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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.

Review of a decision of the Court of Appeals of July 30, 2021
affirming 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

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

1. Whether Mr. Thomas's statement regarding sexual assault was sufficiently corroborated by a significant fact which provides a basis for confidence that a sexual assault actually occurred.

The postconviction court denied relief on this issue by operation of law by failing to decide timely the postconviction motion. Apx. 139; 287: 1.

The Court of Appeals determined that two facts sufficiently corroborated Mr. Thomas' statement regarding a sexual assault: the recovery of a pornographic video which Mr. Thomas said he had watched, and the testimony of a downstairs neighbor who heard a woman's voice was "stop, stop, I love you, I love you." Apx. 103-107.

2. Whether the Court of Appeals applied the wrong test in determining that the erroneous introduction of testimonial hearsay DNA evidence through cross-examination of the defense expert in violation of Mr. Thomas' Confrontation right was harmless.

The trial court admitted the DNA evidence, ruling that if the defense medical examiner "examined it, then it's

presumably something he discounted or relied upon." Apx. 141; 320: 88.

The Court of Appeals determined that admission of the DNA evidence violated Mr. Thomas' Confrontation right. Apx. 107-123. However, the Court of Appeals found the error to be harmless. Apx. 123-125.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Thomas requests both oral argument and publication, as this case raises important issues regarding the degree of corroboration of a defendant's statement is sufficient to provide confidence that the offense occurred, and the proper test to apply in determining whether an err is harmless.

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 the Court of Appeals affirmed his convictions in 2010-AP-1606-CR. This 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, Ms. Oliver-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 released her. 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, and left the building with his friend, but returned and found Ms. Oliver-Thomas 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 the 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 this 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 decisions below

Mr. Thomas filed three postconviction motions. He sought dismissal of the sexual assault, asserting his statement was not corroborated by a significant fact. 279: 3-7. He sought a new trial based on admission of the DNA evidence in violation of his confrontation rights. 279: 8-13. And, he sought a new trial based on a biased juror. 279:

13-20. In the order denying these motions, the postconviction court noted the motions were denied by operation of law, and briefly addressed only the biased juror issue. Apx. 139-140; 287: 1-2.

Mr. Thomas appealed from his convictions and the denial of his postconviction motions, 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 Court 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 Court of Appeals erred in concluding that Mr. Thomas' statement was corroborated by a significant fact sufficient to show that a sexual assault actually occurred

The standard of review for sufficiency of the evidence is the same, regardless of whether the prosecution's case is based upon direct evidence or circumstantial evidence:

> [A]n appellate court may not reverse a conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.

State v. Poellinger, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). The court in *Poellinger* noted that juries routinely are instructed that in a circumstantial case, the jury must acquit unless the evidence cannot be reconciled to support any reasonable theory consistent with innocence. 153 Wis.2d at 502, 451 N.W.2d at 755 (text and footnote 3). However, while this is a rule which guides the deliberations of the jury, it does not constitute the rule

on appellate review:

> Although the trier of fact must be convinced that the evidence presented at trial is sufficiently strong to exclude every reasonable hypothesis of the defendant's innocence in order to find guilt beyond a reasonable doubt, this court has stated that that rule is not the test on appeal.

Poellinger, 153 Wis.2d at 503, 451 N.W.2d at 756.

Despite the general *Poellinger* rule, conviction for a crime may not be grounded solely on the confession or admission of the accused. *State v. Verhasselt*, 83 Wis.2d 647, 661, 266 N.W.2d 342 (1978). While a confession need not be verified in every detail, at a minimum, corroboration of a significant fact is required:

> All the elements of the crime do not have to be proved independently of an accused's confession; however, there must be some corroboration of the confession in order to support a conviction. Such corroboration is required in order to produce a confidence in the truth of the confession. The corroboration, however, can be far less than is necessary to establish the crime independently of the confession. If there is corroboration of any significant fact, that is sufficient under the Wisconsin test.

Jackson v. State, 29 Wis.2d 225, 232, 138 N.W.2d 260 (1965) quoting *Holt v. State*, 17 Wis.2d 468, 480, 117

N.W.2d 626 (1962). A fact is "significant" so as to satisfy the corroboration rule if it verifies that the offense to which the defendant confessed actually occurred:

> A significant fact is one that gives confidence that the crime the defendant confessed to actually occur. [sic] A significant fact need not either independently establish the specific elements of the crime or independently link the defendant to the crime. Rather, the State must present at least one significant fact that gives confidence that the crime the defendant has been convicted of actually did occur.

State v. Bannister, 2007 WI 86, ¶31, 302 Wis.2d 158, 734 N.W.2d 892. *See, also, Smith v. United States*, 348 U.S. 147 (1954):

> The corroboration rule, at its inception, served an extremely limited function. In order to convict of serious crimes of violence, then capital offenses, independent proof was required that *someone* had indeed inflicted the violence, the so-called *corpus delicti*. Once the existence of the crime was established, however, the guilt of the accused could be based on his own otherwise uncorroborated confession.

Smith at 153-154 (emphasis by the court). *Smith* extended the corroboration rule so as to apply even in crimes in which no tangible injury is inflicted (e.g., tax evasion) and thus no *corpus delicti* exists.

The origin of the corroboration rule explains its purpose: After a man went missing and his bloody hat was found, a confessor admitted to murder and implicated his brother and mother. Years after the confessor and the two others were executed, the missing man reappeared, alive. Thus, a rule was created to ensure that something more than a person's confession establishes that a crime actually happened before a person may be convicted. *See*, *Bannister*, ¶24, discussing *Perry's Case*, 14 Howell St. Tr. 1312 (1660).

When a court considers whether a defendant's confession is corroborated, the court is considering the sufficiency of the evidence to support the conviction, and not addressing merely a rule of admissibility. *Bannister*, ¶¶32-33. Thus, when a court determines that a defendant's confession is not corroborated, Double Jeopardy prevents a retrial and the remedy is dismissal with prejudice. *Burks v. United States*, 437 U.S. 1 (1978); *State v. Ivy*, 119 Wis.2d 591, 350 N.W.2d 622 (1984).

Nothing in the evidence aside from Mr. Thomas' statements suggests any sexual contact or sexual assault. While a rape kit was done, its results do not confirm any sexual activity. The autopsy revealed no evidence of

sexual activity, consensual or otherwise. Simply stated, but for Mr. Thomas' statements, no evidence supports the contention that Mr. Thomas (or anyone) sexually assaulted Joyce Oliver-Thomas on December 27, 2006.

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, and he released her. Apx. 105 (quoting Mr. Thomas' statement). The Court of Appeals focused on two facts which it deemed sufficient to corroborate Mr. Thomas' statement:

> The recovery of the video by police corroborated Thomas's statement that he watched the video, and Cruz's testimony that she heard fighting and a woman say, "Stop, stop, I love you, I love you" corroborates Thomas's recollection of his interactions with Joyce.

Apx. 107. These two facts do not serve to give confidence to the conclusion that a sexual assault actually occurred. 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 trunk of the woman's car. *Potman v. State*. 259 Wis. 234, 47 N.W.2d 884 (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, 132 N.W.2d 578 (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 that these facts sufficed 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.

Mr. Thomas prays that this Court order the sexual assault conviction be vacated and dismissed with prejudice.

II. Admission of DNA evidence in violation with Mr. Thomas' right to confront his accusers was prejudicial error

The Court of Appeals correctly determined that admission of the DNA evidence through cross-examination of the defense medical examiner, without producing the DNA analyst for cross-examination, violated Mr. Thomas' Confrontation right. Apx. 107-123. However, the Court of Appeals errored in determining that this error was harmless. Apx. 123-125.

A. Admission of the DNA evidence violated the Confrontation Clause

Generally, the rules of evidence permit a witness to testify only as to matters of which the witness has personal knowledge. Wis. Stat. §906.02. However, persons with specialized knowledge may testify in the form of opinion as to conclusions drawn by the person from facts or data reviewed by the person. Wis. Stat. §907.02(1). While the bases for such opinion need not be admissible, inadmissible bases may not be elicited by the proponent of the expert:

> The facts or data in the particular case upon which an expert bases an opinion or inference

> may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion or inference substantially outweighs their prejudicial effect.

Wis. Stat. §907.03. This statute allows admission of an expert's opinion even when the opinion is based in part on inadmissible hearsay. *State v. Watson*, 227 Wis.2d 167, ¶67, 595 N.W.2d 403 (1999).

Although an expert's opinion may be based on inadmissible hearsay, the hearsay underlying the opinion is not thereby rendered admissible: "Wisconsin Stat. §907.03 is not a hearsay exception." *Watson*, ¶77; see also *State v. Weber*, 174 Wis. 2d 98, 107, 496 N.W.2d 762, 766 (Ct. App. 1993) ("Hearsay data upon which the expert's opinion is predicated may not be automatically admitted into evidence by the proponent and used for the truth of the matter asserted unless the data are otherwise admissible under a recognized exception to the hearsay

rule."). Cross-examination regarding the hearsay sources upon which an expert relies may be serve as a proper basis for impeachment of the expert's conclusions. Wis. Stat. §907.05. However, the proper purpose of such cross-examination must be to "'assist the jury in evaluating the expert's opinion, not to prove the substantive truth of otherwise inadmissible information.'" *State v. Heine*, 2014 WI App 32, ¶10, 354 Wis. 2d 1, 844 N.W.2d 409, quoting *United States v. Pablo*, 696 F.3d 1280, 1288 (10th Cir. 2012). Thus, the Court in *Watson* admonished against not only admission of hearsay bases for an expert's opinion "through the front door of direct examination." but also admission "through 'the back door' of cross-examination." *Watson*, ¶¶78-79. The Court in *Watson* noted the numerous pitfalls in dealing with hearsay bases for expert opinions by quoting a series of questions from Professor Blinka:

> What should be done with the experts' inadmissible bases? Does the experts' reliance validate the otherwise inadmissible information, thereby transforming it into admissible evidence? Conversely, should the court bar any mention of the tainted bases while permitting only the expert's testimony about the opinion? Or should the judge instruct the jury to consider the inadmissible bases for whatever bearing they

> have on the cogency of the expert's opinion testimony, but not for any other purpose? If the judge elects the latter course, what exactly does such an instruction mean? And if such limiting instructions are meaningless, is Rule 703 [§ 907.03] a device that allows a party to simply parade inadmissible evidence before the jury in direct contravention of the exclusionary rules?

Watson, ¶79 (bracketed insertion by the Court), quoting Daniel D. Blinka, *"Practical Inconvenience" or Conceptual Confusion: The Common-Law Genesis of Federal Rule of Evidence 703*, 20 Am. J. Trial Advoc. 467, 468 (1997).

Watson concerned a preliminary hearing in a Chapter 980 commitment proceeding. An expert testified to an opinion that Mr. Watson's prior false imprisonment offense was sexually motivated; this opinion was based solely on a hearsay statement contained in a presentence report attributed by the victim to Mr. Watson. The State asserted that even at trial the hearsay statement could be used without substantiation, but the *Watson* Court rejected this assertion based not only on Mr. Watson's statutory right to cross-examine but also his constitutional right to confrontation, noting that hearsay rules and the Confrontation Clause protect similar interests. *Watson*,

¶88.

The Sixth Amendment provides that every accused shall enjoy the right "to be confronted with the witnesses against him." Similarly, Article I, §7 of Wisconsin's Constitution guarantees the right of the accused "to meet the witnesses face to face."

The Confrontation Clause was once applied in close conjunction with hearsay rules, and was held to allow admission of an out-of-court statement if such statement falls within a "firmly rooted hearsay exception" or otherwise bears "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). This approach to the Confrontation Clause has been abandoned, at least with respect to statements deemed testimonial: under the new standard, the Confrontation Clause allows admission of "[t]estimonial statements of witnesses absent from trial ... only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

Crawford did not precisely define what statements are deemed testimonial and noted various possible formulations without expressly accepting any one.

Crawford, 541 U.S. at 51-52. However, the court noted two categories of statements which would satisfy any definition of testimonial: *ex parte* testimony at a preliminary hearing; and, statements taken by police officers in the course of interrogations, whether sworn or unsworn. *Crawford*, 541 U.S. at 52.

After *Crawford*, the Supreme Court issued three decisions addressing Confrontation Clause issues involving forensic evidence: *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 547 (2011); *Williams v. Illinois*, 567 U.S. 50 (2012).

Melendez-Diaz was a drug case in which the prosecution introduced three notarized "certificates of analysis" stating that substances attributable to the defendant were cocaine. These certificates were introduced without testimony from the author of the certificates. The Court found that these certificates were testimonial, as they had a clear "evidentiary purpose" and were "'made under circumstances which would lead an objective witness reasonably to believe that [they] would be available for use at a later trial.'" 557 U.S. at 310-311 (quoting *Crawford*). The Court rejected the State's

argument that the certificates were presumptively reliable results of "neutral scientific testing" and concluded that the defendant had a right to cross-examine the author of the certificates. 557 U.S. at 318.

Bullcoming was a drunk driving case in which the prosecution introduced a crime lab report showing the defendant's blood alcohol concentration through a crime lab analyst who was *not* the author of the report. While this witness was familiar with crime lab procedures, the witness did not participate in the testing which resulted in the report. *Bullcoming* rejected such surrogate testimony, holding that the "accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." *Bullcoming*, 564 U.S. at 652.

Williams was a rape case in which the alleged victim's vaginal swabs were sent to an outside laboratory which produced a DNA profile. A witness from the crime lab testified that this DNA profile from the outside lab matched a DNA profile of the defendant produced by the crime lab. No one from the outside laboratory testified. The decision in *Williams* resulted in a 4-1-4 split decision

with no rationale enjoying majority support and creating confusion as to its precedential value. *See*, *e.g.*, *State v. Dotson*, 450 S.W.3d 1, 68 (Tenn. 2014) ("The Supreme Court's fractured decision in *Williams* provides little guidance and is of uncertain precedential value"); *State v. Michaels*, 219 N.J. 1, 31, 95 A.3d 648, 666 (N.J. 2014) ("We find *Williams's* force, as precedent, at best unclear"). In Wisconsin, *Williams*' holding, as opposed to its rationale, must be followed only where a defendant and the defendant in *Williams* are in "substantially identical positions." *State v. Deadwiller*, 2013 WI 75, ¶32, 350 Wis.2d 138, 834 N.W.2d 362. Where such substantially identical positions are not present, *Williams* is not binding. *State v. Griep*, 2015 WI 40, ¶42, 361 Wis.2d 657, 863 N.W.2d 567.

In Oscar Thomas' trial, the prosecution did not introduce or seek to introduce any evidence in its case-in-chief that Mr. Thomas' DNA was under Ms. Oliver-Thomas' fingernails, or that Ms. Oliver-Thomas' DNA was under Mr. Thomas' fingernails. Instead, the prosecutor brought up the crime lab DNA report in cross-examining Dr. Williams, the medical examiner retained by the defense. Apx. 141; 320: 88. Counsel immediately

objected that the report had not been introduced into evidence and started to further object: "It's a back door –" Apx. 141; 320: 88. The Court apparently interrupted defense counsel mid-sentence to rule: "If he examined it, then it's presumably something he discounted or relied upon. The objection is overruled." Apx. 141; 320: 88. The prosecutor proceeded to confirm that Dr. Williams had read the Wisconsin state crime lab report, and that the report stated that Mr. Thomas' DNA was under Ms. Oliver-Thomas' fingernails and Ms. Oliver-Thomas' DNA was under Mr. Thomas' fingernails. Apx. 142; 320: 89.

The Court of Appeals crafted a thorough analysis of the propriety of introducing testimonial DNA evidence through cross-examination of the defense medical examiner without affording cross-examination of the DNA analyst. The Court of Appeals started with a review of the decisions of this Court relating to Wis. Stat. §907.03 and the United States Supreme Court relating to Confrontation. Apx. 111-122. The Court of Appeals sought an accommodation between the Confrontation right and §907.03. The Confrontation Clause prohibits admission of testimonial hearsay unless the declarant is

unavailable and the defendant had a prior opportunity to cross-examine the declarant. Wis. Stat. §907.03 permits impeaching expert witnesses by asking about inadmissible hearsay considered by the expert, but is not a means to admit the inadmissible hearsay. The Court of Appeals' majority concluded:

> The DNA evidence was inadmissible hearsay and it was erroneously received during trial and closing argument as no limiting instructions were given to the jury as to its consideration of the DNA evidence. Pursuant to ***Melendez-Diaz***, ***Bullcoming***, ***Williams***, ***Watson*** and ***Heine***, the DNA evidence, at a minimum, could not be presented to the jury without proper limiting instructions and could not be used by the State as substantive evidence.

Apx. 122-123 (footnote omitted).

The concurrence found no need to reach the question of whether admission of the DNA evidence violated Mr. Thomas' right to Confrontation, and was content to conclude the error, if any, was harmless. Apx. 130. The concurrence proceeded to criticize the majority's rationale. The concurrence would have allowed admission the DNA evidence because Dr. Williams' review and consideration of the DNA report "opened the door to admission" of the report through cross-examination and

impeachment. Apx. 135.

Since the Court of Appeals' decision in Mr. Thomas' case, the Supreme Court has determined that testimonial hearsay may not be admitted against a defendant under an evidentiary rule allowing admission of such hearsay upon a determination that the defendant "opened the door," for such an evidentiary rule may not impair the right to Confrontation. *Hemphill v. New York*, 595 U.S. ____ (January 20, 2022).

In *Hemphill*, a 2-year-old child was killed by a 9mm bullet. Initially a man named Morris was charged with the homicide and with possession of a 9mm gun. However, these charges were resolved by dismissal of the homicide and a plea to possession of .357 gun, a gun differing from the one in the homicide.

Years later, Hemphill was charged with the homicide. Seeking to point to Morris as the killer, Hemphill elicited uncontroverted testimony that police had recovered 9mm ammunition from Morris' nightstand. Morris was unavailable to testify. The government sought to rebut the defense theory that Morris was the killer by introducing Morris' plea allocution to show he pleaded to possessing a .357 (and thus not to possessing the murder

weapon). The trial court admitted this plea allocution pursuant to *New York v. Reid*, 19 N.Y.3d 382, 971 N.E.2d 353, 948 N.Y.S.2d 223 (2012) which permitted admission of hearsay, otherwise inadmissible under the Confrontation Clause, if the defendant "opened the door" to such testimony.

The Supreme Court in *Hemphill* rejected the notion that the Sixth Amendment suggests any open-ended exceptions from the confrontation requirement might be developed by the courts, aside from those established at the time of the founding. *Hemphill*, slip op. 9, (citing *Crawford*). The Court also rejected the argument that the *Reid* "opened the door" rule was a procedural rule which treated door-opening actions of counsel as analogous to failure to object. The Court determined that the "door-opening principle incorporated in *Reid* . . . is a substantive principle of evidence that dictates what material is relevant and admissible in a case." *Hemphill*, slip op. 10. The Court held that "Hemphill did not forfeit his confrontation right merely by making the plea allocution arguably relevant to his theory of defense." *Hemphill*, slip op. 2, 12-13.

Hemphill validates the correctness of the Court of Appeals' decision below, and undercuts the concurring

opinion's "opened the door" rationale. The evidentiary *Reid* "opened the door" rule had been deemed sufficient by New York courts to allow admission of evidence in violation of the Confrontation Clause. It was applied to allow the introduction of testimonial hearsay statements "because they were 'reasonably necessary' to 'correct' the 'misleading impression' Hemphill had created." *Hemphill* slip op. 1. The Court in *Hemphill* simply ruled that a State evidentiary rule may not trump the Confrontation Clause.

Unlike the *Reid* rule, Wis. Stat. §907.03 is not a hearsay exception. *Watson*, ¶77. Nonetheless, testimonial DNA hearsay was admitted against Mr. Thomas, without opportunity to cross-examine the DNA analyst, simply because Mr. Thomas' expert medical examiner had "examined it" and had "presumably . . . discounted or relied" upon it. Apx. 141; 320: 88. This is functionally indistinguishable from the "opened the door" rule of admission prohibited by *Hemphill*. Thus, the Court of Appeals correctly determined that the trial court erred in admitting the DNA evidence.

B. The erroneous admission of the DNA evidence was not harmless

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 (1967) quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). 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. Unlike many cases, the *Neder* Court was not called upon to determine if evidence improperly admitted or excluded affected the verdict, for the error found harmless in *Neder* concerned jury instructions. Mr. Thomas can find no later Supreme Court case adopting the *Neder* formulation. Rather, the standard on direct appeal (as opposed to collateral review) is the *Chapman* standard. *Davis v. Ayala*, 576 U.S. 257, 135 S. Ct. 2187, 2197 (2015) ("On direct appeal, the harmlessness standard is the one prescribed in *Chapman*, 386 U.S. 18, [24,] 87 S.Ct. 824, 17 L.Ed.2d 705: '[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.'") Likewise in *Hemphill*, the Supreme Court mentioned the *Chapman* harmless error standard, but declined to evaluate harmless error in the first instance when it had not had not been addressed in lower courts. *Hemphill*, slip op. 14, n. 5.

The proper test for harmless error is 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).

This Court has adopted the *Neder* formulation, in a case (like *Neder*) determining whether an erroneous jury instruction was harmless: "A constitutional or other error is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.' *Neder*, 527 U.S. at 18." *State v. Harvey*, 2002 WI 93, ¶ 49, 254 Wis.2d 442, 647 N.W.2d 189. In a more recent case, this Court continued to follow this

Harvey/Neder formulation. *State v. Martin*, 2012 WI 96, ¶3 & ¶45, 343 Wis.2d 278, 816 N.W.2d 270. However, the *Martin* Court also gave an alternate formulation:

> Framed a different way, an "error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *State v. Mayo*, 2007 WI 78, ¶ 47, 301 Wis.2d 642, 734 N.W.2d 115 (quoting *State v. Anderson*, 2006 WI 77, ¶ 114, 291 Wis.2d 673, 717 N.W.2d 74) (internal quotation marks omitted); *State v. Stuart*, 2005 WI 47, ¶ 40, 279 Wis.2d 659, 695 N.W.2d 259. Therefore, this court must be satisfied, beyond a reasonable doubt, not that the jury *could* have convicted the defendant (i.e., sufficient evidence existed to convict the defendant), *State v. Weed*, 2003 WI 85, ¶ 28, 263 Wis.2d 434, 666 N.W.2d 485, but rather that the jury *would* have arrived at the same verdict had the error not occurred. See *Harvey*, 254 Wis.2d 442, ¶ 46, 647 N.W.2d 189 (quoting *Neder*, 527 U.S. at 18, 119 S.Ct. 1827).

Martin, ¶45. This quote makes two important points: First, this alternate framing occurred immediately after quoting the *Neder* formulation, and commences with a *Chapman* formulation; this confirms that this Court deems the *Neder* and *Chapman* formulations as two ways of expressing the same standard for harmless error. Second, this Court agrees with the Supreme Court that assessing whether the

untainted evidence is sufficient to convict is not a proper way to analyze whether an error is harmless.

As shown by *Martin*, this Court has struggled to reconcile the *Chapman* and *Neder* formulations. *See also*, *State v. Hale*, 2005 WI 7, 277 Wis.2d 593, 691 N.W.2d 637. In *Hale*, the majority applied the *Chapman* test to an error which, as in the instant case, involved evidence admitted in violation of the Confrontation Clause. *Hale*, ¶¶59-77. *Neder* was mentioned only in a footnote. *Hale*, ¶60, n. 9. Justice Abrahamson concurred, and would limit the *Neder* formulation to *Neder*-type cases. *Hale*, ¶¶79-85. Justice Wilcox joined by Justices Crooks and Prosser, concurred, and viewed *Neder* and *Chapman* as having been harmonized by prior decisions, including *Harvey*. *Hale*, ¶¶86-90. Justice Butler, also concurring, believed the majority properly applied *Chapman*. *Hale*, ¶108. He found *Chapman* appropriate for analyzing most Constitutional errors, and noted that *Neder* was applied in assessing jury instruction error. *Hale*, ¶111, ¶113. Read in aggregate, the majority and concurring opinions support applying the *Chapman* formulation when assessing a Confrontation error.

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 error in the harmless error analysis is in the Court of Appeals' application of the harmless error test.

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 without being afforded the opportunity to cross-examine the DNA analyst.

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. Likewise, Mr. Thomas' friend Mr. Platt observed no dishevelment or injuries to Mr. Thomas. 318: 149. 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).

There is a reasonable probability that the DNA evidence might have contributed to Mr. Thomas' convictions. This evidence was crucial to the prosecution in buttressing the argument that "It was a brutal, vicious, violent choking the life out of her." Apx. 143; 321: 37. This was shown, the prosecutor argued, by Mr. Thomas' "scratching up her face with his free hand." Apx. 143; 321: 37. Mr. Thomas' counsel objected this argument was unsupported by the evidence. Apx. 143; 321: 37. The prosecutor, in an exchange with the Court in front of the

jury, explained that scratches on Ms. Oliver-Thomas' face and *Mr. Thomas' DNA under Ms. Oliver-Thomas' fingernails* supports his theory:

> 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. 144; 321: 38. Thus, the DNA was crucial to the State's version of events, and in particular, the State's assertion that the death was the result of intentional actions and not recklessness.

Had the DNA evidence been admitted merely to impeach Dr. Williams, and not for the truth of the matter asserted, the prosecutor could not have made this argument. No such limit was placed on the prosecutor's use of the DNA evidence for its truth. Nor was the jury's consideration of the DNA evidence limited. As a practical matter, as the concurrence below acknowledged, no reasonable and coherent limiting jury instruction *could* be placed on how the jury considered the DNA evidence:

> [T]he expert may have relied upon the hearsay statement for the truth of the matter asserted, yet the jury is instructed it cannot use the statement for the very same purpose. Rather, the jury is told to use it to evaluate and weigh the expert's testimony not for its truth, a distinction that is nonsensical and incomprehensible because it is exactly how the expert used it! *See* [7 DANIEL D. BLINKA, WISCONSIN PRACTICE SERIES: WISCONSIN EVIDENCE § 702.6042] at 722.

Apx. 134, n. 5.

In any event, the DNA evidence was admitted and argued as substantive evidence. It was a key aspect in the prosecutor's portrayal of events as evincing an intentional killing, and thus in rebutting the defense argument that the death was the result of accident or recklessness. There is a "reasonable probability that the [DNA evidence] might have contributed to the conviction." *Chapman*, 386 U.S. at 23.

CONCLUSION

Oscar C. Thomas prays that this Court order that the sexual assault charge be dismissed with prejudice, and that this court vacate his other convictions and sentences and remand for a new trial.

Respectfully submitted,

_____

John T. Wasielewski
Attorney for
Oscar C. Thomas

FORM, LENGTH AND APPENDIX CERTIFICATION
Wis. Stat. §809.19(8g)(a)1 and (b)1.

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 10901 words.

I hereby certify that filed with this brief is an appendix that complies with §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the Court of Appeals and the circuit court; (3) a copy of any unpublished opinion cited under §809.23(3)(a) or (b); and (4) 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.

This appeal is not taken from a circuit court decision entered in a judicial review of an administrative decision.

The record is not required by law to be confidential under Wis. Stat. §809.86, as homicide victims are excluded under subsection (3).

I further certify that that the electronic copy of this brief and appendix submitted for e-filing and the paper copies of this brief and appendix are identical in all respects (except that the paper copy has ink signatures on the signature lines).

_____
John T. Wasielewski

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