianity when Garba was a child. They were, as a result, subject to violence and persecution. Like so many others, the Garba family fled religious persecution, and came to America.

He arrived in America with nothing, and raised a family, sending three of his four daughters to universities. He and his wife care for a disabled daughter, at their home in Pewaukee. He earned a doctoral degree in business administration, and is employed as an investment banker and adjunct professor.¹

When he was arrested for drunken driving, he expected that he would have a fair opportunity to defend himself. The proceedings, however, were tainted with a critical presumption against Garba that he was not allowed to impeach or rebut.

¹ These facts were proffered to the court at the sentencing proceeding. R:52, pp. 100-104.

ARGUMENT

The State Was Able to Hide the Erratic Behavior of the Blood Test Machine

The essential keystone of the state's case against Mr. Garba was a blood test result from the Wisconsin State Laboratory of Hygiene, a laboratory plagued with anomalous readings in chromatograms from all three of their blood test machines. An analyst at the lab called these anomalies, "jagged humps," a name that was publicized in the public and legal media. Jagged humps appeared on chromatograms in Mr. Garba's test run, both before and after the Garba tests. Garba asserts that these anomalies cast doubt upon his blood test result; as, the State was unable to explain them, and investigated neither their cause nor their consequences. They were not *de minimus* or trivial phenomena; they were large conspicuous outcroppings on the blood test readings.

No one from the Wisconsin State Laboratory of Hygiene, no one from the Wisconsin State Crime Laboratory, in fact no witness at all disputed the expert testimony of Dr. Valentine and Ms. Arvizu, who stated that the jagged humps indicated a malfunction of the blood testing machine,

which therefore, was not in proper working order at the time of Mr. Garba's blood test.

No one from the State sought to explain why the equipment was not subjected to any diagnostic testing, root cause analysis, or even basic troubleshooting. The unchallenged testimony was that the jagged hump phenomena were a repeated failure or suspect results, that required a root cause analysis under the ISO 17025 or the ABFT standards for the conduct of analytic chemistry.

In fact, the State has no idea what caused the jagged hump phenomena, or whether it affected the precision or accuracy of blood alcohol test results. The State, who is the only party in possession of all of the raw data and the equipment, never investigated the phenomena. They excused it and ignored it, but they never analyzed it – a conspicuous omission in the field of forensic analytic chemistry.

The State Was Able to Hide Its False Explanation for the Jagged Humps

The only explanation offered by the State was an unsigned letter to the Wisconsin Law Journal, claiming that the jagged humps represented actual substances in the samples in which they appeared. That explanation was so patently false as to grievously wound the credibility of any state

scientist who would have had the temerity to agree with it. Nevertheless, Garba was prohibited from questioning the State's analyst as to whether she wrote or subscribed to that opinion. That alone, merits reversal as a denial of the right to confront and cross-examine his accuser. (See, e.g. *Chambers v. Mississippi*, 410 U.S. 284 (1973), reversing a murder conviction where the state rules of evidence restricted the defendant's right to cross-examine a hostile witness called by that defendant, and to admit hearsay rebutting that witness).

**The Trial Court Misapplied the Presumption of Blood Test
Admissibility, and Shifted the Burden of Proof to Garba**

The State framed the issue as though Garba was attempting to introduce a novel or unaccepted scientific theory. That, however, is not a proper view of the case. Rather, Garba sought to rebut or impeach the State's proof that its equipment was in proper working order – citing the consensus scientific standards for analytic chemistry and laboratory procedure. The proper framing of this case is not whether Garba's expert could prove the test result was wrong; but rather, whether Garba's experts could cast reasonable doubt upon the state's evidence that the test result was accurate. That is something that Garba had a right to do. Restrictions on a defendant's basic right to challenge the state's evidence are viewed

with disfavor; and as in this case, run afoul of a defendant's right to testify, confront and cross-examine his accusers, or his right of compulsory process. (See e.g., *Chambers, supra*, reversing the strict application of a state rule of evidence limiting cross-examination. See also, *Rock v. Arkansas*, 483 U.S. 44 (1987), reversing a murder conviction where the state rules of evidence disallowed testimony by hypnotically refreshed recollection. See also, *Washington v. Texas*, 388 U.S. 14 (1967), reversing a murder conviction where state rules of evidence prohibited testimony of a co-participant).

The State enjoyed a jury instruction that implied that the state's method of analysis was beyond reproach. So, the state went into trial armed with scientific testimony that was exempt from a *Daubert*² analysis by statute, and even enjoyed a presumption of reliability that was contrary to *Sandstrom v. Montana*, 442 U.S. 51 (1979).

The trial was tainted in that Garba was subjected to an improper presumption of guilt as to an essential element of the offense: his blood test result. The state was relieved of its obligation to prove that its equipment was in proper working order.

² *Daubert v. Merrill Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993)

The State's reply may be distilled down to one point: Garba did not prove that the jagged hump causes inaccurate blood alcohol test results; and, therefore, Dr. Valentine and Ms. Arvizu's testimony was speculative and unscientific. The State's argument, however, reveals its deep misunderstanding of basic points of law and science.

The state placed the burden on Ali Garba to disprove a presumption that the state's equipment was reliable – arguing that if Garba failed to make a *prima facie* disproving that presumption, then his defense is barred. That is a misconstruction of a basic principle of criminal procedure: the State had to prove its equipment was working properly. Garba, additionally, had the right to challenge to the state's proof.

Moreover, proper practice in analytic chemistry requires a laboratory to demonstrate the validity of its methodology. In effect, from a scientific point of view, in addition to a legal point of view, the State bears the burden of proof to show that its equipment was working properly.³

³ See Vosk and Emery, *Forensic Metrology*, Scientific Measurement and Inference for Lawyers, Judges and Criminalists. C. 4. Validation and Good Measurement Practices. CRC Press, Boca Raton, Florida, 2015, appended. This book is the first basic manual for lawyers and judges in the science of forensic measurement.

The State and the trial court consistently ignored the expert testimony that, in order to be considered valid, a measurement in analytic chemistry must meet three criteria: precision, accuracy, and reliability. A test instrument that is unreliable is not in proper working order, just as a broken clock is unreliable, even though it is accurate and precise twice a day. This is neither a novel concept, nor, as the State suggests, *ipse dixit*. It is a basic principle of forensic toxicology, and all analytic science.

Another analogy is that of a car that makes a horrible noise. It may accelerate, steer, brake, and seemingly function perfectly, but for the loud noise. It is not, however, in proper working order. It is not reliable. The car may run perfectly for many years, but for the noise. Or, the car may break down at any moment, leaving its driver stranded. The car may get its driver where he wants to go, but still use oil, gas, tires, or brakes at an abnormal rate. Even if the car seems to function well, it may never be considered reliable, until the cause of the noise is discovered – and that is true even if the noise goes away, as the underlying problem may still exist. The jury in this case was asked to rely on a blood test machine without being told that it was making a horrible (electronic) noise. The fact that ignoring such a noise is against the rules of forensic analytic chemistry was

also hidden. In effect, the state sold a car without allowing the buyer to hear the terrible noise.

Despite its claim that this case is unremarkable, and simply a matter of applying existing law to uncontroversial facts, the State has failed to cite a single case in any jurisdiction, where a criminal defendant was similarly prohibited from challenging the reliability and methodology of a forensic measurement. Indeed, the state failed to cite a single instance from another laboratory, call any expert, or introduce any evidence supporting their argument that this bizarre anomaly could be reliably ignored.

A recent case from Idaho illustrates the point. In *Idaho v. Cruz-Romero*, ___ P.3rd ___, 2016 WL 1249367 (2016) (appended), the trial court excluded evidence of out-of-tolerance calibration checks on a breath test machine, both before and after the date of the defendant's test. Similar to this case, the Idaho laboratory did not know what caused the problem – indeed it could find nothing wrong. The police suggested a, “(F)aulty hose, loose connection, or faulty solution jar.” The trial court held that the tests from a different date than the defendant's test were irrelevant, as the machine appeared to be in calibration on the date of the defendant's test;

and indeed, it was programmed to shut down unless it passed a calibration check. The Idaho Court of Appeals reversed, stating:

An acceptable calibration result, even one occurring on the day of the challenged test, does not establish that a machine is working correctly as a matter of law. See *In re Hubbard*, 152 Idaho 879, 883, 276 P.3d 751, 755 (Ct.App.2012). Whether an Intoxilyzer machine was working properly at a particular date and time is a question of fact reserved for the trier of fact. Moreover, it is improper for a court to base a relevancy determination on its own findings of fact. The machine's history of malfunctioning, at any capacity, would have a tendency to show a probability that Cruz-Romero's test results may not have been accurate. The accuracy of his breathalyzer result is a fact material to his conviction, as the accuracy of the result is a fact that the State must establish beyond a reasonable doubt. Therefore, evidence of the machine's prior and subsequent malfunctioning is relevant.

Cruz-Romero at p. 3 of the decision.

The reasoning of the Idaho court is persuasive. Acceptable standards and controls in blood testing do not establish that a blood test is accurate, without question. It was improper for the trial court to shield important facts regarding the blood test equipment from the jury; just as it was improper for the trial court to insert its own view of the standards of forensic analytic chemistry. The history of the jagged hump anomalies, the State's failure to address the problem, and its false explanations all cast doubt upon the veracity of the blood test.

Arizona v. Bernstein (Herman), 234 Ariz. 89, 317 P.3d 630 (App. 2014) was a case with remarkably similar facts. *Bernstein* involved a series of anomalies at the Scottsdale Crime Laboratory, involving readings from a Perkin Elmer Clarus 500 machine, the same make and model used at the Wisconsin State Laboratory of Hygiene. The Scottsdale machine would, at times misreport the sample numbers of the samples that it was testing. Eleven cases were consolidated for a *Daubert* hearing on the defendants' motions to exclude the results. In none of the eleven cases was there affirmative proof that the alcohol test result was inaccurate. Nevertheless, the defendants argued that the anomalies cast doubt upon the reliability of the blood test machine. The court held a seventeen day *Daubert* hearing, and excluded all blood test results from the Scottsdale lab's Perkin Elmer Clarus 500 device. While the Supreme Court of Arizona reversed, allowing in the blood test results, it also held that the anomalies were admissible to show that the results were unreliable. In other words, in Arizona, it was a matter for the jury.⁴

⁴ The Arizona "data-drop" problem was not confined to the Scottsdale crime laboratory. It was a serious problem in that it caused one person's sample to be reported as a different person's sample. It was experienced by other laboratories using Perkin Elmer equipment, including the Wisconsin State Laboratory of Hygiene. The manufacturer conducted an analysis and

The Jury Instruction Implied an Improper Presumption Against Garba

The State declines to address Garba's argument that the WI CRIM JJ 2663 violates Wis. Stat. §903.03 and *Sandstrom v. Montana, supra*, by creating a presumption on a fact essential to an element of the offense. The State maintains that the argument is conclusory and insufficiently developed. Garba respectfully disagrees.

This court, however, need not reach that issue, because even under the presumption implied by the jury instruction, the state was still required to prove that their equipment was in proper working order. Even under that presumption, Garba was entitled to ask questions on impeachment, and elicit evidence to rebut the state's contention that the jagged humps should be ignored.

CONCLUSION

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

determined that it was caused by a malfunction in the interface between a new software operating system, and the machinery that physically moved the samples into the device. That software was withdrawn from the market, and older software reinstalled in all systems, including those in Wisconsin. Whether a similar problem was responsible for the jagged hump anomalies is unknown, as no one has investigated.

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 2663 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 this _12_day of April, 2016.

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 2,429 words.

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 12th day of April 2016.

Respectfully submitted,
MISHLOVE & STUCKERT, LLC

_____/s/_____
BY: Andrew Mishlove
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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 12th day of April, 2016.

Respectfully submitted,
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