STATE OF WISCONSIN CIRCUIT COURT WASHINGTON COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 11-CF-469

ROBERT WHITE,

Defendant.

MOTION IN LIMINE:
LAY OPINION AND EXPERT TESTIMONY

Robert White, by his attorney Michael J. Fitzgerald, pursuant to Wis. Stat. §901.04, moves the Court for an order excluding any lay opinion and expert testimony offered by the state, absent a showing that the requirements of Wis. Stat. §907.01, §907.02, *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and *Kumho Tire v. Carmichael*, 526 U.S. 136 (1997) have been met.

As grounds for this request, the defendant submits the following:

1. Effective February 1, 2011, the legislature amended Wis. Stat. §907.02 to adopt the *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), reliability standard as stated in Fed. R. Evid. *See* 2001 Wis. Act 2, §§34m, 45(5); *State v. Kandutsch*, 2001 WI 78, ¶26 n.7, 336 Wis. 2d 478, 799 N.W.2d 865. *See also,* Daniel Blinka, *The Daubert Standard in Wisconsin: A Primer*, WISCONSIN LAWYER, March, 2011.

2. The lay opinion statute, Wis. Stat. §907.01, was also amended to conform to Fed. R. Evid. 701. *See* Blinka, *supra*, at p. 16.

3. Before expert testimony may be admitted , the proponent must show that: (a) scientific, technical or other specialized knowledge will assist the jury in understanding the evidence or determining a fact in issue; (b) the witness must be qualified as an expert by knowledge, skill, experience, training or education; (c) the testimony must be based on sufficient facts or data; (d) the testimony is the product of reliable principles and methods; and (e) the witness has applied the principles and methods reliably to the facts of the case. Wis. Stat. §907.02.

4. With respect to the reliability of the expert's principles and methods, the Supreme Court in *Daubert* set forth five nonexclusive factors for the trial court to consider:

(a) Whether the expert's technique or theory can be or has been tested – that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;

(b) Whether the technique or theory has been subject to peer review and publication;

(c) The known or potential rate of error of the technique or theory when applied;

(d) The existence and maintenance of standards and controls; and

(e) Whether the technique or theory has been generally accepted in the scientific community.

Daubert, 509 U.S. at 592-595; Blinka, *supra*, at p. 19; *see also Kumho Tire v. Carmichael*, 526 U.S. 136 (1997) (reliability analysis applies to non-scientific expert testimony as well as scientific).

5. The advisory committee on Fed. R. Evid. 702 also offers the following additional reliability factors, developed from federal case law:

(a) Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for the purposes of testifying;

(b) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;

(c) Whether the expert has adequately accounted for obvious alternative explanations;

(d) Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation counseling; and

(e) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Fed. R. Evid. 702, advisory committee's note (2000); Blinka, *supra*, at p. 19.

6. With respect to lay opinion testimony under Wis. Stat. §907.01, the proponent still must satisfy the long-standing requirements that the opinion be rationally based on the witness's perception, and helpful to a clear understanding of the witness's testimony or determination of a factual issue. Additionally, Wis. Stat. §907.01 now states that lay

opinions *cannot* be based on the specialized knowledge that is regulated by Wis. Stat. §907.02's reliability requirements.

7. The discovery provided to date contains significant materials that potentially encompass expert testimony and would be subject to the *Daubert* foundational requirements. The discovery materials include:

- A 160 page Postcrash Inspection Report authored by Inspector Barlar of the Wisconsin State Patrol;
- A 42 page Collision Analysis and Reconstruction Report authored by Inspector Barlar;
- A 299 page Logbook Analysis and Supporting Documentation Report authored by Inspector Barlar;
- Voluminous and technical GPS data from People Net concerning the truck Mr. White was driving;
- Voluminous and technical Crash Retrieval Data from Bosch pertaining to vehicles involved in the accident;
- Voluminous and technical ECM data from Delta Engineering concerning the truck that Mr. White was driving; and
- Potential opinion testimony by Detective Sette, Inspector Barlar, and perhaps others, as to the cause of the accident ("driver fatigue").

8. In addition to these materials contained in the discovery, it is possible (from counsel's experience) that the state will prepare computer-generated animations of the accident or accident scene.

9. In summary, the defendant moves to exclude all lay opinion and expert testimony proffered by the state unless, prior to trial, the foundational requirements outlined in this motion have been met.

10. There is virtually no reported appellate case law in Wisconsin yet applying *Daubert* and the new rules 907.01 and 907.02. The parties and the Court will need to rely primarily on federal case law. Rather than submit a lengthy brief with this motion, defense counsel suggests that the state outline its intention to use any lay opinion or expert testimony at trial. After receiving that response, the trial court can then conduct a hearing, order further briefing, or both.

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DEFENDANT'S RESPONSE TO STATE'S MOTION IN LIMINE

BACKGROUND

Mr. White is charged with two counts of homicide by negligent operation of a motor vehicle, two counts of reckless driving – causing great bodily harm, and one count of reckless driving – causing bodily harm. The charges arise from a fatal accident which occurred on Highway 41 southbound at approximately 10:00 a.m. on December 15, 2010.

The basic circumstances surrounding the accident are set forth in the criminal complaint.

Mr. White, a semi-truck driver, was hauling a load of liquid ammonia from Hydrite Chemical in Oshkosh. He was traveling south on Highway 41, slightly below the speed limit (62-65 mph).

There was an accident further south of Mr. White on Highway 41 which caused the State Patrol to divert traffic off the highway at County Highway D. Cars were slowing or stopped at the Highway D exit. Mr. White failed to stop and his truck impacted several

vehicles at a high rate of speed, causing the fatalities and injuries charged in the criminal complaint.

The complaint alleges that Inspector Barlar conducted an investigation of Mr. White's hours of service (commonly known as a truck driver's logbook) and concluded "that the defendant was in excess of hours of service at the time of the crash in that the defendant was in excess of his actual driving hours and maximum number of hours of on-duty and driving hours." Complaint, p.2. The complaint does not establish what the federal limits are, or the extent to which Inspector Barlar claims that Mr. White exceeded them. Nor is this information set forth in the state's motion in limine.

The complaint further summarizes a statement made by Mr. White to Detective Sette, in which Mr. White indicated that his attention was focused on an orange Schneider truck, but he otherwise had no explanation for why the crash occurred. The complaint also sets forth a statement allegedly made by Mr. White at the scene to Kohlsville Fire Department Chief Raymond Dornacker in which Mr. White said "I believe I feel asleep."

Notably, there is no allegation here of: (1) reckless driving or careless driving by Mr. White; (2) distracted driving by Mr. White (talking on a cell phone, etc...); or (3) speeding or otherwise operating his truck in a manner unsafe for the conditions at the time.

The state has filed a motion in limine seeking several things.

First, the state asks that the defendant be precluded from introducing any statements of Mr. White to a third party.

Second, the state wishes to introduce testimony by Inspector Barlar regarding his "Hours of Service Records Audit" for a one month period prior to the accident (November 16, 2010 through December 15, 2010). According to the state's motion, Mr. White "falsified entries in his logbook to conceal violations of 49 C.F.R. §395." The state submits that this evidence is admissible as other acts evidence under Wis. Stat. §904.04(2).

Third, Chief Dornacker has passed away since the time of the accident. The state seeks to admit a written statement that Chief Dornacker made to Detective Sette concerning statements made by Mr. White to Chief Dornacker at the scene.

Fourth, the state also seeks to allow Lt. Schulteis to testify as to a conversation that he had with Chief Dornacker at the Jake's Auto Christmas party in December, 2010. It is asserted that, in this conversation, Chief Dornacker told Lt. Schulteis about what Mr. White told him (Chief Dornacker) at the scene.

The defendant will now address each request in turn.

I. Statements of Defendant to a Third Party.

The defendant currently has no plans to introduce any statements that he made to a third party, except as necessary pursuant to the rule of completeness. Wis. Stat. §901.07 provides that, "when a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

Mr. White made a statement to the police at the hospital shortly after the accident, and another statement at his home two weeks later. If the state chooses to present only portions of those statements, the defendant is entitled, under Wis. Stat. §901.07, to require the state to introduce any other portions of those statements that ought in fairness to be considered contemporaneously with the portion introduced into evidence.

Other than that, the defendant currently foresees no other issue with respect to this request by the state.

II. Other Acts Evidence: Logbook Entries.

A. Initial considerations: *Daubert*.

The state's motion does not explain Inspector Barlar's methodology in determining that Mr. White's logbook entries do not actually reflect the actual amount of on-duty, off-duty, and driving time that he had for the one month prior to the accident. Nor does the motion set forth Inspector Barlar's qualifications to conduct such an analysis, or set forth any other criteria relevant to determine whether his testimony is admissible under Wis. Stat. §907.02 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

The court could defer a ruling on the "other acts evidence" issue until the *Daubert* issue is briefed and decided. On the other hand, the court could find that the *Daubert* inquiry is not necessary because the testimony is inadmissible under Wis. Stat. §904.04(2).

Either way, the defendant will set forth here the reasons why the testimony is not admissible under Wis. Stat. §904.04(2).

B. Applicable legal principles.

The law in Wisconsin is that "'other acts evidence should be used sparingly and only when reasonably necessary'" *State v. Veach* 2002 WI 110, ¶ 48, 255 Wis. 2d 390, 648 N.W. 2d 447 (quoting *Whitty v. State*, 34 Wis. 2d 278, 149 N.W. 2d 557 (1967)). Other acts evidence may not be used to demonstrate that the accused has a certain character and acted in conformity with that trait. *Id*.

The rule excluding other acts evidence is based on the fear that the evidence will invite the jury to focus on an accused's character and magnifies the risk that jurors will punish the accused for being a bad person regardless of his guilt of the crime charged. *Veach*, 648 N.W. 2d. at 458. Other reasons justifying the rule excluding other acts evidence include: (1) the tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence from other crimes. *Id*. (citing *Whitty*, 34 Wis. 2d. at 292).

In assessing the admissibility of other acts evidence, the Court must conduct a three-step analysis. First, whether the other acts evidence is offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2). Second, whether the other acts evidence is relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01 — whether

the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action and whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence. Third, whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. *State v. Sullivan*, 216 Wis. 2d. 768, 772-73, 576 N.W. 2d 30, 32-33 (1998).

The state's motion only briefly addresses the *Sullivan* factors. The state's entire argument is less than one page. No legal authority other than *Sullivan* is cited. No further facts about Inspector Barlar's proposed testimony is set forth, such as the amount of the alleged discrepancy between Mr. White's logbooks and his actual hours of driving (e.g., is the difference even material?).

This Court should reject the state's request to admit the evidence because it has not developed its argument in support of its position. *Cf. Riley v. Town of Hamilton*, 153 Wis. 2d 582, 588, 451 N.W.2d 454 (Ct. App. 1989) ("we have often held that we will not consider propositions which are not specifically argued and are unsupported by citations to legal authority"); *see also State v. Sullivan*, 216 Wis. 2d 768, 774, 576 N.W.2d 30 (1998) ("the proponent and the opponent of the other acts evidence must clearly articulate their reasoning

for seeking admission or exclusion of the evidence and must apply the facts of the case to the analytical framework").

On the merits, the other acts evidence is inadmissible because it is not relevant to any acceptable purpose, and any probative value it has is outweighed by the risk that the evidence would invite the jury to base it's decision on an improper basis. The evidence would also create a significant "trial within a trial," in which the parties would have to litigate a month of Mr. White's on-duty, off-duty and driving time – which is a condition precedent for concluding that Mr. White "falsified" his logbook entries on any particular date. Thus, the evidence should be excluded because it's minimal probative value is outweighed by the danger of confusion of the issues, and an unnecessary waste of judicial resources by lengthening the trial over an issue that is not material to the charged offenses.

C. The proffered other acts evidence is not relevant to any legitimate purpose in this trial.

In the state's brief summary argument, in conclusory fashion it uses the terms "intent," "knowledge" and "absence of mistake" interchangeably as a basis for admission of the other acts evidence under Wis. Stat. §904.04(2).

1. Intent.

The state argues that the logbook entries are relevant to intent. If the defendant were charged with making false entries in his logbook, the state might have a point.

That, of course, is not what Mr. White is charged with. There is a significant difference between proving that Mr. White was driving too many hours before the accident,

and proving that Mr. White made a false entry in his logbooks about that driving time. The former *might* be relevant to this trial (depending on when it occurred, the number of hours, the circumstances, etc...); the latter is not.

The elements of the offense of homicide by negligent operation of a motor vehicle are that: (1) the defendant operated a vehicle; (2) he did so in a criminally negligent manner; and (3) that the defendant's criminal negligence caused a person's death. *State v. Schutte*, 2006 WI App 135, ¶19, 295 Wis. 2d 256, 720 N.W.2d 469, 476 (citations omitted).

The legislature defines criminal negligence as ordinary negligence to a high degree, consisting of conduct that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm. Wis. Stat. §939.25(1). The focus as to whether the defendant's conduct constituted a "high degree of negligence" is determined by the circumstances under which the defendant was driving at the time. *Schutte*, 2006 WI App 135, ¶21.

This is not a criminal offense charging intent or any specific state of mind, but rather one that focuses on the defendant's conduct in operating a vehicle at the particular time an accident occurs. Making an entry in a logbook – accurate or otherwise – one day, one week or one month before the accident proves nothing of relevance to this question. It is conduct that is entirely dissimilar to the conduct upon which the charge is based.

In *State v. Muckerheide*, 2007 WI 5, 298 Wis. 2d 553, 725 N.W.2d 930, for example, the defendant was charged with intoxicated vehicular homicide, and claimed that his

passenger had caused the accident by grabbing the steering wheel. In support of this defense, the defendant sought to present evidence that the passenger had, on prior occasions when he was a passenger with his father, gestured as if to grab the steering wheel or had actually grabbed the wheel. Muckerheide argued that one reason for admitting the other acts evidence was to establish the identity of the person who was responsible for the accident. 2007 WI 5, ¶22. The Wisconsin Supreme Court disagreed, holding that the other acts evidence offered by Muckerheide was not relevant to a consequential fact and therefore constituted impermissible propensity evidence.

The *Muckerheide* court noted that "'[t]he greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of other acts evidence.'" *Id*. at ¶27 (quoting *Sullivan*, 216 Wis. 2d at 787). The court emphasized several dissimilarities between the passenger's prior act of grabbing the steering wheel and his alleged conduct at the time of the accident that supported exclusion of the evidence, including: (1) the passenger was intoxicated at the time of the accident, but not on the prior occasion he grabbed the wheel; (2) on the prior occasion he had gestured toward the steering wheel before grabbing it, but he did not do that prior to the accident; and (3) there was no evidence that the passenger had ever grabbed the steering wheel when riding with Muckerheide.

Thus, *Muckerheide* shows that even prior conduct of careless or reckless driving is not necessarily admissible in a case such as this. Accusations about false logbook entries

are nothing more than character evidence that may or may not be admissible under Wis. Stat. §906.08, depending on the circumstances of the trial, but not under Wis. Stat. §904.04(2).

It is also worth noting that *Sullivan* was a case precluding use of other acts evidence under the "intent" exception. Again, the emphasis of the Supreme Court was on the dissimilarity between the other acts evidence and the charged conduct.

In *Sullivan*, the defendant was convicted of battery and disorderly conduct for striking his girlfriend. At trial the state introduced other acts evidence involving an allegation by Sullivan's ex-wife that he had threatened to assault her two years prior to the charged incident. Additional other acts evidence were excluded by the trial court, including threatening telephone calls by Sullivan to his ex-wife and fits of anger not involving physical abuse of his ex-wife.

The Wisconsin Supreme Court reversed Sullivan's conviction, finding that the other acts evidence involving the threats to his ex-wife were not probative of the defendant's intent in the battery case. The court reiterated that the probative value of other acts evidence depends on the incident's nearness in time, place and circumstances to the charged crime or to the fact or proposition to the proved. *Id*. at 786. "Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the probative value lies in the similarity between the other act and the charged offense. The stronger the similarity between the other acts and the charged offense, the greater will be the probability that the like result was not repeated by mere chance or coincidence." *Id*. at 786-87.

Despite finding many similar circumstances between the two incidents, *Sullivan* held that the other incident involving threats was not sufficiently similar to support the state's theory that the defendant intentionally hit women with whom he has been romantically involved. *Id*. at 788. The court emphasized that the most important distinction between the other acts evidence and the charged offenses was that the other acts involved an argument without physical contact, but the charged offense involved the defendant punching the complainant. In addition, the court emphasized that the other acts evidence involved only one other incident, not a series of incidents, and the factual descriptions of the incidents did not involve particularly complex or unusual facts. Accordingly, the court concluded: "That the defendant confronted and argued with his ex-wife, threatened her, swore at her and refused to leave her house does not make it more probable that he intentionally hit the complainant during an argument two years later." *Id*. at 789.

Here, the other acts evidence is even more dissimilar than it was in *Sullivan*. Mr. White is charged with a crime based on the manner in which he drove his truck, not the manner in which he kept his logbooks, and the other acts evidence does not even involve driving.[1]

[1] As stated previously, depending on the circumstances, prior driving hours may or may not be relevant to this charge. But that is not what the state wants to admit – it wants to admit logbook entries that do not accurately reflect those driving hours.

2. Knowledge.

The state also argues that the logbook entries are relevant to the "defendant's knowledge because said evidence demonstrates the defendant's knowledge of federal and state regulations governing hours of service."

Every truck driver on the road is aware of the federal regulations. That is why truck drivers are required to maintain logbooks in the first place. Mr. White will not assert otherwise in this trial.

Unlike a drug case in which the state must prove that the defendant knew a substance was a controlled substance, Mr. White's knowledge of the federal regulations is not an element of the offense, nor is it otherwise relevant to those elements. *Cf., State v. Anderson*, 176 Wis. 2d 196, 500 N.W.2d 328 (Ct. App. 1993) (defendant's statements about previous marijuana sales admissible under Wis. Stat. §904.04(2) to show knowledge of substance as marijuana). Mr, White's "knowledge" is irrelevant here.

3. Absence of mistake.

The state argues that "evidence of absence of accident in that the falsified logbook entries for dates prior to the alleged incident demonstrate a pattern of conscious disregard for federal regulations by the defendant prior to the date of the accident."

Here again the state confuses two separate concepts. Mr. White's prior on-duty, off-duty and driving time *might* be relevant to this trial (we do not concede that it is). The manner in which Mr. White recorded those times in his logbook says nothing about whether

his *driving* on December 15, 2010, was criminally negligent and caused the deaths and injuries to the victims.

The "absence of mistake" exception is similar to the intent exception and requires prior similar acts. *State v. Gray,* 225 Wis. 2d 39, 599 N.W.2d 918, 928 (Ct. App. 1999). For the same reasons argued above, the absence of mistake exception is not applicable because the manner in which Mr. White maintained his logbook is irrelevant to his driving.

D. The Other Acts Evidence Must Be Excluded Under §904.03.

Finally, the proffered other acts evidence should be excluded because any marginal probative value is outweighed by the risk of unfair prejudice. Evidence can be prejudicial if it tends to influence the outcome of jury deliberations by use of improper means. *State v. Dukes*, 2007 WI App 175, ¶31, 303 Wis. 2d 208, 736 N.W.2d 515.

This is one such case. The logbook evidence is nothing more than thinly veiled character evidence. The state strains the limits of logic in an effort to fit this evidentiary square peg in a round hole. The real purpose is to suggest to the jury that Mr. White is dishonest, or unethical, or otherwise fits a negative stereotype of "truck drivers" that jurors may have.

This trial will have a strong emotional content as it is. Some very good people, who were doing nothing more than waiting in traffic, lost their lives and were injured. As it is, Mr. White will be up against the natural human instinct to "make someone pay," under a statute that potentially criminalizes any car accident.

It would be fundamentally unfair to allow the state the additional advantage of using marginally relevant character evidence that really has nothing to do with this case.

Finally, Mr. White does not and will not accept the claim by Inspector Barlar that he "falsified his logbooks." This will be contested. Thus this evidence, if admitted, will create a "trial within a trial" in which Mr. White will be forced to reconstruct his on-duty, off-duty and driving times for as much as one month prior to the accident.

The evidence should be excluded because its marginal relevance is outweighed by the risk of confusion of the issues by the jury, and ultimately the unnecessary use of judicial resources in extending the length of the trial by admitting evidence that has very little to do with the charges.

III. The Written Statement of Chief Dornacker to Detective Sette is Inadmissible on Evidentiary and Confrontation Grounds.

A. Evidentiary analysis.

The state proffers three exceptions to the hearsay rule which it says would allow the written statement of Chief Dornacker to Detective Sette to be admitted into evidence: §908.01(4)(b)(4) – statement of a party opponent; §908.045(4) – statement against penal interest; §908.03(8) – matters observed pursuant to duties imposed by law.

The problem is that these exceptions would arguably only apply to what Mr. White told Chief Dornacker. They do not apply to what Chief Dornacker told Detective Sette. Chief Dornacker's written statement to Detective Sette thus contains "double hearsay," each portion of which must be admissible under a hearsay exception. Wis. Stat. §908.05.

The state has not proposed any hearsay exception which would allow Detective Sette to testify as to what Chief Dornacker told him.[2] Accordingly, this request should be denied on this basis alone.

B. Confrontation analysis.

The admission of Chief Dornacker's written statement would also violate Mr. White's Sixth Amendment right to confrontation because the statement is testimonial and Chief Dornacker is not available for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004). Statements made to the police describing past events are testimonial. *Davis v. Washington,* 547 U.S. 813, 829-830 (2006).

Statements during police interviews are testimonial, regardless of whether they are characterized as interrogations or not. *See, e.g., United States v. Summers*, 414 F.3d 1287 (10th Cir. 2005); *People v. West*, 823 N.E.2d 82, 91-92 (Ill. App. Ct. 2005); *Gay v. State*, 611 S.E.2d 31 (Ga. 2005) (witness' statements to police at hospital shortly after event testimonial); *Wall v. State*, 184 S.W.3d 730 (Tex. Crim. App. 2006) (victim's statements to police at hospital shortly after assault testimonial); *People v. Cage*, 155 P.3d 205 (Call. 2007); *State v. Cannon*, 254 S.W.3d 287 (Tenn. 2008); *Marquardt v. State*, 882 A.2d 900 (Md. Ct. Spec. App. 2005); *State v. Walker*, 118 P.3d 935 (Wash. App. 2005); *State v. Moses*, 1919 P.3d 906 (Wash. App. 2005) (victim's statements to responding officers at

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[2] Wis. Stat. §908.03(8) applies only to things like public records which document matters observed pursuant to duties imposed by law. It does not permit the wholesale admission of witness statements through the police officer who took them

friend's house 70 minutes after event testimonial and witnesses' statements in interview with social worker at hospital testimonial); *United States v. Logan*, 419 F.3d 172 (2nd Cir. 2005); (statement in police interview regarding alibi testimonial even though it constituted a statement in furtherance of conspiracy); *United States v. Saner*, 313 F. Supp. 2d 896 (S.D. Ind. 2004) (statements in response to prosecutor's questions during field interview testimonial).

Chief Dornacker's written statement to the lead detective in the case, Detective Sette, falls squarely within the definition of testimonial hearsay. Because Chief Dornacker cannot be cross-examined about the statement, its admission is barred by the Sixth Amendment confrontation clause.

IV. Chief Dornacker's Conversation with Lt. Schulteis at the Jake's Auto Holiday Party is Inadmissible on Evidentiary and Confrontation Grounds.

The state seeks to admit a verbal statement by Chief Dornacker to Lt. Schulteis at the Jake's Auto holiday party.[3] In the conversation, Chief Dornacker told Lt. Schulteis that Mr. White told him (Chief Dornacker) at the scene "I think I fell asleep."

The state seeks to admit this statement as a statement of recent perception under Wis. Stat. §908.045(2). This hearsay exception has no federal equivalent and it is not considered to be a "firmly rooted" exception. *State v. Manuel,* 2005 WI 75, 281 Wis. 2d 554, 697 N.W.2d 811.

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[3] The exact date of the party is unknown. Because Chief Dornacker's subsequent written statement to Detective Sette is dated December 27, 2010, it can be assumed that the party took place sometime between the date of the accident (December 15, 2010) and December 27, 2010.

In addition to showing that the declarant is unavailable, the foundation requirements for this exception are: (1) the statement was not made in response to the instigation of a person engaged in investigating, litigating, or settling a claim, (2) the statement must narrate, describe or explain an event or condition recently perceived by the declarant, (3) it must be made in good faith and while the declarant's recollection is clear, and (4) the statement was not made in contemplation of pending or anticipated litigation in which the declarant was interested. Wis. Stat. §908.045(2).

It is questionable that a statement of culpability by a suspect in a significant case, passed on from one law enforcement officer to another, would fall within this exception. Although Lt. Schulteis indicates that he was not directly involved in investigating the accident, numerous other deputies and detectives from his department were involved, and Lt. Schulteis clearly knew this. Lt. Schulteis immediately recognized the importance of Chief Dornacker's statement, in that steps were then taken to reduce the statement to writing with Detective Sette, the lead investigator in the case.

The fact that the conversation occurred at a social gathering is irrelevant. It took place between two law enforcement officers, with supervisory positions in their respective jobs. They weren't talking about their holiday plans or the Packers' chances in the play-offs. They were talking about a serious accident with multiple injuries and fatalities which was already under investigation by the district attorney.

Although the application of the statement of recent perception exception might be a close call, the application of the confrontation clause is not. The statement is clearly inadmissible because it is testimonial and its admission would violate the Sixth Amendment.

A statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement *might* be used in the investigation or prosecution of a crime. *State v. Jensen,* 2007 WI 26, ¶25, 299 Wis. 2d 267, 727 N.W.2d 518 (emphasis added).

Chief Dornacker was a first responder to the scene and saw firsthand the seriousness of the accident, as well as the presence of numerous sheriff's department personnel. He surely knew that such an accident, with fatalities, would be investigated. At the holiday party, his comment about what Mr. White told him was not made to just any party guest, but rather to Lt. Schulteis. This was not casual small talk, but a conversation about an admission made by the person who caused the accident. Any reasonable person in Chief Dornacker's position would have known that this important information might be used in the investigation.

For confrontation purposes, it does not matter that the statement was made at a social gathering, or outside the context of formal questioning. In a follow-up case to *Crawford*, the Supreme Court in *Davis v. Washington* indicated that "[t]he Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended

questions than they were to exempt answers to detailed interrogation." *Davis v. Washington,* 547 U.S. 813, 822, n.1 (2006).

It is also irrelevant that Lt. Schulteis was not formally assigned to investigate the case. The *Davis* court, for example, assumed that 911 operators were police officers for purposes of confrontation clause analysis. The Court noted that 911 operators are agents of the police when they speak with callers. *Davis,* 547 U.S. at 823, n.2. *See also, State v. Blue*, 717 N.W.2d 558 (N.D. 2006) (videotaped interview conducted by forensic interviewer at a private child advocacy center while police officer watched from another room was testimonial, as the interviewer either acted in concert with or as agent of the government); *State v. Hooper*, 2006 WL 2328233 (Idaho App. 2006) (videotaped interview by nurse acting in tandem with police who watched interview from another room was testimonial) (collecting cases).

Because any reasonable person in Chief Dornacker's position would have known that his statement to Lt. Schulteis about what Mr. White told him at the scene might be used in a criminal investigation, the statement is considered to be testimonial for Sixth Amendment purposes and its admission would violate the defendant's right to confrontation.

V. Conclusion.

For the foregoing reasons, the defendant respectfully requests that the state's motion in limine be denied.