STATE OF WISCONSIN COURT OF APPEALS
DISTRICT I

Appeal Number: 2016AP000119 - CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs-

DEVIN WHITE,
Defendant-Appellant.

Milwaukee County
Case No. 2010-CF-004776

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND DECISION AND ORDER DENYING POST CONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, BRANCH 40, THE HONORABLE REBECCA F. DALLET, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CASES

i.

OTHER AUTHORITIES

CONSTITUTIONAL AMENDMENTS

STATUTES

ISSUES PRESENTED

1. Whether instructional errors denied White Due Process, a unanimous verdict and jury trial, the right to present a defense, and retroactively enlarged the scope of §940.02 First-Degree reckless homicide contrary to Article I; §I, §V, §VII, and IX of the Wisconsin Constitution; and the 5th, 6th, and 14th Amendments of the U.S. Constitution.

   The trial court held: 1) even "if the court did not organize the instructions in the proper order, the error was harmless," and

2) "the instructions accurately stated the law as a whole and that the burden of proof was not wrongfully placed on the White to disprove *[sic]* self-defense," and 3) "trial counsel was not ineffective for failing to object to the jury instructions as given."

2. Whether a new trial is required because White did not knowingly, intelligently, and voluntarily waive his right to a unanimous 12-person jury trial and verdict on the absence of the self-defense actual and reasonable beliefs elements, contrary to his rights guaranteed by §972.02, Article I; §I, §V, and §VII of the Wisconsin Constitution; and the 6th & 14th Amendments of the U.S. Constitution?

The trial court did not answer this question.

3. Whether this Court should reverse this case in the interests of justice under §752.35 because the real controversy of self-defense was not fully and fairly tried, and because of the miscarriage of justice since White is actually innocent under the correct application of §940.02 and utter disregard?
The trial court did not answer this question.

4. Whether White was denied the effective assistance of trial counsel due to cumulative error, contrary to his rights guaranteed by Article l, §7 of the Wisconsin Constitution, and the 6th and 14th Amendments to the U.S. Constitution?

The trial court held that counsel was not ineffective for failing to prevent the errors that the court did address.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The main issues presented by this appeal concern Constitutional violations and statutory constitution, namely, the correct definition and additional elements of §940.02 First-Degree Reckless Homicide once the privilege of self-defense is raised, the correct burden for the State in negating the self-defense "actual" and "reasonable" beliefs elements beyond a reasonable doubt, and whether §940.02 and utter disregard reach objectively unreasonable self-defense based on "actual

beliefs" which is a legal exception to utter disregard and a complete defense to §940.02. Since *State v. Austin,* 2013 WI App 96, merely reiterated that the State must negate self-defense beyond a reasonable doubt on reckless crimes, which is consistent with case law and the Statutes, the issues can be resolved based on well-established law.

However, since the: 1) broadened definition of §940.02 to include self-defense actual beliefs and objectively unreasonable force (by omission) were applied retroactively and an erroneous self-defense burden was constructed from Statewide pattern instructions; 2) correct self-defense standard on §940.02 announced in *Harp* in 1989 has been ignored in the pattern instructions; 3) White is actually and legally innocent of utter disregard; and 4) Legislature rejected a lesser self-defense standard before the 1987 Homicide Revision, publication is warranted due to the Statewide significance of resolution of the issues. *See* §809.23(l)(a) l-5.

STATEMENT OF THE CASE

This is a self-defense case where White used defensive force against an assailant to terminate an unlawful interference. The State filed a Criminal Complaint and Information charging White with §940.02 First-Degree Reckless Homicide for killing Montrealle Jackson while using a dangerous weapon and felony possession of a firearm. R2; R5. White pled not guilty and requested a jury trial. On August 26, 2011, the jury returned guilty verdicts on all counts. R11; 12. On October 19, 2011, White was sentenced to 45 years in prison on Count 1, concurrent with 15 years on Count 2.

On September 25, 2012, appointed counsel filed a No-Merit Brief. White then filed several motions to extend time to respond because he knew Langston Austin's case was pending due to the errors in the pattern self-defense instructions used in this case. On December 2, 2013, White filed a No-Merit reply after this Court decided ***State v. Austin***, 2013 WI App 96.

On July 14, 2014, this Court rejected the No-Merit Brief, and White retained counsel who filed a §809.30 motion for new trial on August 10, 2015 raising the Constitutional and Statutory issues raised here. After briefing, the court denied the motion without hearing. R76. This appeal follows. R78.

STATEMENT OF FACTS

Because this case involves mostly questions of law and it is undisputed that White was entitled to a self-defense jury trial and instruction, the facts are succinct. The State's case rested mostly on Randall Bradford and Regina Washington who testified that they heard gunshots and looked and saw an exchange of shots between Jackson and White. Neither witness saw who shot first, but both agreed that White fired last. R37:98-97, 104, 109, 111-114.

White testified that he was bar-hopping with friends when he received a call from his brother about keys. R40:42-43, 54. Toward the end of the night, White went to the bar where his brother was at. *Id.* 54-55. White did not know

anyone outside the bar once he arrived and attempted to enter. *Id.* 43, 46. White testified that Jackson—a complete stranger—shot White as he approached the bar's entrance causing White to return fire. R40:43-44, 46-47,74, 77, 83.

Thus, White's testimony that he fired his gun after Jackson shot him was consistent with Bradford and Washington that White fired last. Based on this evidence, the court instructed the jury on §940.02 First-Degree Reckless Homicide, §940.06 Second-Degree Reckless Homicide, and self-defense. R41:3 14-19. See ***State v. Mendoza*****,** 80 Wis.2d 122, 150-56 (1977). Neither party objected to the final instruction.

ARGUMENT

I. INSTRUCTIONAL ERROR DENIED WHITE DUE PROCESS, A UNANIMOUS JURY TRIAL AND VERDICT, THE RIGHT TO PRESENT A DEFENSE, AND RETROACTIVELY ENLARGED THE SCOPE OF §940.02 FIRST-DEGREE RECKLESS HOMICIDE CONTRARY TO HIS CONSTITUTIONAL RIGHTS.

The instructions violated White's rights under both Constitutions and the Statutory requirements of what the State was required to prove on §940.02 by 1) retroactively broadening §940.02 by omitting the self-defense "actual" beliefs elements and unreasonable force, 2) convicting White of an unknown offense of §940.02 with actual beliefs and unreasonable force, 3) omitting the self-defense "reasonable" beliefs elements, 4) omitting the self-defense burden of proof, 5) depriving White of two complete defenses, and 6) suggested the evidence had to show White acted lawfully in self-defense—versus the State proving its absence.

Applicable Law and Standard of Review.

State law "explicitly recognize the defense of privilege." ***State v. Nollie*****,** 2002 WI 4, ¶12. "An actor's conduct, although otherwise criminal, is legally justified when it occurs under one of several circumstances recognized by statute." *Id.* "[A]n act is privileged if it is done in [self]-defense." *Id.* A defendant has the burden of production and "[t]o sustain a claim of self-defense the defendant must show that (1) the defendant had an actual and reasonable belief that

there was an actual or imminent unlawful interference with the defendant's person; (2) the defendant had the actual and reasonable belief that the threat or use of force was necessary; and (3) that the defendant only used such threat or force as he actually and reasonably believed was necessary." *Id.* ¶19. *See* §939.45; §939.48.

If any of the subjective "actual" beliefs are objectively unreasonable, and the State fails to negate them, a defendant cannot be convicted of §940.02. ***State v. Harp***, 150 Wis.2d 861, 882-86 (CA 1989) (modified on other grounds by ***State v. Camacho***, 176 Wis.2d 860, 880-83 (1993); *rev'd by* ***State v. Head***, 2002 WI 99, ¶103-07,140).

As part of a defendant's Statutory presumption of innocence, once self-defense is raised, the State is required to negate the self-defense elements beyond a reasonable doubt. *See* §939.70; ***Moes v. State***, 91 Wis.2d 756, 764-65 (1979); ***Head***, *supra* at ¶67, 106-07; ***State v. Schmidt***, 2012 WI App 113, ¶18 ("lack of [self-]defense [is] element of the crime."). As such, the State must also carry this burden under the 14th Amendment. ***In re Winship***, 397 U.S. 358, 364 (1970); ***Taylor v. Kentucky***, 436 U.S. 478, 483-86 (1978); ***Jackson v. Virginia***, 443 U.S. 307, 315-19 (1979).

Proper instruction "is a crucial component of the fact finding process." ***State v. Schulz***, 102 Wis.2d 423, 426 (1981). Instructions must inform the jury of the State's burden when several Statutes are at issue. *See* ***State v. Howard***, 211 Wis.2d 269, 276-78 (1997). An instruction "is erroneous if it fails to clearly place the burden of proving all elements of the offense on the State," and instructions must be viewed as a whole to determine if it was reasonably likely the jury could have returned a verdict based on insufficient proof. ***State v. Patterson***, 2010 WI 130, ¶53. "A court may not direct a verdict of guilt against a defendant in a criminal case." ***State v. Peete***, 185 Wis.2d4, 19 (1994).

The instructions must be considered from the standpoint of persons who usually do not possess law degrees. ***State v. Hubbard***, 2008 WI 92, ¶26. "[I]f it is possible that a reasonable juror could have given the instruction two different interpretations, [this Court] must assume the worst...that the jury interpreted the instruction in a light most damaging to the defendant." ***Adams v. State***, 92

Wis.2d 875, 885 (CA 1979).

A trial court must "exercise its discretion in order 'to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" ***State v. Neuman***, 2013 WI 58, ¶89. Discretionary decisions must be arrived at by applying proper legal standards; "the failure to apply the correct legal standards is an erroneous exercise of discretion." ***Lemere v. Lemere***, 2003 WI 67, ¶14.

Whether instructions violate Due Process is a legal question reviewed *de novo*. ***State v. Zelenka***, 130 Wis.2d 34, 43 (1986). The interpretation and application of Constitutional and Statutory provisions are legal questions reviewed *de novo*. ***State v. Alexander***, 2013 WI 70, ¶18.

A. §940.02 As Applied To White Violated Due Process By Failing To Give Fair Warning That He Could Be Convicted Of §940.02 If Acting With Self-Defense "Actual Beliefs" Or Using Unreasonable Force Because No Hybrid Crime Of §940.02 With Actual Beliefs Or Unreasonable Force Exists.

Article I, §9 of the Wisconsin Constitution "preserves the right to obtain justice on the basis of the law as it in fact exists." ***Aicher v. WI Patients Comp. Fund***, 2000 WI 98, ¶43. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." ***Connally v. General Const. Co***., 269 U.S. 385, 391 (1926). "The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving his conduct may seem." ***Viereck v. U.S.***, 318 U.S. 236, 243 (1943). "[W]hen [a] Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." ***Rivers v. Roadway Express, Inc***., 511 U.S. 298, 312-13 (1994).

"There are two ways in which a Statute may fall short of the mark: it may fail to give a person of ordinary intelligence fair notice of what conduct is prohibited, or it may be so lacking in standards that it invites arbitrary

enforcement." ***Whatley v. Zatecky***, 833 F.3d 762, 777 (CA7 2016) "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." ***Grayned v. Rockford***, 408 U.S. 104, 108-09 (1972). The "void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." ***Kolender v. Lawson***, 461 U.S. 352, 357-58 (1983). The government violates Due Process when it takes away liberty "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." ***Johnson v. U.S.***, 135 S.Ct. 2551,2556 (2015).

The Supreme Court has held that when a new state-court application of law has *ex post facto* effect to retroactively narrow or broaden a criminal statute to subject a person to criminal liability for past conduct, he is denied Due Process and fair warning that his conduct constitutes a crime. ***Bouie v. Columbia***, 378 U.S. 347, 353-55 (1964); ***Marks v. U.S.***, 430 U.S. 188, 195 (1977). *See* ***Cole v. Young***, 817 F.2d 412, 420-23 (CA7 1987). ***Bouie*** also applies to judicial alteration of a common-law defense or doctrine of criminal law. ***Rogers v. Tennessee***, 532 U.S. 451,461-62 (2001); *cf.* ***State v. Hobson***, 218 Wis.2d 350, ¶41 (1998) (*ex post facto* precludes new law from depriving defendant of previous defense). Lastly, charges or instructions cannot combine two distinct crimes to create a "generic" crime. ***Schad v. Arizona***, 111 S.Ct. 2491,2497-98 (1991).

i. §940.02 First-Degree Reckless Homicide and utter disregard do not reach conduct motivated by self-defense "actual beliefs" in an unlawful interference and/or force used, even if the beliefs and force were objectively unreasonable.

When self-defense is not an issue, the State must prove the following elements on §940.02:

1. The defendant caused someone's death;
2. By actions that created an unreasonable and substantial risk of death or great bodily harm;

3. The defendant was "aware of that risk"; and
4. The circumstances showed utter disregard for human life.

State v. Edmunds, 229 Wis.2d 67, 75 (CA 1999).

But once self-defense is raised the definition of §940.02 and the State's burden must be modified (like §940.01) to include another element(s): the State must negate a defendant's subjective "actual beliefs," ***Harp***, *supra* at 882-86, or, objective "reasonable beliefs" in the self-defense force used, or both beyond a reasonable doubt. ***Head***, supra at ¶67, 106-107; ***Moes***, *supra* at 764-65; ***State v. Staples***, 99 Wis.2d 364, 380 (CA 1980) (absence of self-defense is element of any crime); ***State v. Shah***, 134 Wis.2d 246, 254-55 (1986) (State must negate self-defense on §940.02).

Because the Legislature has not defined the reach of §940.02 and utter disregard, Wisconsin Courts have declared exceptions to both: §940.02 and utter disregard do not reach excused or justified conduct, even if not privileged or objectively reasonable. ***State v. Dolan***, 44 Wis.2d 68, 73 (1969); ***Wangerin v. State***, 73 Wis.2d 427, 436 (1976) (utter disregard "exists when the conduct causing death demonstrates an utter lack of concern for the life and safety of another and for which conduct there is no justification or excuse."); ***State v. Ott***, 111 Wis.2d 691, 695 n.4 (CA 1983)(rejecting State's argument that justification or excuse must be reasonable to preclude depraved mind); ***State v. Blanco***, 125 Wis.2d 276, 281-82 (CA1985) (utter disregard only if justification or excuse absent).

Utter disregard must be found in the act itself and the objective circumstances of the act. ***State v. Weso***, 60 Wis.2d 404, 408-12 (1973). A shooting typifies utter disregard, however, if the reason for shooting in self-defense is to stop an unlawful interference, even if unreasonable, utter disregard does not apply. ***State v. Bernal***, 111 Wis.2d 280, 284-85 (CA 1983) (no conduct evincing depraved mind if "otherwise defensible, even if not privileged."); ***State v. Miller***, 2009 WI App 111, ¶37-40 (even if not self-defense, shooting was not utter disregard if reason was to terminate unlawful interference); ***State v. McClinton***, 205 Wis.2d 736 (CA 1996) (incomplete self-defense-"negated…'utter disregard for

human life.'")(App 189).(See footnote#[1]) See also ***State v. Felton***, 110 Wis.2d 485, 518 (1983) (relying on imperfect self-defense instruction: "Hereafter, a jury will be instructed to reject...[§940.02] if [§940.05] elements...are present."); ***State v. Sarabia***,118 Wis.2d 655, 675 (1984) (unreasonable self-defense is not depraved mind); ***State v. Gomaz***, 141 Wis.2d 302, 310 (1987) (§940.02 invalid if State fails to negate imperfect self-defense).

Other Courts have followed Wisconsin which is in accord with the common law. ***State v. Leidholm***, 334 N.W.2d 811, 816 (ND 1983) ("honest but unreasonable belief will never result" in murder) (citing ***Mendoza***); ***People v. Gonzalez***, 1 N.Y.3d 464, 468 (NY 2004) (depraved indifference insufficient even if self-defense rejected); ***People v. Payne***, 3 N.Y.3d 266, 271-72 (NY 2004) (same); ***Raneri v. State***, 255 So.2d 291, 294 (Fla. CA 1971) (same, cited by ***Kasieta v. State***, 62 Wis.2d 564, 571 n.2 (1974)); ***Wood v. State***, 81 Miss. 408, 411-12 (1902) (same); ***Dorsey v. State***, 74 So.3d 521, 524 (Fla. CA 2011) ("While the jury may...reject...self-defense...a defendant's impulsive overreaction to a victim's attack warrants a conviction for manslaughter, not second degree murder."); ***Brown v. U.S***., 159 U.S. 100, 103 (1895) (imperfect self-defense is not murder); ***Stevenson v. U.S.***, 162 U.S. 313, 320-23 (1896) (same, cited by ***Ross v. State***, 61 Wis.2d 160 (1973));***Wallace v, U.S.***,162 U.S. 466, 471-74 (1896) (same); ***Addington v. U.S.***, 165 U.S. 184, 186 (1897) (same); ***Anderson v. U.S.***, 170 U.S. 481, 510-11 (1898) (same); ***Mullaney v. Wilbur***, 421 U.S. 684, 696 (1975) (same); ***Patterson v. N.Y.***, 432 U.S. 197,205-07 (1977) (same).

No published case has broadened §940.02 and utter disregard to give fair notice to persons of common intellect that they could be convicted of §940.02 or that utter disregard reaches conduct motivated by a defendant's subjective but objectively unreasonable belief in the self-defense force used. The published cases describing what utter disregard is (and is

[1] An unpublished case can be cited to show a conflict exists in applying the law. ***State v. Higginbotham***, 162 Wis.2d 978, 998 (1991). ***McClinton*** shows that this Court has agreed that incomplete, imperfect, or unreasonable self-defense is not utter disregard. As such, ***McClinton*** and ***Miller*** in comparison to White's case demonstrate unequal application of the law which is the main concern of vague laws.

not) gives no basis for citizens to know their conduct is in the proscribed zone.

To the contrary, based on the above-cited cases, a person can legally use too much self-defense force and still be actually innocent and/or legally entitled to be found not guilty of §940.02 and utter disregard. *See* ***Grayned***, 408 U.S. at 108 ("Vague laws may trap the innocent by not providing fair warning."); ***Cole***, 817 F.2d at 426 ("grave risk that... conviction was factually as well as legally erroneous" due to missing element).

As demonstrated below, the court did not "fully and fairly" inform the jury of the applicable law because the instructions failed to inform the jury that if the State did not negate the subjective self-defense elements beyond a reasonable doubt, *i.e.,* even if White's subjective beliefs in the unlawful interference and/or use of force were objectively unreasonable, the jury could not convict him of §940.02 or find utter disregard.

ii. The 1987 Homicide Revision did not alter §940.02 or the State's self-defense burden.

During a 1985 Homicide Committee meeting the State requested that it be relieved of its burden of negating imperfect self-defense and the self-defense actual beliefs. Instead, the State suggested shifting the burden to a defendant to prove actual beliefs which would then trigger the State's burden to negate actual beliefs, or prove them objectively unreasonable. *See* Frank J. Remington Center's *amicus* brief in ***State v. Head*** which included a letter from Prof. David Schultz citing the legislative history of the Homicide Revision and Judicial Council meetings that rejected altering any self-defense burdens (App 160-67). (See footnote#[2])

The Committee and Legislature rejected the State's request, however, the standard instructions created after the Revision (801, 1016, 1017, and 1022) omit actual beliefs and unreasonable force on §940.02 and these omissions have provided the State with more than the lesser standard it had

[2] Available from UW-Madison Law School at: http://www.librarv.law.wisc.edu/eresources/wibriefs.

sought. *See* Judicial Council Minutes of April 19, 1985, pp. 9-14 ("[I]f you unreasonably believe you're in imminent danger of death and you use deadly force, that's 'imperfect self-defense,' and you are guilty of manslaughter [§940.05]. [If] [y]ou reasonably believe that you're in imminent danger of death or great bodily harm, but you unreasonably decide to use deadly force[,] [t]hat is also 'imperfect self-defense.'" (App 168-72); *Importance Of Clarity In The Law Of Homicide: The Wisconsin Revision*, 1989 Wis.L.Rev. 1323, 1326 (1989) (Committee's purpose "was to clarify the homicide statutes, not to recommend major substantive changes in them."); Note: ***State v. Camacho***: *The Judicial Creation Of An Objective Element To Wisconsin's Law Of Imperfect Self-Defense Homicide*, 1995 Wis.L.Rev. 741, 749-59 (1995) (noting Committee's rejection of altering State's burden on perfect and imperfect self-defense).(See footnote#[3])

After reviewing the 1987 Revision and noting that the absence of "actual beliefs" were a defense to and elements of §940.01 First-Degree Intentional Homicide under §940.01(3), this Court held that the same standards applied to §940.02:

> We are free to hold—that [§940.05] is an affirmative defense to...[§940.02], even though it is not among the several defenses to criminal liability the legislature established in sees. 939.42 through 939.48...

Harp, *supra* at 884. This Court then defined the State's burden on §940.02 once self-defense is raised:

> If the jury finds that the state proved the...statutory elements of [§940.02], but...failed to prove that the defendant lacked an actual belief that the force used was necessary in self-defense, then the state has failed to disprove not only perfect self-defense but also manslaughter/imperfect self-defense, and the jury should be so instructed. The jury should be instructed that under these circumstances, the defendant must be acquitted of [§940.02]. If the defendant's actual belief was reasonable, then the defendant acted in perfect self-defense and must be acquitted of [§940.02].

[3] Whereas §940.02 excludes self-defense actual beliefs and unreasonable force, §940.05 includes actual beliefs, unreasonable force, and all of §940.02. Mitchell v. State, 47 Wis.2d 695, 702-03 (1970); State v. Kelley, 107 Wis.2d 540, 547 (1982); Harp, supra at 869, 881, 885; State v. Seifert, 155 Wis.2d 64, 70 n.4 (1991). The Revision did not alter case law. Camacho, supra at 882-83.

> If defendant's actual belief was unreasonable, then the defense of manslaughter/imperfect self-defense has been established, and the defendant must be acquitted of [§940.02].

Id. at 885-86. ***Harp*** holds that self-defense actual beliefs modify the State's overall burden of proof and that a defendant must be acquitted of §940.02 if the State does not negate actual beliefs and unreasonable force beyond a reasonable doubt. This holding is law. See ***Cook v. Cook***, 208 Wis.2d 166, 189-90 (1997); ***Seifert***, *supra* at 70 (approving ***Harp***); ***Head***, *supra* at ¶¶24, 140 (instructions before ***Camacho*** correctly stated law).

iii. The trial court violated Due Process and exercised erroneous discretion because the instructions did not fully and fairly state the law by omitting self-defense actual beliefs and unreasonable force which retroactively enlarged the scope of §940.02.

In this case the written instructions provided to the jury stated:

> **Statutory Definition of First Degree Reckless Homicide**
>
> First degree reckless homicide, as defined in...§940.02...is committed by one who recklessly causes the death of another human being under circumstances that show utter disregard for human life.
>
> **State's Burden of Proof**
>
> Before you may find the defendant guilty of [§940.02], the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.
>
> 1. The defendant caused the death of Montrealle Jackson...
> 2. The defendant caused the death by criminally reckless conduct...
> 3. The circumstances showed utter disregard for human life...
>
> **Jury's Decision**
>
> If you are satisfied beyond a reasonable doubt that the defendant caused the death of [the victim] by criminally reckless conduct and that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of first degree reckless homicide.

R41:5-6 (emphasis added). The court told the jury that

it must accept the law given (R41:11-12). The oral instruction mirrored the written one that only listed §940.02's Statutory elements. R41:16-18; 44:6-7 (App 106-08, 114-15). Nowhere did the court include in the instruction the absence of self-defense actual beliefs and unreasonable force in the definition of §940.02 or the State's overall burden of proof despite the fact that actual beliefs and unreasonable force are raised once reasonable beliefs are raised. *See* ***Ross***, ***Harp***, ***Head***, *supra.*

As such, by omitting actual beliefs and unreasonable force from §940.02 and applying such a retroactively broadened construction to obtain a conviction, the State has imprisoned White—without notice—for conduct that was not criminal: §940.02 with actual beliefs and unreasonable force. This is conduct he may have been guilty of under §940.05, but legally innocent of under §940.02 because ***Harp*** held that a defendant "must be acquitted" if the State fails to negate actual beliefs on §940.02. 150 Wis.2d at 885-86. ***Camacho*** modified ***Harp*** by increasing a defendant's burden of production —not reducing the State's burden of persuasion. 176 Wis.2d at 882. ***Camacho*** did not alter the State's ***Harp*** burden of negating actual beliefs and unreasonable force on §940.02 once the objective threshold was met because ***Camacho*** was not new law "at all." ***State v. Jones***, 192 Wis.2d 78, 109 (1995) (rejecting ***Bouie*** argument because ***Camacho*** not new law).

The Wisconsin Supreme Court and Legislature have not disturbed ***Harp***, and because the Legislature is presumed to have knowledge of case law, ***State v. Gordon***, 111 Wis.2d 133, 145 (1983); it is presumed to know that unless it changes a law, this Court's law remains valid. ***State v. Banks***, 105 Wis.2d 32, 46 (1980). ***Harp*** has been overlooked since 1993 with the creation of WI JI-Crim 801, 1016, 1017, and 1022, however, the belated correction of instructions reflecting this Court's law caused the Seventh Circuit to grant relief in ***Cole v. Young***, 817 F.2d 412 (CA7 1987). ***Austin*** proves the Committee overlooked the law by omitting all self-defense burdens and elements on reckless crimes.

Here, White is not pressing the defense of imperfect self-defense; neither did ***Miller*** nor ***McClinton***. Rather, once the reasonable beliefs burden of production is met, actual beliefs are met, ***Ross***, 61 Wis.2d at 167-68, because "it is impossible to act in perfect self-defense without actually

believing that the force used was necessary for self-defense." ***Harp,*** 150 Wis.2d at 885. Instead, White asserts that actual beliefs modify §940.02 and/or the State's burden of persuasion by adding a negative element, just as it modifies §940.01. *See* §940.01(3); WI JI-Crim 1010 and 1014 (actual beliefs are third element on §940.01); compare 1016, 1017, and 1022 (no self-defense elements on §940.02 or §940.06).

The jury must also be informed that unreasonable self-defense force is an exception to utter disregard when self-defense is raised by the facts. Otherwise, the standard instructions implicitly "widens the net" by omission, ***Kolender***, *supra,* while creating a "generic" crime, ***Schad***, *supra,* by allowing a verdict on §940.02 with self-defense actual beliefs and unreasonable force: a non-crime.

Further proving the law was incorrectly applied and that the jury returned an invalid §940.02 verdict in this case if White acted with self-defense actual beliefs or unreasonable force is shown because the court told the jury: "*if the defendant was acting lawfully in self-defense, his conduct did not create an unreasonable risk to another*" (*emphasis* added). R41:17. By emphasizing whether White acted "lawfully" in self-defense, the court implicitly told the jury it could return a §940.02 verdict if White acted unlawfully in self-defense, *i.e.,* if the force was objectively unreasonable. Allowing the jury to return a guilty verdict based on §940.02's Statutory elements violated Due Process. *See* ***Whatley***, 833 F.3d at 779 (Due Process violated when "trial court gave the jury only the language of the statute.").

Yet the only crime a defendant can be convicted of when the State proves a defendant acted unreasonably in self-defense, or fails to negate self-defense actual beliefs is §940.05. *See* ***Harp***, *supra* at 883 ("Excessive self-defense is not an absolute defense but it affects the nature of [§940.02]. The legislature recognized that fact by creating…[§940.05]..."); ***Ross***, 61 Wis.2d at 168 (imperfect self-defense is innocent of §940.02).

Even if White was not entitled to an acquittal if the State failed to negate actual beliefs, he was entitled to not be found guilty of §940.02. Holding otherwise renders §940.05 mere surplusage because §940.05 includes all of §940.01 and §940.02 as its first element, and unreasonable force as its

final two elements. *See* ***Mitchell***, ***Kelley***, ***Harp***, *supra.* The standard instructions obscure the law distinguishing §940.02 from §940.05 while removing the State's self-defense burdens on §940.02.

Because Wisconsin law is clear that §940.02 does not embrace self-defense actual beliefs or unreasonable force, and because the absence of actual beliefs are a defense to and elements of §940.02, and because unreasonable self-defense force is an exception to utter disregard, the conviction must be reversed because White is effectively convicted of an unknown offense: §940.02 with actual beliefs and unreasonable force. If the jury convicted White of §940.02 because his conduct was unreasonable self-defense force, the conviction violates the 14th Amendment's Due Process Clause and runs afoul of ***Bouie***, ***Kolender***, ***Rogers***, and ***Harp***.

To demonstrate, the Seventh Circuit has reversed two cases similar to ***Harp*** where the jury was not informed of the exceptions to murder. In ***Falconer v. Lane***, 905 F.2d 1129, 1132 (CA7 1991), the Court held that Due Process was violated when the jury was not told that unreasonable self-defense precluded a murder verdict under Illinois law. *See* ***Taylor v. Gilmore***, 954 F.2d 441, 452 (CA7 1992) (applying ***Falconer***, evidence of manslaughter exonerates murder) rev'd at ***Gilmore v. Taylor***, 508 U.S. 333, 353 (1993) (Blackmun, J. dissenting from majority's refusal to apply ***Falconer*** retroactively because the jury was never told that "a person who killed under...provocation [is] innocent of murder.")

Likewise, in ***Sanders v. Cotton***, 398 F.3d 572, 581-83 (CA7 2005), the Court held that counsel was ineffective for not pressing an instruction that would have told the jury that provocation precluded a murder verdict under Indiana law. In Wisconsin, like ***Falconer*** and ***Sanders***, a defendant who actually believed in an unlawful interference and/or the force used in self-defense—even if unreasonable—cannot be convicted of §940.02 because no such crime of §940.02 with actual beliefs or unreasonable force exists. *See* ***Harp***; ***Johnson v. State***, 129 Wis. 146, 150-52, 158-64 (1906).

In the trial court, the State did not dispute that ***Harp*** was valid law on the State's burden on §940.02 once self-defense is raised, or that the instructions enlarged the scope of §940.02—the State has conceded error by ignoring these

issues. ***State v. Jackson***, 2015 WI App 49, ¶49 (unrefuted arguments deemed conceded). The trial court also failed to address these errors. However, the trial court and the State were bound by precedent from this Court and both Supreme Courts. ***Pro. Office Bldgs., Inc v. Royal Indem. Co***., 145 Wis.2d 573, 580-81 (CA 1988).

If ***Harp*** and the cases it relied have been overruled, or if §940.02 has been enlarged to embrace self-defense actual beliefs and unreasonable force, this Court must say so. This must be done in order to ensure equal application of the law, and to provide notice and guidance to lower courts, prosecutors, defense attorneys, defendants, and the public.

B. The Trial Court Violated Due Process And Exercised Erroneous Discretion By Not Instructing The Jury That The State Must Negate Self-Defense Beyond A Reasonable Doubt On §940.02.

The State has had the burden to negate self-defense on §940.02 before and after the 1987 Revision. *See* §939.45, §939.70, ***State v. Kanzelberger***, 28 Wis.2d 652 (1965); ***Moes***; ***Shah***; ***Harp***; ***Head***, *supra.*

Omission of the State's burden of negating self-defense beyond a reasonable doubt misstates the law, rendering an instruction erroneous. ***State v. Austin***, 2013 WI App 96, ¶6, 12, 16-17. In ***Sullivan v. Louisiana***, 508 U.S. 275, 277-82 (1993), the Court held that a deficient or missing reasonable doubt instruction violates the 5th, 6th, and 14th Amendments and requires automatic reversal. *See* ***Howard***, 211 Wis.2d at 290-93 (reversed in part under ***Sullivan*** due to "no [jury] finding" of nexus requirement); ***Jackson***, 443 U.S. at 320 n.14 (missing reasonable doubt burden "never harmless"); ***Carpenters v. U.S***., 330 U.S. 395, 408-09 (1947); ***Bollenbach v. U.S.***, 326 U.S. 607, 614 (1946); ***U.S. v. US Gypsum Co.***, 438 U.S. 422, 446 (1978); ***Rose v. Clark***, 478 U.S. 570, 578 (1986); ***U.S. v. Martin Linen Supply Co.***, 430 U.S. 564, 573 (1977) (erroneous reasonable doubt standard akin to directed verdict).

In ***Cool v. U.S.***, 409 U.S. 100, 104 (1972), the Court held that an instruction that reduces the ***Winship*** standard violates the presumption of innocence and requires "the defendant to establish his innocence."

Like the entrapment defense, self-defense raises additional facts for the State to negate only after proving a completed crime. ***Staples***, 99 Wis.2d at 380; *cf.* ***State v. Saternus***, 127 Wis.2d 460, 468 (1986) (entrapment triggered after "defendant...has done every act essential to the completion of the offense."). "To illustrate, a defendant who successfully raises the affirmative defense of perfect self-defense may be found not guilty even if the State proves that the defendant killed a person intentionally." ***State v. Watkins***, 2002 WI 101, ¶39. Likewise, a defendant is entitled to an acquittal "even if" the State proves any other homicide, *i.e.,* that a defendant caused death with any lesser mens rea yet fails to negate self-defense.

i. The trial court exercised erroneous discretion by including the State's self-defense reasonable doubt burden on §940.06 but not on §940.02.

As shown above the written and oral instructions told the jury to return a guilty verdict if the State proved §940.02's Statutory elements. R41:16-18. Nowhere in the §940.02 instruction did the court inform the jury that the State was required to negate self-defense beyond a reasonable doubt in addition to proving §940.02. In contrast, the court included the self-defense burden on §940.06:

> **Statutory Definition of Second Degree Reckless Homicide**
>
> Second degree reckless homicide, as defined in §940.06..., is committed by one who recklessly causes the death of another human being.
>
> **Difference Between First and Second Degree Reckless Homicide**
>
> The difference between [§940.02] and [§940.06] is that [§940.02] requires proof of one additional element: that the circumstances of the defendant's conduct showed utter disregard for human life.
>
> **State 's Burden of Proof**
>
> The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

> If you are satisfied beyond a reasonable doubt that all the elements of [§940.02] were present, except the element requiring...utter disregard...you should find the defendant guilty of [§940.06],

R44:7 (emphasis added). The oral instructions mirrored the written instructions given to the jury. R41:18-19.

Here, the court erred by including the State's self-defense burden on §940.06 but not on §940.02. *See* R41:3; App 101 ("Now, the substantive instruction I did fiddle with. I found the [s]elf-defense part that applied to reckless offenses"). For starters, the court gave the wrong self-defense instruction (WI Crim-JI 805 used on "intent" crimes) along with WI Crim-JI 801/1022 (R41:14; App 104) which simultaneously omitted the self-defense burden on §940.02, combined a negative self-defense burden only on §940.06, while telling the jury to merely "consider" self-defense on §940.02 (R41:14, 17). *See* ***Corrigan v. U.S.***, 548 F.2d 879, 882-83 (CA10 1977) ("consider" does not meet self-defense reasonable doubt standard).

In rejecting White's argument, the trial court held that no error occurred because the instructions as a whole were a correct statement of the State's burden of negating self-defense:

> The court tailored the instructions as necessary, and it specifically included instructions to the jury that the State had the burden of proving that the defendant did not act lawfully in self-defense.

R76:2. Additionally, the court held that even if it did not "organize the instructions in the proper order, the error was harmless." R76:3.

The court was wrong for the same reason the trial court and State were wrong in ***Austin*** because the State's self-defense burden was omitted on the crime he was convicted. Under ***Sullivan***, harmless error does not apply to defective or missing reasonable doubt standard.

In rejecting the No-Merit Brief in ***Austin***, this Court noted a problem that the self-defense burden was located

elsewhere in the instructions on defense-of-others but not on the charge ***Austin*** was convicted. *See* Order in ***State v. Austin***, 2010AP2580-CRNM, ¶5-8. (App 180-82). This Court noted the contrast and rejected the State's argument because the State's self-defense burden was located elsewhere in the instructions, they correctly stated the law. *See* ***Austin***, 2013 WI App 96, ¶7-8.

Thus, ***Austin*** rejected the same rationale used by the trial court in this case: because the burden of negating self-defense was inserted somewhere, the instructions as a whole conveyed the State's self-defense burden to the jury on the charged offense. *See* ***Staples***, 99 Wis.2d at 380 (self-defense burden should be inserted after each offense). After reviewing the Committee's notes and rejecting the State's claim that it need not negate self-defense because it is a negative defense on reckless crimes, this Court held that "the jury must be instructed as to the State's [self-defense] burden of proof regarding the nature of the crime, even if the defense is a negative defense. ***Austin***, *supra* at ¶16.

The fact that jury was provided with written instructions in this case increased the probability that it applied the law in the fashion suggested by the State in ***Austin***: because self-defense is a negative defense, proof of §940.02's Statutory elements negated the defense, i.e., White did not act "lawfully in self-defense." This is consistent with the 20 years of oversight just as the State pressed in ***Austin*** based on the Committee's notes. Nothing in the instructions suggested otherwise. Here, the jury could have applied the law in the fashion suggested by the State and accepted in the court below—but rejected in ***Austin*** —because the jury would have noticed that the self-defense burden was included in §940.06 (i.e., "somewhere "), and not §940.02. Yet the court and State overlooked a key obstacle to the jury's consideration of §940.06 which contained the State's self-defense burden: the bridging instruction told the jury to consider §940.06 only if the evidence was insufficient to prove §940.02. R41:18; 44:6.

If the jury believed that proof of §940.02 negated self-defense or proved it unreasonable, the jury was at liberty to return a §940.02 verdict, and if that happened, the jury never considered §940.06 which held the State's burden of negating self-defense. The missing self-defense reasonable doubt

language in this case prejudiced White because he was convicted of §940.02. If the jury applied the law as directed, it was contrary to ***Moes***, ***Staples***, and ***Harp***, which all hold that the absence of self-defense is an additional burden to the Statutory elements of any crime that must be proved beyond a reasonable doubt—thus contrary to ***Winship*** and ***Sullivan***.

The State was let off the hook for proving the criminal and self-defense elements and burdens because White had to admit to the shooting, which caused the death, in order to receive the self-defense instruction—which then omitted the reason for White's testimony—to prevent the conviction by increasing the State's burden of persuasion above §940.02. By relieving the State's self-defense burden after White testified, White was "affirmatively misled into unknowingly confessing to a crime of which he claimed he was innocent." *Cf.* ***Gilmore***, 508 U.S. at 363-64 (testimony establishing murder defense akin to guilty plea once instruction omitted State's burden on defense). Due to the omitted self-defense burden on §940.02, White's testimony was the equivalent of a guilty plea and unknowing, involuntary, and unintelligent confession.

Here, like ***Austin***, the State's burden of negating self-defense was missing on the crime White was convicted of, but included elsewhere in the instruction. Like ***Austin***, the missing reasonable doubt language did not "impress upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused," ***Jackson***, 443 U.S. at 315, or produce a jury verdict that may be weighed for harmless error—it is structural error under ***Sullivan*** which requires automatic reversal.

However, even if harmless error applies, this Court has thrice held that a missing or incorrect self-defense burden of proof is not harmless. *See* ***Austin***, ***Harp***, 150 Wis.2d at 889-90; ***State v. Harp***, 161 Wis.2d 773, 775, 783 (CA 1991), (instructions "Constitutionally defective."). The State cannot meet its burden of proving the error harmless beyond a reasonable doubt. ***State v. Wyss***, 124 Wis.2d 681, 741 (1985).

C. Counsel's Failure To Object To The Instructions Does Not Bar Relief.

While counsel failed to object to the instructions, that

failure does not bar relief despite §805.13 and ***State v. Schumacher***, 144 Wis.2d 388 (1988). First, regarding self-defense and what the jury must find in a self-defense case, the Supreme Court explained that counsel's failure to object does not bar review where the central issue is statutory construction and what the State is required to prove to a jury. *See* ***Peete***, 185 Wis.2d at 14.

Second, although trial counsel's failure to object would bar review of the instructional claims as of right, review is not barred on any of the errors in the context of ineffective counsel, *see* Section IV, or in the interests of justice under §752.35, *see* Section III.

Third, because White has claimed above that the missing self-defense burden is structural error, the Wisconsin Supreme Court has already held that "If there were structural error in the trial...such error could not be waived and there was therefore no need for an ineffective assistance of counsel claim." ***State v. Carprue***, 2004 WI 111, ¶57.

II. A NEW TRIAL IS REQUIRED BECAUSE WHITE DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HIS RIGHT TO A UNANIMOUS 12-PERSON JURY TRIAL AND VERDICT ON THE ABSENCE OF THE SELF- DEFENSE ELEMENTS, CONTRARY TO HIS STATUTORY AND CONSTITUTIONAL RIGHTS.

The presumptive right to a unanimous 12-person jury trial is a fundamental Due Process right guaranteed by §972.02 and both Constitutions and must be waived knowingly, voluntarily, and intelligently on the record. Here, there is no jury waiver on any self-defense elements.

Applicable Law and Standard of Review.

Under §972.02 Jury trial; waiver:

> (1) Except as otherwise provided in this chapter, criminal cases shall be tried by a jury...unless the defendant waives a jury in writing or by statement in open court...on the record, with the approval of the court and the consent of the state.

The Due Process Clause of the 14th Amendment

"protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***Winship***, 397 U.S. at 364. Both Constitutions require that a jury, rather than a judge, make factual determinations beyond a reasonable doubt. ***State v. Cleveland***, 50 Wis.2d 666, 670 (1970); ***Duncan v. Louisiana***, 391 U.S. 145, 149, 155 (1968); ***Sullivan***, 508 U.S. at 277; ***Gaudin v. U.S.***, 515 U.S. 506, 510-11 (1999); ***State v. Hauk***, 2002 WI App 226, ¶32; ***State v. Villareal***, 153 Wis.2d 323, 326 (CA 1989) (modified by ***State v. Smith***, 2012 WI 91, ¶62, n.19); ***Evans v. Dorethy***, 833 F.3d 758, 762 (CA7 2016) (violation occurs if "judge [withdraws] from the jury any factual questions.").

Under the Wisconsin Constitution, White had a right to a 12-person, ***State v. Hansford***, 219 Wis.2d 226, 241, ¶19 (1998), unanimous jury verdict on the absence of the self-defense elements. ***Holland v. State***, 91 Wis.2d 134, 138 (1979). ***State v. Lomagro***, 113 Wis.2d 582, 590-91 (1983).

"Personal [jury trial] waiver may not be inferred or presumed" from a silent record. ***Hauk***, *supra* at ¶36. A defendant's jury trial right is violated if he has not validly waived his right to have the jury determine each element unanimously. Because it is fundamental right, presumption of nonwaiver controls-- jury waiver requires a showing that White knowingly waived it. ***Smith***, 2012 WI 91, ¶52-57. See ***State v. Ndina***, 2009 WI 21, ¶31-32 (some rights not lost by defendant's failure to assert them); ***N. Y. v. Hill***, 528 U.S. 110, 114-15 (2000) ("For certain fundamental rights, the defendant must personally make an informed waiver.").

Whether a defendant has been denied a fundamental Constitutional right is a question of law this Court reviews de novo. ***State v. Alexander***, 2013 WI 70, ¶18. Because this issue "considers whether there was a valid jury waiver rather than an erroneous jury instruction, [this Court] do[es] not engage in a harmless error analysis." ***Hauk***, *supra* at ¶37 n.9. No waiver requires a new trial. ***State v. Livingston***, 159 Wis.2d 561, 569 (1991).

A. White Did Not Knowingly, Intelligently, Or Voluntarily Waive His Right To A 12-Person Unanimous Jury Trial On The Absence Of Any Self-Defense Elements.

Self-defense "is a question peculiarly within the province of the jury." ***Mendoza***, 80 Wis.2d at 153, 156. *See* ***Banks v. State***, 51 Wis.2d 145, 153 (1971) (same). The absence of self-defense actual and reasonable beliefs elements are additional to §940.02 and "heavy burden" that the State must negate beyond a reasonable doubt. *See* ***State v. Dundon***, 226 Wis.2d 654, ¶24 (1999) (excuse or justification "impose[s] a heavy burden on prosecutors."). Yet the self-defense elements are irrelevant unless the State first proves §940.02's elements because proof of §940.02 is not dispositive of whether the State has negated self-defense beyond a reasonable doubt. ***Moes***; ***Staples***; ***Harp***; ***Head***; ***Watkins***; ***Austin***, *supra*.

In this case, there was no jury trial or unanimous verdict on the absence of any self-defense elements because, as shown above, the verdict was based on the court's instructions that only required proof of §940.02's Statutory elements. By only instructing the jury that it only had to be unanimous on finding §940.02's elements without unanimity on the absence any self-defense elements, White was denied jury unanimity, trial, and verdict on the absence of all self-defense elements. Compare ***Villareal***, 153 Wis.2d at 325-26 (new trial because verdict on §940.02 elements did not reflect "while armed" jury finding).

Here, there is no written or oral waiver on the record, or proof that White knew of or intended to waive a jury trial on any self-defense elements. As such, there was no jury trial, waiver, or finding that the State proved unanimous the absence of the self-defense elements especially because the State's self-defense burden is not triggered unless it has first proved §940.02. Self-defense is not an "either or" legal proposition-- it is an "even if" proposition: even if the State proves any completed homicide, a defendant is still not guilty if the State fails to carry its additional negative self-defense burden. ***Watkins***, *supra* at ¶39.

To prove this point under an extreme example, a defendant can waive jury trial on any offense's elements and only have the jury determine whether the State has unanimously negated the presence of the self-defense elements beyond a reasonable doubt.

The deprivation of jury trial by non-waiver was aggravated in this case because White was also denied a unanimous jury verdict on the absence of self-defense. This is because the jury could have also believed it had to be unanimous on the presence of reasonable self-defense just as it had to be unanimous on §940.02 and §940.06. The instructions implied that reasonable self-defense had to exist as condition precedent for acquittal: "if the defendant was acting lawfully in self-defense, his conduct did not create an unreasonable risk to another." R41:17. Under this scenario, one dissenting juror could have prevented the acquittal due to lack of jury consensus that White acted lawfully in self-defense.

However, the opposite was true-- reasonable self-defense had to be negated, *unanimously* by the State, beyond a reasonable doubt for the jury to return a guilty of §940.02 verdict. Under this scenario which is legally correct, one dissenting juror could have prevented the conviction by believing that the State failed to negate self-defense beyond a reasonable doubt, i.e., no unanimity on the absence of the self-defense elements. A defendant will always be denied jury unanimity on a fact the jury is legally required to find if that fact has been disputed yet omitted, like here.

If one juror believed White actually or reasonably believed in the unlawful interference or use of force, the jury was not unanimous on the absence of those elements, and could not return a guilty §940.02 verdict, yet the instructions did not make this clear. Stated otherwise, the instructions told the jury that self-defense must be present as a fact to preclude conviction on §940.02, R41:17, whereas by law and in contrast, self-defense must be unanimously negated to preclude acquittal or a hung jury on §940.02 and §940.06.

The only thing known is that all 12 jurors agreed on §940.02's elements. However, it cannot be determined how many jurors believed White acted with actual but unreasonable beliefs and if only one juror believed the State failed to disprove White held an actual or reasonable belief in the unlawful interference and/or force used, the jury was not unanimous on those beliefs' absence. In that case, White was Constitutionally entitled to not be convicted of §940.02 even if he was not entitled to a complete acquittal.

Like ***Villarreal*** and ***Hauk***, White is not raising instructional error; he is raising a jury trial issue. The State and the court did not address this issue below; it was ignored. As such, this Court must remand for a new trial because White did not knowingly, intelligently, or voluntarily waive his right to a unanimous jury trial and verdict on the absence of the self-defense elements. Because there was no trial or waiver, "the proper remedy is a new trial--not a postconviction hearing." ***Livingston***, 159 Wis.2d at 596.

III. THE INTEREST OF JUSTICE REQUIRES REVERSAL BECAUSE THE REAL CONTROVERSY OF SELF-DEFENSE WAS NOT FULLY AND FAIRLY TRIED, AND DUE TO THE MISCARRIAGE OF JUSTICE BECAUSE WHITE IS ACTUALLY INNOCENT UNDER THE CORRECT APPLICATION OF §940.02 AND UTTER DISREGARD.

The interest of justice requires reversal under §752.35 because the above instructional errors misled the jury on the law on §940.02 and self-defense as well as the factual and legal invalidity of the §940.02 verdict combined to result in the real controversy not being tried, as well as a miscarriage of justice. *See* ***Vollmer v. Luety***, 156 Wis.2d 1 (1990). This Court's discretionary authority to reverse in the interests of justice furthers its obligation to do justice in an individual case. *Id.* at 13-15. This Court may exercise its discretion under §752.35 without regard to whether the circuit court failed to exercise discretion under §805.15(1). *See* ***Stivarius v. DiVall***, 121 Wis.2d 145, 153 & n.5 (1984).

A. Real Controversy Not Tried.

Even if counsel's failure to object means White cannot challenge the errors as of right, this Court may exercise its power of discretionary reversal in the interests of justice under §752.35, if instructional error occurred, whether or not the error was objected to.

In this case, the inescapable result of the above instructional errors in Section I was that the real controversy of utter disregard and self-defense was not tried. The instructions did not explain that the State's failure to unanimously negate beyond a reasonable doubt a defendant's actual beliefs in either the unlawful interference or the

amount of force used, or both, precluded a §940.02 verdict. In addition, the jury was not told that the State was required to negate self-defense beyond a reasonable doubt in addition to proving §940.02's Statutory elements. Instead, the instructions suggested that self-defense had to exist, i.e., that White "acted lawfully" in self-defense before the jury could acquit. And because the instruction allowed the jury to return a verdict upon finding §940.02's Statutory elements, the jury was at liberty to ignore the self-defense elements and burden of proof that were part of the §940.06 instruction.

Finally, the State's §940.02 theory is factually and legally invalid. All it would have taken was for one juror to have reasonable doubt that White subjectively or objectively feared (or both) for his life, then he could not be convicted of §940.02, but this was not made clear. Subjective self-defense beliefs and force used—even if objectively unreasonable—are factual and legal exceptions to utter disregard. Thus, even if White used too much force in terminating an unlawful interference, he is not guilty—and actually innocent—of utter disregard. As such, utter disregard and self-defense were not fully and fairly tried because the jury was erroneously led to believe that the State's theory was legally and factually valid, when it was not.

B. Miscarriage Of Justice.

For similar reasons, the interests of justice also require a new trial under §752.35 because it is probable, given the errors already discussed, that justice has miscarried. ***Vollmer***, 156 Wis.2d at 19. Even without the identified errors, this was a very close case because no witness saw who fired first or testified that White was the aggressor. In fact, it was undisputed that Jackson was armed and that he shot White, and that they were unknown to each other. That this was a close case is shown because both parties could not have been acting in self-defense.

In ***Engle v. Isaac***, 456 U.S. 107, 121-23 & n.22 (1982), and ***Murray v. Carrier***, 477 U.S. 478, 497 (1986), the Supreme Court held that the miscarriage-of-justice exception excuses procedural default where counsel forfeited an objection or omitted an issue if a defendant demonstrates actual innocence. *See* ***Schlup v. Delo***, 513 U.S. 298, 327-28 (1995); ***Bousley v. U.S.***, 523 U.S. 614, 622-24 (1998)

(extending ***Schlup*** where defendant pled guilty to conduct excluded by interpretation of "using" firearm). Because White raised self-defense which includes subjective beliefs and the jury was not told that shooting an assailant based on those beliefs in the force used were factual and legal exceptions to utter disregard, it is reasonably probable that White is convicted of conduct that he is actually innocent of.

Under current law a defendant who actually believed in an unlawful interference and/or the force used, even if unreasonable, is actually innocent of §940.02 because objectively unreasonable force is an exception to the objectively unreasonable circumstances of utter disregard. The Wisconsin Supreme Court and this Court have already held that excuse or justification, even if not privileged, are factual and legal exceptions to utter disregard--*i.e.,* actual innocence. *See* above—cited cases in Section I.

The Ninth Circuit has held that "[o]ne way a petitioner can demonstrate actual innocence is to show in light of subsequent case law that he cannot, as a legal matter, have committed the alleged crime" because a specific Statute does not reach the alleged conduct and/or mens rea. ***Vosgien v. Persson***, 742 F.3d 1131, 1134-35 (CA9 2014) (remanding under ***Bousley*** and ***Schlup*** to determine if petitioner was actually innocent because correct interpretation of Statute did not reach conduct). *See* ***Bunkley v. Florida***, 538 U.S. 835 (2003) (remanding to determine if "common pocketknife" exception of "weapon" applied before conviction became final).

In addition to the actual innocence exception, White's conviction raises Due Process concerns under ***Fiore v. White***, 531 U.S. 225 (2001) because State law holds that self-defense actual beliefs, even if unreasonable, preclude finding utter disregard and §940.02. By omitting actual beliefs on §940.02, moreover, the State produced no evidence concerning the absence of White's actual beliefs and the court led the jury to believe it could find utter disregard and §940.02 if self-defense was unreasonable although the only legal conviction for unreasonable self-defense is §940.05. ***Ross***, ***Harp***, ***Head***, *supra*. "Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar" ***Jackson***, 443 U.S. at 324, and "[i]t is barbaric to imprison a person" contrary to the

Winship*/*Jackson standard. ***Bates v. McCaughtry***, 934 F.2d 99, 102 (CA7 1991).

Lastly, because there is no crime of §940.02 with actual beliefs, White's conviction is jurisdictionally void and cannot be waived even if counsel requested the erroneous instructions or failed to object. ***State v. Briggs***, 218 Wis.2d 61, 68-69 (CA 1998); ***State v. Banks***, 105 Wis.2d 32, 43 (1981). This is because a conviction cannot be affirmed on a theory of an unknown crime. *See* ***Davis v. U.S.***, 417 U.S. 333, 346-47 (1974) (miscarriage of justice to convict on unknown crime); ***Rewis v. U.S.***, 401 U.S. 808, 814 (1971); ***Dunn v. U.S.***, 442 U.S. 100, 106 (1979); ***Chiarella v. U.S.***, 445 U.S. 222, 236, 239 (1980). Holding otherwise "would lead to repugnancy" between §940.02 and §940.05. ***Howard v. State***, 139 Wis. 529, 531 (1909). *See* ***Champlain v. State***, 53 Wis.2d 751, 756 (1972) (interests of justice reversal because instructions "intertwined" 2 distinct crimes).

Because this was a close case and the jury was not properly instructed, and because White is innocent of utter disregard, "a substantial probability of a different result on retrial" is certain. ***Vollmer***, 156 Wis.2d at 16-17.

IV. WHITE WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

White was denied the effective assistance of trial counsel as guaranteed by Article I, §7 of the Wisconsin Constitution and the 6th and 14th Amendments of the U.S. Constitution. The specific instances of ineffectiveness are detailed below. There was no tactical basis for the counsel's identified failures, such failures were unreasonable under prevailing professional norms, and White's defense was prejudiced by counsel's deficient performance.

Applicable Law and Standard of Review.

A defendant alleging ineffective assistance of counsel must show that counsel's representation fell below an objective standard of reasonableness. ***State v. Johnson***, 133 Wis.2d 207, 217 (1986); ***Strickland v. Washington***,466 U.S. 668 (1984). "Counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.* at 690.

"A prudent lawyer must be 'skilled and versed' in the criminal law...[and this Court] must consider the law and the facts as they existed when trial counsel's conduct occurred. Trial counsel's decisions must be based upon facts and law upon which an ordinarily prudent lawyer would have then relied." ***Felton***, 110 Wis.2d at 502-03; ***Strickland*** at 695. A single error may justify reversal. ***U.S. v. Cronic***, 466 U.S. 648, 657 n.20 (1984). The deficiency prong is met when counsel's performance was the result of oversight rather than reasoned strategy. ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003); ***State v. Moffett***, 147 Wis.2d 343, 353 (1989).

Prejudice is shown when counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Johnson***, 133 Wis.2d at 222; ***Strickland*** at 687. "The defendant is not required to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" ***Moffett***, *supra* at 354; ***Strickland*** at 693. Rather, a defendant need only show a "reasonable probability" of a different outcome which is defined as "'probability sufficient to undermine confidence in the outcome.'" *Id;* ***Strickland*** at 694.

If Strickland's two-part test is satisfied, relief is required; no abstract inquiry into the "fairness" of the proceedings is permissible. ***Williams v. Taylor***, 529 U.S. 362 (2000). In assessing prejudice, this Court must consider the sum of all error. ***Alvarez v. Boyd***, 225 F.3d 820, 824 (CA7 2000); ***Washington v. Smith***, 219 F.3d 620, 634-35 (CA7 2000); ***State v. Thiel***, 2003 WI 111, ¶59-60. Once the facts are established, each prong of the analysis is reviewed de novo. ***Cummings***, 199 Wis.2d at 748.

A. Trial Counsel's Deficient Performance Caused Prejudice.

i. Trial counsel unreasonably failed to object to the erroneous instructions identified in Section I.

Trial counsel is ineffective under ***Strickland*** for allowing a defendant to be convicted under instructions that fail to identify and distinguish the exceptions to murder raised by the evidence, ***Sanders***, 398 F.3d at 581-83, and for allowing a defendant to be convicted without a unanimous

verdict. ***Kubat v. Theriet***, 867 F.2d 351, 370-74 (CA7 1989). Also, "counsel's failure to understand [a] statute...[is] deficient performance as a matter of law. ***Theil***, 2003 WI 111 ¶51. *See* ***Felton***, 110 Wis2d at-513-18; ***Harris v. Thompson***, 698 F.3d 609, 644, 649-50 (CA7 2012) (Counsel ineffective for not objecting to burden of proof error.)

Trial counsel in this case did not object to the standard instruction (R41:3, 14), or the fact that the court also included the wrong 805 self-defense instruction. Nor did counsel object to the omitted self-defense actual beliefs elements which expanded the scope of §940.02. Counsel also failed to object to the missing self-defense burden of proof and unanimity requirement. Counsel did not intentionally fail to object to the defective instructions, nor did he have any strategic or tactical reasons to do so.

The State took advantage of the instructions' failure to clarify that the self-defense elements were additional facts to §940.02's elements that had to be negated. ***Harp***, 150 Wis.2d at 885-86; ***Watkins***, 2002 WI 101, ¶39; ***Schmidt***, 2012 WI App 113, ¶8. Rather, the instruction here only required proof of §940.02's Statutory elements while reducing disproof of self-defense to a mere "consideration." Although the instructions were directly contrary to well-established law, they guaranteed a §940.02 conviction if 1) the State failed to negate self-defense beyond a reasonable doubt, and 2) White failed to demonstrate, by the equivalent of a preponderance of evidence, that he acted "lawfully in self-defense."

Here, the jury rewarded the State's failure to unanimously negate the self-defense elements beyond a reasonable doubt.

In addition, the jury was instructed: "if the defendant-was acting lawfully in self-defense, his conduct did not create an unreasonable risk to another." R41:17. While this may be a true statement of law because it describes §939.48, it incorrectly suggests it was White's burden. This relieved the State's burden of negating self-defense beyond a reasonable doubt, expanded the scope of §940.02, and imposed a risk of non-persuasion upon White on criminal recklessness and utter disregard (*i.e.,* White did not act with utter disregard or criminal recklessness), either of which is forbidden by Due Process. *See* ***Mullaney***, *supra.*

Moreover, the jury was never told that if White's conduct was unreasonable self-defense or acted with self-defense actual beliefs and the State failed to negate those beliefs beyond a reasonable doubt, the jury must not find utter disregard or White guilty of §940.02. The jury was also never told that even if White's conduct was unreasonable self-defense, his conduct was not utter disregard because unreasonable self-defense is a legal exception to utter disregard. The jury was also misled to believe that if White did not produce sufficient evidence to persuade it that he acted reasonably in self-defense, he could be convicted of §940.02 and, that the State need not negate actual and reasonable beliefs beyond a reasonable doubt because the self-defense reasonable doubt standard was missing from §940.02 but included in §940.06.

Trial counsel's failure to object to erroneous instructions that heightened White's burden while relaxing the State's burden was neither intentional nor based on defense strategy. No reasonable attorney would allow such an erosion of the presumption of innocence. No reasonable attorney would allow structural error under ***Sullivan***. Indeed, counsel's failure to object and request instructions that included the additional self-defense elements and burden of proof was directly contrary to the defense strategy that focused on only raising reasonable doubt on self-defense.

Given that all of White's defense and presumption of innocence rested on self-defense, moreover, no reasonable attorney would knowingly allow a client to admit to a homicide while allowing the jury to be instructed in such a way as to nullify the defense on which his client's freedom depended. Neither would reasonable counsel seek to increase a client's burden of producing sufficient evidence to entertain reasonable doubt on self-defense while lessening the State's burden of disproving self-defense, especially after White admitted causation.

Further, although ***Austin*** was not yet decided, it did not create new law, however, ***Kanzelberger***, ***Winship***, ***Mitchell***, ***Ross***, ***Moes***, ***Kelley***, ***Shah***, ***Staples***, ***Harp***, and ***Head*** were the law at the time of White's trial and trial counsel should have researched them in order to object and/or request a proper statement of law which would have told the jury that

the State had to negate self-defense beyond a reasonable doubt in addition to proving §940.02 otherwise White was Constitutionally entitled to not be found guilty of §940.02 even if he was not entitled to an acquittal. *See* ***Cannan v. McBride***, 395 F.3d 376, 386 (CA7 2005) ("Even if the odds that the defendant would have been acquitted had he received effective representation appear to be less than fifty percent, prejudice has been established so long as the chances of acquittal are better than negligible.").

The instructions failed to inform the jury of the proper self-defense elements and burden of proof. Trial and counsel's oversight was based on the erroneous belief that the instructions were correct just as what has occurred in the previous 20 years before ***Austin*** was decided and even today. Because trial counsel's underlying assumptions were wrong in light of case law and the Statutes, see Section I, White was prejudiced by counsel's ineffectiveness.

ii. Trial counsel unreasonably failed to prevent the deprivation of White's right to a unanimous jury trial and verdict on the absence of the self-defense elements in Section II.

"[D]efense counsel has a…responsibility to ensure that the record of jury waiver is developed and failure to meet this responsibility can sometimes be considered inadequate representation by counsel." ***Livingston***, 159 Wis.2d at 570-71. In this case, trial counsel did not protect White's Statutory and Constitutional rights to have the jury unanimously decide whether the State negated the self-defense elements beyond a reasonable doubt. Given that the defense was self-defense, and whether the State could unanimously negate the self-defense elements in addition to proving §940.02's Statutory elements, no reasonable attorney would allow a White to be convicted in such a way as to nullify a unanimous jury decision on which his client's freedom depended.

Because "the proper remedy is a new trial and not a Postconviction hearing," ***Livingston,*** 159 Wis.2d at 596, ***Strickland*** prejudice must be presumed because no objectively strategic reason exists for counsel's failure to ensure White received a self-defense jury trial and unanimous verdict on the absence of the self-defense elements.

B. A Reasonable Probability Of A Different Result Exists

A *Machner* hearing at this point would waste judicial resources because no reasonable strategy exists for any of trial counsel's errors, and, but for the above errors, prejudice is shown because there exists a reasonable probability of a different result. As ***Strickland*** makes clear, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." 466 U.S. at 696. That the evidence proved the Statutory elements of §940.02 is irrelevant to whether the State has disproved self-defense beyond a reasonable doubt.

CONCLUSION

For these reasons, White respectfully seeks remand for a *Machner* hearing or that this Court order a new trial and reverse the judgment of conviction and circuit court's order denying him a new trial.

Dated at Milwaukee, Wisconsin this 27th day of January 2017.

Respectfully Submitted,

Thomas W. Kurzynski
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State v. Devin White
Appeal Number 2016AP000119 - CR
Court of Appeals District 1

I, Thomas W. Kurzynski, certify that this brief is identical to the paper version submitted on January 31, 2017.

Date January 31, 2017

Signature THOMAS W. KURZYNSKI
"s/" Thomas W. Kurzynski
Attorney for the Defendant-Appellant

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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