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SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2020-AP-32-CR

vs.

Trial No. 07-CF-1

OSCAR C. THOMAS,

Defendant-Appellant-Petitioner.

Seeking review of a court of appeals' decision of July 30, 2021 arising from an appeal of a judgment of conviction entered August 1, 2018 and an order denying postconviction relief entered December 26, 2019 in the Circuit Court of Kenosha County,
Honorable Bruce E. Schroeder, Judge, presiding

PETITION FOR REVIEW

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STATEMENT OF THE ISSUES

1. Whether the Court of Appeals applied the wrong standard in determining that admission of DNA evidence in violation of his right of Confrontation was harmless.

While quoting and purporting to follow a harmless error stand set forth by this Court, the Court below essentially conduct a review of the evidence supporting the convictions, without any balancing of countervailing or exculpatory evidence.

2. Whether the Court of Appeals erred in determining that Mr. Thomas confession to a sexual assault was corroborated by a significant fact.

While pointing to two facts which corroborate aspects of Mr. Thomas statement, the Court below pointed to no facts which provide confidence that a sexual assault actually occurred.

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STATEMENT OF CRITERIA FOR REVIEW

The decision of the court of appeals raises an important and oft-recurring issue regarding how to analyze whether an error is harmless. The standard applied by this Court and the United States Supreme Court is easy to state: an error is harmless only if the beneficiary of the error shows beyond a reasonable doubt that the error did not contribute to the verdict. However, application of this standard is difficult, and sometimes, as here, erroneously turns into a review of whether the untainted prosecution evidence is sufficient to support the conviction.

The decision also raises an issue regarding application of the rule that a defendant's confession must be corroborated by a significant fact, that is, a fact that provides confidence that the crime admitted actually occurred.

STATEMENT OF THE CASE

Procedural history

A complaint dated January 3, 2007 charged Mr. Thomas with three counts: first degree intentional homicide in violation of Wis. Stat. §940.01(1)(a); first degree sexual assault in violation of Wis. Stat. §940.225(1)(a); and false imprisonment in violation of Wis. Stat. §940.30. Mr. Thomas was convicted of these three charges after a jury trial on June 11-14, 2007 before the Honorable Bruce E. Schroeder.

Mr. Thomas appealed, and this Court affirmed his convictions in

2010-AP-1606-CR. The Wisconsin Supreme Court denied review. Mr. Thomas pursued federal habeas corpus relief, resulting in the decision in *Thomas v. Clements*, 789 F.3d 760 (7th Cir. 2015), *reh'g den.* 797 F.3d 445. After the remand ordered in that decision, Mr. Thomas was granted a new trial.

Mr. Thomas again proceeded to jury trial on January 22-29, 2018 before the Honorable Bruce E. Schroeder. He was convicted of all three charges. On July 19, 2018 Judge Schroeder imposed sentences which included a sentence on the homicide count of life imprisonment without possibility of release.

On October 17, 2019 Mr. Thomas filed postconviction motions seeking dismissal of the sexual assault and a new trial on all remaining charges. On December 26, 2019 Judge Schroeder issued an order denying the postconviction motions. Although this order was issued more than 60 days after the filing of the postconviction motions, it was timely pursuant to the Court of Appeals' order of January 13, 2020.

Mr. Thomas appealed; the Court of Appeals' decision (apx. 101-138) is described below.

The offenses

On December 27, 2006 at 3:24 a.m., police were dispatched to a medical call at 4716 37th Avenue, Apartment 3, in Kenosha. 316: 37-38, 145. Officer Farchione, the first to arrive, entered the building and

met Defendant Oscar Thomas, who led her to the victim, Joyce Oliver-Thomas. 316: 145-146. Ms. Oliver-Thomas was face-up on the floor in a back bedroom, in a bra and underwear, with a pillow under her head and a comforter beneath her; her skin was warm but she was not conscious or breathing, so Officer Farchione started chest compressions until medical personnel arrived. 316: 39, 146-148. Rescue personnel removed Ms. Oliver-Thomas from the apartment while continuing resuscitation efforts. 316: 52.

Three officers responding to the scene spoke to Mr. Thomas on the scene regarding events leading up to the 911 call. 316: 39-52, 148-151, 168-170. Mr. Thomas identified Ms. Oliver-Thomas as his wife, indicating that they had been married, had gotten divorced, and had gotten back together. 316: 45, 168. Mr. Thomas said Ms. Oliver-Thomas had an ear infection and that she had trouble breathing when she slept. 316: 44, 46, 151. Mr. Thomas was in the basement of the four-plex apartment building with his friend, Alfonso Platt, but he went several times to check on Ms. Oliver-Thomas. 316: 40, 44-45, 46, 148. On one of these occasions, Ms. Oliver-Thomas was half-asleep and was gurgling; Mr. Thomas woke her, and she appeared to be okay. 316: 47. Mr. Thomas went for a walk with Mr. Platt, then returned to check again on Ms. Oliver-Thomas. 316: 47, 149. Mr. Thomas found Ms. Oliver-Thomas on the floor in the bedroom with her hands around her

neck; when he turned her over, she was turning bluish and had white foam around her mouth. 316: 39-40, 48, 150, 168. Mr. Thomas called 911. 316: 48, 157, 168.

One of the officers on the scene conducted a pat-down search of Mr. Thomas and found a crack pipe. 316: 41-43.

Alfonso Platt confirmed that on the night of Ms. Oliver-Thomas' death, he was with Mr. Thomas in the basement, as this is where they used crack together. 318: 125-126, 134. Mr. Thomas would go check on his wife, and was gone an hour. 318: 127, 136-137. Mr. Platt had never met Ms. Oliver-Thomas, and had not entered the Thomas' apartment. 318: 130, 134. At one point, Mr. Platt and Mr. Thomas left the apartment building, walked a short distance, and then returned; Mr. Platt returned to the basement, while Mr. Thomas went upstairs. 138: 137, 140. Less than an hour later, Mr. Platt heard sirens. 138: 141-142. Mr. Platt saw Mr. Thomas speaking with an officer; Mr. Platt hid in the basement, but spoke to police later in the day. 138: 142. Mr. Platt never heard any altercation between Mr. Thomas and his wife, did not observe any injuries to Mr. Thomas, and did not notice Mr. Thomas being sweaty or disheveled. 318: 149.

Mr. Thomas gave three formal recorded statements to police.

Mr. Thomas first statement was to Det. May, who found Mr. Thomas at the hospital; Mr. Thomas agreed to come to the station with

Det. May to be interviewed, but was not under arrest. 319: 18-21. Det. May typed up a summary of the interview and gave Mr. Thomas a chance to make corrections and additions; Mr. Thomas then signed the summary. 319: 21-22, 24. Det. May read this summary to the jury. 319: 31-36.

In this first statement, Mr. Thomas indicated after dinner, Mr. Platt came by and he and Mr. Platt smoked crack in the basement, but Mr. Thomas would check on his wife, who had been complaining of chest pain and that her ear hurt. 319: 32-33. Throughout the night, he alternately smoked crack in the basement with Mr. Platt and went up to the apartment to check on Ms. Oliver-Thomas. 319: 33. After midnight, while in the apartment checking on Ms. Oliver-Thomas, Mr. Thomas watched a porn video, and then engaged in consensual sex with Ms. Oliver-Thomas. 319: 33. During this sex, they fell off the bed together, but Ms. Oliver-Thomas had no visible injury, and complained of none, except that her chest was still hurting. 319: 33-34. Ms. Oliver-Thomas went back to bed, and Mr. Thomas rejoined Mr. Platt in the basement, but continued to check on his wife periodically. 319: 34-35. Mr. Thomas and Mr. Platt left the apartment and then returned, and Mr. Thomas again checked on Ms. Oliver-Thomas and found her on the floor next to the bed. 319: 35. Her face and arms were blue, and Mr. Thomas turned her over to check her. 319: 35. Mr. Thomas called 911,

and was told to check for breathing or a pulse. 319: 35. Finding neither, he followed instructions to perform chest compressions until a female officer arrived and took over. 319: 35.

Mr. Thomas' second recorded statement was to Det. Labatore, who found Mr. Thomas on the street; Mr. Thomas agreed to make another statement and Det. Labatore took him to the station. 319: 53. While initially not under arrest, Mr. Thomas was placed under arrest in the course of the interview, but waived *Miranda* rights and agreed to speak further. 319: 54-55, 57. Detective Labatore prepared a written summary of Mr. Thomas' statement, which incorporated changes by Mr. Thomas. 319: 58. Detective Labatore read this summary to the jury. 319: 68-76.

In this second statement, Mr. Thomas indicated: He smoked crack with Mr. Platt in the basement, but kept going back upstairs to belay Ms. Oliver-Thomas' suspicions regarding why he was in the basement. 319: 71. Ms. Oliver-Thomas was lying down, complaining her chest hurt. 319: 71-72. Mr. Thomas left Mr. Platt to purchase more crack, then went to check on Ms. Oliver-Thomas and to break off and retain a portion of the crack he had purchased. 319: 72. Mr. Thomas ingested the retained crack, took some prescribed medications, and watched a porn video. 319: 73. Mr. Thomas initiated sex with Ms. Oliver-Thomas, with her consent; during this sex, they fell out of bed,

but Ms. Oliver-Thomas said she would be all right. 319: 73-74. After the sex, Ms. Oliver-Thomas used the bathroom and Mr. Thomas resumed smoking crack and watching his porn video. 319: 74. Mr. Platt knocked at the door, and Mr. Thomas told him he would rejoin him later in the basement. 319: 74. When Ms. Oliver-Thomas come out of the bathroom, Mr. Thomas reinitiated sex, during which he rolled Ms. Oliver-Thomas over and they went back on the floor. 319: 74-75. Mr. Thomas had his left arm around Ms. Oliver-Thomas' neck, and while he did not believe he was squeezing hard, Mrs. Thomas yelled for him to stop and kicked the floor. 319: 75. Ms. Oliver-Thomas told Mr. Thomas she loved him, said he should quit playing, and threatened to bite him, at which point Mr. Thomas turned her loose. 319: 75. Ms. Oliver-Thomas was "breathing funny" and looking at Mr. Thomas. 319: 75. Mr. Thomas got up and left. 319: 75. Mr. Thomas and Mr. Platt left the apartment building, but then Mr. Thomas came back for his cigarettes. 319: 75-76. He retrieved them without seeing Ms. Oliver-Thomas, then left again to give a cigarette to Mr. Platt. 319: 76. Upon again returning to the apartment, Mr. Thomas found Ms. Oliver-Thomas face down on the floor. 319: 76. Mr. Thomas call her name and shook her, and she made a gurgling sound and passed gas; he rolled her over and saw she had urinated. 319: 76. When he tried to pick her up and put her on the bed, her face hit the bed, then she fell and her face

hit the floor. 319: 76. He called 911 and, as instructed, did chest compressions until an officer came and took over. 319: 76. Mr. Thomas stated he believed he was "accidentally responsible" for Ms. Oliver-Thomas' death, and was uncertain if mixing crack and his medications made him so rough with Ms. Oliver-Thomas. 319: 76.

On December 31, 2006 Mr. Thomas filled out an inmate request slip asking to again speak to a detective investigating his wife's death. 319: 104-105. In response, Det. May conducted a third interview with Mr. Thomas on January 2, 2007. 319: 106.

In this third statement, Mr. Thomas told of a crack dealer named Greg whom Mr. Thomas had owed $500 and failed to pay; Mr. Thomas believed that Greg must have been the person who strangled Ms. Oliver-Thomas while Mr. Thomas was out of the apartment with Mr. Platt. 319: 106-107. Mr. Thomas provided a physical description of Greg, but no address or contact information. 319: 107.

Dr. Mary Maitland performed an autopsy on Ms. Oliver-Thomas on December 27, 2006. 316: 189-191. Dr. Maitland diagnosed four maladies: strangulation; blunt force injuries to the face; pulmonary congestion and edema; and, hepatomegaly and steatosis; this last condition is having a big, fatty liver, and was not the cause of death. 316: 193-194. Dr. Maitland concluded the cause of death was "strangulation due to physical assault." 316: 213. Another doctor,

called by the defense, opined that Ms. Oliver-Thomas died due to compression force to the neck consistent with the defendant's account of events. 320: 52.

Sexual assault

In several of his statements to police Mr. Thomas mentioned or described having sex with Ms. Oliver-Thomas. One of the officers who spoke to Mr. Thomas on the scene testified that Mr. Thomas said he had sex with Ms. Oliver-Thomas a couple hours before the incident. 316: 51-52, 86. Mr. Thomas recounted sexual activities in two of his formal recorded statements police.

In his first statement, to Detective Mays, Mr. Thomas indicated that after watching a pornographic video, he had consensual sex with Ms. Oliver-Thomas; although they fell out of bed during this sex, Ms. Oliver Thomas had no apparent injury or complaint. 319: 33-34. Mr. Thomas then left the apartment to smoke crack with a friend in the basement, but checked on Ms. Oliver-Thomas several times before finding her on the floor, not breathing, and Mr. Thomas called 911. 319: 34-35. In this statement, Mr. Thomas made no mention of a second episode of sexual activity, and did not mention having his arm around Ms. Oliver-Thomas' throat. 319: 40.

In his second statement, to Detective Labatore, Mr. Thomas recounted smoking crack with a friend in the basement, but returning

to the apartment to check on Ms. Oliver-Thomas to allay suspicion. 319: 70-73. During one of these times in the apartment, after watching a pornographic video, Ms. Thomas had consensual sex with Ms. Oliver-Thomas, during which they fell out of the bed. 319: 73. While on the floor, the sex continued, during which Mr. Thomas had his left arm around Ms. Oliver-Thomas' throat. 319: 74. Mr. Thomas then went to the bathroom, watched more of the video, and got on top of Ms. Oliver-Thomas and "humped" her hip with his arm around her neck; Ms. Oliver-Thomas struggled, told him to stop, that she loved him, and threatened to bite him, so he stopped. 319: 75. Ms. Thomas left the apartment with his friend, but returned and found her face down on the floor, called 911 and performed CPR. 319: 75-76.

A rape kit was done on Ms. Oliver-Thomas in the course of her autopsy the examination of which would usually produce evidence of recent sexual intercourse had it occurred, but no physical evidence was found to suggest or support that Mr. Thomas and Ms. Oliver-Thomas had sex on the night of her death. 318: 33-34; 319: 121-123. Specifically, Mr. Thomas DNA was not in the rape kit. 319: 123. The medical examiner testified that while she always considers the possibility of a sexual motive in cases of strangulation, she found no genital injuries or other evidence of forced sex in her examination of Ms. Oliver Thomas. 318: 32-33.

DNA evidence

No reference was made in the State's case-in-chief to any positive finding of DNA. The only expert from the crime lab testified as to the presence of cocaine in Mr. Thomas' blood and on a crack pipe. 318: 98, 101. Detective May recalled that the rape kit testing did not result in finding Mr. Thomas' DNA. 319: 119, 123.

During the State's cross-examination of defense medical examiner, the prosecutor brought up crime lab reports, and the defense objected:

> Q. Okay. But in those crime lab reports, you are aware that there was some analysis done?
>
> MR. COTTON: Objection.
>
> MR. BINGER: It's what he relied on in his opinion.
>
> MR. COTTON: I'm objecting to going into the details of reports that haven't been introduced into evidence, though. It's a back door –
>
> THE COURT: If he examined it, then it's presumably something he discounted or relied upon. The objection is overruled.

Apx. 141; 320: 88. After reviewing a three-page crime lab report, the defense medical examiner testified that Mr. Thomas' DNA was found under Ms. Oliver-Thomas' fingernails, which were clipped during the autopsy. Apx. 141-142; 320: 88-89. In addition, Ms. Oliver-

Thomas' DNA was found in swabs of Mr. Thomas' fingernails. Apx. 142; 320: 89.

During the prosecutor's (Mr. Binger's) closing argument, and in the course of responding to a defense objection, the prosecutor referred to DNA evidence:

> [MR. BINGER:] You would have to be high on crack to think that there is any other explanation for Joyce Oliver-Thomas's death than that Oscar Thomas killed her, but it was more than just killing. It was brutal, vicious, violent, choking the life out of her for minutes while she struggled, while she pled for her life, "Stop, stop, I love you, I love you" -- while she bit her own tongue and swallowed two to three ounces of her own blood while she is dying, while he is scratching up her face with his free hand, with his right hand, trying to cover her mouth.
>
> MR. COTTON: I'm going to object to that. I'm objecting to this demonstrative. There is no evidence of that, Judge.
>
> MR. BINGER: Closing argument, Your Honor.
>
> THE COURT: Well, no, no, no. Confined to the evidence.
>
> MR. BINGER: And the evidence supports this theory, Your Honor. We have testimony of the scratches on her face. ***We have testimony that it could have been caused by DNA. Her DNA is found under his fingernails.*** We have testimony from the neighbor downstairs.
>
> THE COURT: All right, as long as you are clear this is your theory, and that –

> MR. BINGER: Absolutely. It is my closing argument, Your Honor. I'm presenting to the jury my theory of how Joyce Oliver-Thomas died, and I think the evidence supports that. This is exactly what I think happened. Oscar Thomas placed his left arm around her throat and squeezed, compressing her neck while using his other hand to muzzle her nose and her mouth to keep her quiet and to speed up her death, and ***that's how she got the scratches on her face***.

Apx. 143-144; 321: 37-38 (emphasis added).

The decision below

Mr. Thomas appealed from his conviction, raising three issues.

The Court of Appeals rejected Mr. Thomas' contention that his sexual assault conviction was based solely on his uncorroborated statement, and therefore lacked sufficient support in the evidence. Apx. 103-107. The Court of Appeals noted that the law required a defendant's inculpatory statement must to corroborated by a significant fact. Apx. 103. The pointed to corroboration of two facts it deemed significant. Apx. 107.

The Court of Appeals, after a lengthy review of Wisconsin and United States Supreme Court precedent, determined that introduction of DNA evidence through cross-examination of the defense medical expert violated Mr. Thomas' right to confront the DNA examiner. Apx. 107-123. However, the error was deemed harmless. Apx. 123-125.

The Court of Appeals reject Mr. Thomas' assertion juror Zina

Cruz Vargas was objectively biased because she stated she might be a cousin of witness Erika Cruz. Apx. 125-129.

A concurring Judge agreed with the disposition on the corroboration and bias juror claims, and the finding that any confrontation violation was harmless, but found no need to determine whether a confrontation violation occurred. Apx. 130-137.

ARGUMENT

I. The decision below applied the wrong standard for harmless error

Determining the proper test to apply when assessing whether an error is harmless has been a matter of controversy in this Court. See *e.g., State v. Harvey*, 2002 WI 93, ¶50, 254 Wis.2d 442, 647 N.W.2d 189 (Crooks, J., concurring): "For at least the past 38 years, this court has wrestled with formulating a standard for harmless error. [citations omitted]"; *State v. Dyess*, 124 Wis.2d 525, 540, 370 N.W.2d 222 (1985): "This court for years has been struggling with methodology to rationalize upholding a conviction despite the acknowledgment that error has been committed."

This Court in *Harvey* deemed *State v. Dyess* "our seminal harmless error case" and set forth the *Dyess* harmless error test:

> We conclude that, in view of the gradual merger of this court's collective thinking in respect to harmless versus prejudicial error, whether of omission or commission, whether of constitutional proportions or not, the test should be whether there is a reasonable possibility that the error contributed to the conviction. If it did, reversal and a new trial must result. The burden of proving no prejudice is on the beneficiary of the error, here the state. The state's burden, then, is to establish that there is no reasonable possibility that the error contributed to the conviction.

Harvey, ¶40, quoting *Dyess*, 124 Wis.2d at 543 (citation and footnote omitted).

The leading federal case on harmless error sets forth a similar standard "'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Chapman v. California*, 386 U.S. 18, 23, quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87. Thus, an "error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless." *Chapman*, 386 U.S. at 23-24. In order to declare a federal constitutional error harmless, the court must find it was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24.

In a later case, the United States Supreme Court quoted *Chapman* harmless error standard with approval. *Neder v. United States*, 527 U.S. 1, 15, 17 (1999). However, after these citations to *Chapman*, the Court in *Neder* set forth the harmless error inquiry as: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Neder*, 527 U.S. at 18.

However, whether the formulation of harmless error inquiry is applied, the test if never whether the untainted evidence is sufficient to support the conviction. The Supreme Court has repeatedly emphasized this point in cases both before and after *Chapman*. Over seventy years ago, the Supreme Court addressed a harmless error inquiry:

> And the question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict.

> It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision.
>
> * * * * *
>
> The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos v. United States, 328 U.S. 750, 764-765 (1946). Similarly in a death penalty case where the lower state court found psychiatric testimony, obtained in violation of the defendant's right to counsel, harmless in light of other evidence supporting the death verdict, the Court stated:

> The question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

Satterwhite v. Texas, 486 U.S. 249, 258-259 (1988), quoting *Chapman*, 386 U.S. at 24. *see also Sullivan v. Louisiana*, 508 U.S. 275, 279, (1993): "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error."; and, *Fahy v. Connecticut*, 375 U.S. 85, 86, (1963): "We find that the erroneous admission of this unconstitutionally obtained evidence at this petitioner's trial was

prejudicial; therefore, the error was not harmless, and the conviction must be reversed. We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of." In *Neder*, the Court cautioned that Court conducting a harmless error inquiry does not "'become in effect a second jury to determine whether the defendant is guilty.'" *Neder*, 527 U.S. at 19, quoting R. Traynor, The Riddle of Harmless Error 21 (1970).

In Mr. Thomas' case, the Court below set forth the standard for harmless error: the State has the burden to prove that "'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Apx. 123. This is the *Neder* formulation. *Neder*, 527 U.S. at 18. The Court elaborated that this meant the error is harmless if it "'did not contribute to the verdict obtained' and 'the jury *would* have arrived at the same verdict had error not occurred.'" Apx. 123-124 (emphasis by the court). This first quote corresponds to *Chapman*, 386 U.S. at 23, and the second to *Neder*, 527 U.S. at 18.

The evaluation of the court proceeded in three paragraphs. Apx. 124-125 (¶¶37-39)

In paragraph 37, the Court minimized to effect of the DNA evidence, noting that identity of the perpetrator was not at issue. While this is true, it evades how the prosecutor used the DNA evidence: to

argue the violent and intentional nature of Mr. Thomas' actions. The prosecutor argued that *the victim's* DNA was under Mr. Thomas' fingernails. Apx. 144; 327: 38. This, the prosecutor argued to the jury, supported his theory that Mr. Thomas was "scratching up her face with his free hand, with his right hand, trying to cover her mouth." Apx. 143; 327: 37.

Defense counsel argued was that Mr. Thomas' actions were "either an accident or a reckless crime." 321: 64. Mr. Thomas' jury was instructed on the defenses of voluntary intoxication (321: 24) and accident (321: 24-25), and the lesser-included charges of first- and second-degree reckless homicide (321: 15-19). Mr. Thomas should not have had to explain or refute the DNA evidence which impaired his defense and supported the prosecutor's theory.

In paragraphs 38 and 39, the Court below conducted what can only be described as an evaluation of the sufficiency of the evidence. This is so because, in these paragraphs, the Court recounts *only* the evidence supporting guilt.

The officer responding to the scene who met with Mr. Thomas observed no injuries on Mr. Thomas' hands, arms or face. 316: 111-112. Mr. Thomas was the person who had called 911. 316: 157, 168. The medical examiner testified that fingertip bruises, fingernail marks and extensive external injuries to the neck are common in manual

strangulations, but no defensive wounds or external bruising were found on Ms. Oliver-Thomas. 318: 36-37, 45. Neither these arguably exculpatory facts, nor any other facts favorable to Mr. Thomas' accident/recklessness defense were mentioned in the Court's analysis of the evidence. Of course, when a court "evaluat[es] the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006).

This Court should review Mr. Thomas' case to clarify that harmless error analysis is not properly conducted by evaluating only the sufficiency of the prosecution's evidence.

II. The Court erred in finding that Mr. Thomas' admission of sexual assault was corroborated by a significant fact

In the course of a statement to police, Mr. Thomas described how, after watching a pornographic video, he humped on Ms. Oliver-Thomas with his arm around her neck; Ms. Oliver-Thomas told him to stop, and that she loved him. Apx. 105 (quoting Mr. Thomas' statement). A downstairs neighbor testified to hearing a woman above saying "Stop, stop, I love you, I love you." 316: 126. Police found a pornographic video. 319: 36.

Mr. Thomas was convicted of first-degree sexual assault. He

asserted below that no "significant fact" corroborated this charge, and that his conviction was based solely on his statement in violation of *State v. Bannister*, 2007 WI 86, 302 Wis.2d 158, 734 N.W.2d 892. While a significant fact need not establish an element of the offense, "A significant fact has been corroborated when there is confidence in that the fact that the crime the defendant has confessed to indeed occurred." *Bannister*, ¶26. A review of Bannister and other cases shows that the significant fact relied upon to corroborate a confession also shows that the crime at issue actually occurred.

A confession to delivery of morphine to two brothers is corroborated by the presence of morphine in the blood of the deceased body of one of the brothers. *Bannister*, ¶34. Since the brother had morphine in his system, someone necessarily delivered it to him.

A mother's confession to murdering her newborn child was confirmed by "the finding of a charred human torso with an eight-to-nine-month gestational period in the furnace of the defendant's residence." *Holt v. State*, 17 Wis.2d 468, 481 (1962).

A confession to taking two guns (his own and his father's) and firing shots (charged as reckless injury) was corroborated by the confessor's apprehension near the scene with one of the guns, and the other gun found nearby. *State v. Verhasselt*, 83 Wis.2d 647, 662, 266 N.W.2d 342 (1978). Not mentioned as corroboration were the testifying

victim's gunshot wounds.

A confession to injecting heroin by a woman arrested for illegal use of heroin was corroborated by needle marks on her arm and traces of opium found on paraphernalia found upon her arrest. *Jackson v. State*, 29 Wis.2d 225 (1965).

A woman's confession to hiding the bodies of her two stillborn children was sufficiently corroborated by the finding of the two decomposing infants in the truck of the woman's car. *Potman v. State*. 259 Wis. 234 (1951).

A defendant's inculpatory statements regarding a fatal shooting were sufficiently corroborated by "evidence as to the location and condition of the body, and expert testimony that the condition of the bones was consistent with buckshot wounds inflicted at close range." *State v. DeHart*, 242 Wis. 562, 566, 8 N.W.2d 360 (1943).

In each of the above examples, the corroborating evidence shows that the crime actually occurred, although not always that the defendant was the perpetrator. *E.g., DeHart*. In contrast, verification of mere mundane surrounding circumstances or confirmation that *something* may have happened on a particular date does not suffice to corroborate a confession. Thus, a confession to engaging in a homosexual act was **not** corroborated either by:

- Proof of the existence of the co-actor named and existence of the

apartment described in the confession, and that the confessor occupied this apartment (erroneously accepted as sufficient corroboration by the trial court); or

- Testimony that the alleged co-actor who, when asked if November 6 was the date, agreed "it was possible. This could have been the date." (Argued and rejected on appeal.)

Barth v. State, 26 Wis.2d 466 (1965).

The Court below relied on two facts to corroborate Mr. Thomas' confession to sexual assault: a pornographic video was found on the scene, consistent with Mr. Thomas' statement that he had viewed such video on the night in question; and, the testimony of a downstairs neighbor who heard a woman say "stop, stop, I love you, I love you." Neither of these give any confidence that a sexual assault actually occurred. The downstairs neighbor's testimony may suggest something was occurring between Mr. Thomas and Ms. Oliver-Thomas, but not necessarily a sexual assault.

In *Bannister*, this Court explained the origins of the rule that a confession must be corroborated. A man went missing, and the man's bloody hat was found. A confessor admitted killing the man and implicated two others in the crime. Long after the confessor and his two named cohorts were executed, the missing man returned alive. Thus, a rule requiring corroboration of a confession serves to prevents such

injustices. *Bannister*, ¶24, describing *Perry's Case*, 14 Howell St. Tr. 1312 (1660).

Arguably, two facts supported the confession in *Perry's Case*: the supposed victim was missing, and his bloody hat was found. These may suggest that something was amiss. However, these facts should not be deemed sufficient to corroborate the confession, for they give no confidence that the missing man was actually murdered. Indeed, implicit acceptance of these facts led to the executions of three innocent persons.

In Mr. Thomas' case, the pornographic video is mere confirmation of a mundane fact, like confirming the existence of the alleged co-actor and apartment in *Barth*. The witness testimony of hearing "stop, I love you" may, like the bloody hat in *Perry's Case*, suggest something was amiss, but it provides no confidence that a sexual assault actually occurred.

CONCLUSION

Defendant-appellant-petitioner Oscar C. Thomas prays that the Wisconsin Supreme Court accept his case for review.

Respectfully Submitted:

_____
John T. Wasielewski
Attorney for Oscar C. Thomas

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition for review complies with Wis. Stat. §809.62(4) with respect to form and length. This petition contains 5715 words.

_____
John T. Wasielewski

CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of both the petition for review, identical to the printed form of the petition, and the appendix (contemporaneously e-filed as a separate document), as required by Wis. Stat. §809.62(4)(b) and §809.19(12).

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John T. Wasielewski