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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Appeal No. 17AP001206CR
Milwaukee County Cir. Court Case No. 2015CF3109

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

EMMANUEL EARL TRAMMELL,
Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION, SENTENCE, AND THE DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED BY BRANCH 38, MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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The trial court did not address this issue.

The postconviction court answered: no.

II. WHETHER THE JURY INSTRUCTION DEFINING THE STATE'S BURDEN OF PROOF CONFUSED THE JURY.

The trial court did not address this issue.

The postconviction court answered: no.

III. WHETHER THE JURY INSTRUCTION DEFINING THE STATE'S BURDEN OF PROOF MISSTATED THE LAW.

The trial court did not address this issue.

The postconviction court answered: no.

IV. WHETHER NEW TRIAL IS WARRANTED IN THE INTEREST OF JUSTICE BECAUSE THE TRUE CONTROVERSY WAS NOT FULLY TRIED DUE TO THE WORDING OF THE JURY INSTRUCTION DEFINING THE STATE'S BURDEN OF PROOF.

The trial court did not address this issue.

The postconviction court answered: no.

V. WHETHER NEW TRIAL IS WARRANTED DUE TO PLAIN ERROR BECAUSE OF THE WORDING OF THE JURY INSTRUCTION DEFINING THE STATE'S BURDEN OF PROOF.

The trial court did not address this issue.

The postconviction court answered: no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The relevant facts and the legal issues, positions, and arguments of this appeal should be clearly and exhaustively presented in this Brief and Appendix.

Counsel requests oral argument, if such were to help address this Court's outstanding questions, or aid this Court's decision-making.

STATEMENT ON PUBLICATION

Publication would be warranted pursuant to Wis. Stat. § 809.23, because this case presents an opportunity to correct an error in Wisconsin's criminal jury instructions defining the State's burden of proof that violates defendants' fundamental due process.

STATEMENT OF THE CASE

The Criminal Complaint charged Emmanuel E. Trammell with one count of armed robbery of a vehicle and one count of operating a motor vehicle without owner's consent. (1).

At the close of trial the standard Wis. JI—Criminal 140 instruction (hereafter "J.I.140") was given with both

parties' agreement, and the jury found Trammell guilty as charged. (23). Trammell was sentenced overall to 12 years initial confinement and 8 years extended supervision. (33). He timely filed a Notice of Intent to Pursue Postconviction Relief. (36).

After the sentencing, two research studies published in academic journals reported a statistically-significant increase in conviction rates whenever the dual directives closing J.I.140 ("…you are not to search for doubt. You are to search for the truth") (hereafter "Dual Directives") were included in jury instructions defining the State's burden of proof. [1]

The first study (App. 5-33) proved that mock jurors who were first correctly instructed on reasonable doubt, but ultimately were told "not to search for doubt" but "to search for the truth," convicted at a much higher rate than mock jurors who received a reasonable-doubt instruction *without* the Dual Directives. (See App. 47).

The second study (App. 34-47) replicated the results of the first study, additionally identifying the causal cognitive link between the Dual Directives and the higher conviction rates. The link is this: the Dual Directives cause jurors to be "nearly twice as likely to mistakenly believe that they could convict . . . even if they had a reasonable doubt about guilt. Further, jurors who held the mistaken belief actually voted to

[1] The same language here dubbed the "Dual Directives" was, in the court below, referred to as the "truth language" or "search for the truth language." That language is: "…you are not to search for doubt. You are to search for the truth." Such language is part of the standard J.I.140 given in this case and is also the variable whose effects on the jury are empirically tested in the two studies addressed in this Brief, as explained infra.

convict the defendant at a rate that was 2.5 times that of jurors who properly understood the burden of proof." (App. 47).

This appeal relies on the results of the two studies to challenge Trammell's convictions and sentence, on the grounds that: reliance on the standard J.I.140 (which contains the Dual Directives) violated fundamental due process by misinforming the jurors about the State's burden of proof, by confusing the jurors about the State's burden of proof, and by effectively reducing the State's burden of proof to something lesser than "beyond reasonable doubt," thereby causing a miscarriage of justice and constituting "plain error" which warrants remedy even when not objected-to.

STATEMENT OF FACTS

The charges in this case stem from an incident which occurred on July 8, 2015, at JAD food store in Milwaukee. (1:1).

Complainant Theodore Reese's reports to the police were cited in the Criminal Complaint. (1). Reese came to JAD food store in his mother's car, with girlfriend Aleah Nash. He walked inside, leaving Nash in the car, engine running. Once inside, Reese was approached by a young male he knew, later identified as Trammell. Trammell asked Reese what money and property Reese had with him, tried to reach for Reese's phone and, when rebuffed, took some change from Reese's hand. When leaving the store with Reese's change, Trammell asked whose car Reese was driving. Reese responded the car was his mother's and told Trammell not to take the car "because it belonged to Reese's mother." Trammell walked to the driver's side of the idling car, Reese following. Trammell displayed a firearm, pointed it at Reese, and told Reese to "back off," so Reese complied and told Nash to leave the car, which she did. Trammell entered the

car and drove off. Reese called his mother and the police to report the incident. (1:1-2).[2]

Nash reported that Trammell walked into the store after Reese and soon Trammel exited followed by Reese; and that Trammell got behind the wheel of Reese's car and drove away, although Reese told Trammell the car was Reese's mother's. (1:2).

Two additional males observed the incident. The car was recovered after active pursuit by a Milwaukee Police squad car, when it was stopped remotely by OnStar technology. The car's occupants fled on foot. The driver, Gabarie Silas, was identified as one of the "other two" males present during the Incident. (1:2).

Silas told the police *inter alia* that he had seen Trammell and Reese having an "intense discussion" inside the store, then saw Trammell taking money from Reese and patting Reese down. Silas reported that after the Incident he got Reese's car from Trammell and that during the police chase he was on the phone with Reese's friends. (1:3).

At trial, defense counsel argued in opening that Trammell took over the car as collateral, to leverage repayment of a debt Trammell believed Reese owed him after taking Trammell's weapon. Counsel characterized the Incident as misconceived "street justice," but not an armed robbery, since Trammell never intended *permanently* to keep the car:

> And you're going to hear from the mouths of the State's own witnesses, Reese and Silas, that there was a thing between my client and Mr. Reese. . . . That it was a

[2] This sequence of events will hereafter be referred to as "the Incident."

> debt between them. I'll leave it at that. There was a debt. And they were trying to resolve it.
>
> Mr. Silas will tell you, I believe, that he was kind of watching this. And as far as he could tell, they were just trying to work out an agreement or work out their disagreement.

(53:54-5).

Defense counsel stressed that during the Incident Reese believed that Trammell "was taking this money in a way that was related to this debt that the two had between them." (53:58).[3]

The officer who had watched security camera footage of the Incident testified that Reese and the male who reached for Reese's pocket "look[ed] like they were talking back and forth the whole time. Yes." (53:65).

Reese denied that he had had any problems with Trammell, had met him prior to the Incident, or owed him anything. (54:12). He testified that he had known of Trammell through friends and Facebook, that the store meeting was accidental, and that Trammel had asked Reese about a gun and patted Reese down, looking for it underneath clothing. (54:11-12).

Reese admitted that Trammell had only patted his pockets (without going inside) and did not take Reese's phone, because he was looking for the gun that "[w]ord on the street was I took . . . from him." (54:13).

[3] The prosecution called the Incident "not a stranger robbery," but "essentially a revenge carjacking is a better way to look at it." (53: 46).

Reese admitted to knowing, when Trammell approached him in the store, that "word on the street was that [Reese] took a gun from [Trammell]." (54:13). Reese knew that Trammell was looking for the gun Reese had taken, according to street lore. Id. He knew that Trammell believed that Reese owed him something. Id. Reese denied taking Trammell's gun, but agreed that Trammell had it in his head that Reese had in fact taken the gun. (54:14). Reese admitted that Trammell only took "some change" from Reese's hand, which Reese did not really try to take back. (54:14-15). Reese testified that, after taking the change, Trammell asked about the car and left the store, and Reese and others followed. (54:15).

Gabarie Silas, Trammell's pal who witnessed the Incident, testified after accepting a plea deal in exchange for testimony.[4] He testified that in the store he saw Trammell and Reese talking and Reese "gave [Trammell] some money. But then I guess it wasn't enough. [Trammell] had snatched a couple more dollars. Then we had walked outside . . . [and when Silas followed Trammell out of the store] Then [Trammell] was already in Reese's car." (54:48-49). Silas testified that "Reese told [Trammell] like, like, I'm going to call you. This my momma car. I'm going to call you when I have the rest of your money." (54:49, 60). Silas thought that this statement referred to Reese's debt to Trammell, and was made just before Trammell pulled away in Reese's car. (54:60).

Silas told Trammell not to take the car, "[b]ut then, again, Like I didn't know what was going on. *I thought it was about the collateral*." (54:49). Silas admitted that he understood from "word on the street" that "Reese owed

[4] Silas was also charged in connection with the Incident.

[Trammell] for a gun but he never paid him." Id. At the store, Reese and Trammell were "discussing their differences about what was going on," but "there was no altercation going on or nothing like that." (54:56). Reese ended up giving Trammell the few dollars which Trammell unsuccessfully had tried to snatch. (54:57).

After the Incident Trammell talked to Silas about "Reese calling [Trammell]" and indicated that he (Trammell) expected to be talking to Reese about the taken car. (54:62). When taking Reese's car from Trammell, Silas heard Trammell say that he (Trammell) would call Silas "when Reese call [Trammell]." (54:63). From this Silas gathered that Trammell and Reese were going to negotiate and work something out, so Trammell would return the car to Reese. Id.

After the Incident, while Silas was driving Reese's car and being chased by the police, he got a call from Reese's associates and talked to them "about returning the car." (54:68).

When taking Reese's car from Trammell, Silas believed that Trammell would be talking with Reese to work out some deal, likely involving money or the return of the car. (54:69).

In instructing the jury just minutes before deliberations, the court gave these burden of proof and presumption of innocence instructions: [5]

> Defendants are not required to prove their innocence. The law presumes every person charged with the commission of an offense to be innocent.
>
> This presumption requires a finding of not guilty unless, in your deliberations, you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty.

[5] Other instructions had been given the prior night.

> . . .
>
> Before you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant is guilty.
>
> . . .
>
> The term *reasonable doubt* means a doubt based upon reason and common sense. It's a doubt for which a reason can be given arising from a fair and rational consideration of the evidence or lack of evidence.
>
> . . .
>
> While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth.

(55:3-5).

Defense counsel in closing, just prior to deliberations, emphasized that the jurors' job was to search for the truth: "… nothing is more important today, right now, than finding the right, you know, *finding the truth*. *Your job, in your jury instructions, search for the truth*. Nothing is more important than right now for Mr. Trammell" (emphasis added). (55:13).

The prosecutor's rebuttal closing *again* told the jurors *not to consider doubt*, but *to "search for the truth*:"

> When you hear it on TV, you hear a defense attorney say it's beyond reasonable doubt. And the most important word in there gets lots.
>
> We talk so much about common sense in these instructions. The most important word is reasonable.
>
> Beyond a reasonable doubt. *My favorite part of that instruction* in that it strikes to the heart of everything we're here for. It goes right to the heart of our justice system. *You are not to search for doubt, you are to search for the truth.*
>
> *And the truth here is that* on July 8, 2015, Emmanuel Trammell robbed Theodore Reese of the 2011 Buick Regal at gunpoint. He took the car at gunpoint. And then he drove it away.
>
> . . . And justice demands that you return a verdict of guilty on both counts.

(55:30-31) (emphasis added). [6]

The court followed the closings with these final admonitions: "*Let the verdicts speak the truth* whatever the truth might be" (55:32); and "Justice through trial by jury depends upon the willingness of you -- of each of you to *seek the truth as to the facts* from the evidence and to arrive at a verdict by applying the rules of law as given in the instructions by the Court," (55:33) (emphasis added).

These were some of the very last words the jury heard before deliberating.

Trammell was convicted of one count of armed robbery, contrary to Wis. Stats Section 943.32(2), a C Felony; and one count of driving and operating a vehicle without the

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[6] The jury instructions given in this case were hammered out in a jury instructions conference and given with both parties' agreement and no objections. At the time of Trammell's trial, in April 2016, the two studies supporting Trammell's claims here -- which were attached to the Postconviction Motion as Exhibits A and B (39:15-57), and are now included in the Appendix to this Brief (App. 5-47) – were not yet published. The two studies empirically prove that the Dual Directives, if included in the jury instruction addressing the State's burden of proof, actually reduce the State's burden and double the conviction rates (compared to jury instructions on the State's burden which do not contain the Dual Directives. Because the results and conclusions of the studies were first announced by publication in 2017, Trammell does not claim that defense counsel's failure to object to the instructions, or counsel's own emphasis on the search for truth (as the jury's task), was ineffective assistance of counsel. Trammell may not argue that defense counsel reasonably should have known the import of the studies or should have objected to the Dual Directives language prior to the publication of the studies.

owner's consent, contrary to Wis. Stats Section 943.23(3), a I Felony. (33).[7]

In his postconviction motion pursuant to Wis. Stat. §§ 974.02 and 809.30 (39), Trammell sought vacatur and a new trial in the interest of justice, on the grounds that the jury instructions defining the State's burden of proof erroneously stated such burden.

Trammell argued that, contrary to due process, the standard J.I.140 misstated the law, confused the jurors, and caused him to be convicted based on a burden of proof *lower* than the "heightened" standard constitutionally mandated for criminal prosecutions by *In Re Winship*, 397 U.S. 358 (1970). (39: passim). In support Trammell presented empirical data from two controlled studies measuring the effect of the Dual Directives -- "not to search for doubt" but "to search for the truth" -- on the jurors' understanding of the State's burden of proof in criminal prosecutions. (39:15-57) (App. 5-47) ("Two Studies"). Trammell advised the postconviction court that and how the Two Studies demonstrated that inclusion of the Dual Directives in the burden-of-proof instruction results in near-doubling of conviction rates, compared to jury instructions lacking the Dual Directives; and that it leaves jurors with the incorrect belief that they may convict even if/when reasonable doubt persists. (39:10-12).

Trammell argued that the instruction containing the Dual Directives misstated the law by (1) forbidding the jurors from seeking and identifying every "reasonable doubt," and (2) by commanding the jurors to decide "guilt/innocence" based on an irrelevant and arbitrary standard involving "truth." Trammel argued that the Dual Directives made

[7] The charges of conviction (33) were the same as the charges stated in the Criminal Complaint (1).

dissuaded the jurors from applying the "beyond reasonable doubt" standard mandated in *Winship*. (39:6-9).

Trammell also argued that the Dual Directives confused the jury by flatly contradicting the directives given earlier in the instructions: that the "state must prove by evidence which satisfies [the jurors] beyond a reasonable doubt" all elements of every charge, and that jurors must "give the defendant the benefit of every reasonable doubt." Confusion resulted because the jurors could not "give the defendant the benefit of *every* reasonable doubt" without first searching for reasonable doubt (thereby to identify every reasonable doubt) -- and yet they were instructed to do just such impossible thing. (39:9).

Trammell referred to the Two Studies to explain to the postconviction court that and how the Dual Directives cause (and caused in his case) the jurors to decide guilt/innocence based on a burden of proof which is constitutionally insufficient in criminal prosecutions. Trammell explained that jointly the Two Studies supplied uncontroverted empirical proof that the effect of the Dual Directives in instructions on the State's burden of proof is to misstate such burden and lower the constitutionally-mandated burden of proof; and that the jurors in fact rely (and did in his case) on the misstated, lowered standard in forming verdicts, to convict at *significantly* higher -- double -- rates (compared to conviction rates after jury instructions without the Dual Directives), *because* the Dual Directives cause jurors to believe they may convict even when reasonable doubt lingers. (39:9-12).

Trammell also asked for a new trial in the interest of justice, on the grounds that justice was not "fairly administered" when Trammell was found "guilty" by jurors

misinformed and confused about how and when they may properly convict, based on a standard of proof *lower than* the constitutionally-mandated "beyond reasonable doubt" standard. (39:12-13).

Lastly, Trammell asked for a new trial on the grounds of "plain error," because the Dual Directives effected a fundamental error, warranting relief even though the action was not objected to at the time. (39:13-14).

Without a hearing, in a decision and order entered four days after the filing of the postconviction motion (40), the postconviction court denied relief on the following grounds:

1. The court was "not persuaded" by Trammell's arguments or his reliance on the Two Studies. (40:1) (App.3).

2. The authors of the Studies "theorize that instructions which focus on a search for the truth results [sic.] in nearly double the number of conviction that an instruction which focuses solely on a search for doubt." (40:2) (App.4).

3. The authors of the Studies obtained "test results" and with those "in hand" "concluded" that any instruction which mentioned a search for the truth supported yet another "theory:" "that an otherwise proper reasonable doubt instruction actually diminishes the government's burden of proof." Id.

4. Although the Two Studies "make for an interesting reading," the court was "*bound by the standard jury instruction* implemented by the Jury Instruction Committee which has been accepted for

years by Wisconsin appellate courts." Id. (emphasis added).

The court rejected Trammell's arguments that his jury instructions "misstated the law, lowered the burden of proof, or confused the jury," or prevented the true controversy from being tried, and declined relief on all asserted grounds. Id.

ARGUMENT

I. BY INCLUDING THE DUAL DIRECTIVES THE JURY INSTRUCTION DEFINING THE STATE'S BURDEN OF PROOF REDUCED THE STATE'S BURDEN OF PROOF *BELOW* THAT MANDATED FOR CRIMINAL CASES, CONTRARY TO DUE PROCESS.

A. Standard of review.

Whether a jury instruction correctly states the law, and whether a jury instruction violates due process, are both legal questions, which this Court reviews *de novo*. *State v. Krawczyk*, 2003 WI App *6*, ¶10, 259 Wis. 2d 843, 657 N.W.2d 77; *State v. Tomlinson*, 2002 WI 91, ¶53, 254 Wis. 2d 502, 648 N.W.2d 367.

B. By including the Dual Directives the Instruction reduced the state's burden of proof and thus violated due process.

Fundamental due process requires that a defendant's guilt in a criminal prosecution must be proven by the high burden of proof: "beyond a reasonable doubt." See *In Re Winship*, 397 U.S. 358 (1970).

Wisconsin's standard J.I.140 (hereafter sometimes "Instruction"), containing the Dual Directives and given in this case, violates due process because it -- as a whole -- does *not* communicate to jurors that they *must* acquit if they have reasonable doubt.

The Dual Directives within the Instruction commanded the jurors: (1) "not to search for doubt," but instead (2) "to search for the truth." The trial court and the prosecutor emphatically restated the Dual Directives to the jurors. (55:3031; 55:32-33).

The inclusion of the Dual Directives in the Instruction and their emphatic restatement to the jurors just prior to deliberations (by the court and the prosecutor), violate due process and misstate the law, because they cause jurors erroneously to conclude -- even based on the entire Instruction -- that the State's burden of proof is *lower than* "beyond a reasonable doubt" and allows conviction even when reasonable doubt exists.

Jurors directed "*not* to search for doubt," but instead "to search for the truth," presumably do just that. *State v. LaCount,* 2008 WI 59, ¶ 23, 310 Wis.2d 85, 750 N.W.2d 780 (jurors are presumed to follow the instructions given by courts).

First, such jurors (presumably) stop searching for doubt. They stop asking: "do I (still) have reasonable doubt?" They stop testing the State's evidence against the measure of "reasonable doubt." They stop assessing any doubts they have, to see if they persist.

Second, such jurors *instead* "search for the truth," i.e. weigh the State's evidence to see whether it supports a probably true narrative, or supports the State's narrative as

probably more true than the Defendant's. Such weighing effects not the heightened "beyond a reasonable doubt" burden of proof, but a reduced burden akin to the "preponderance of the evidence" standard, in violation of due process.

Courts have recognized that instructing a criminal jury "to not search for doubt" but "to search for truth" misstates the jury's constitutional duty and improperly reduces the State's burden of proof. See *State v. Berube*, 286 P.3d 402, 411 (Wash. Ct. App. 2012) (instructing the jury in a criminal prosecution to "search for truth and not for reasonable doubt both *misstates the jury's duty* and *sweeps aside the State's burden*.") (emphasis added). [8]

Courts have also recognized that commanding the jurors to "seek for the truth" causes them to ask whose version of events is more likely true -- the government's or the defendant's -- thereby importing a "preponderance of the evidence" standard unsuited for criminal prosecutions. See *United States v. Gonzales-Balderaz*, 11 F.3d 1218, 1223 (5th Cir. 1994) ("[S]eeking the truth suggests determining whose version of events is more likely true, the government's or the defendant's, and thereby intimates a preponderance of the evidence standard.")

Once directed "not to search for doubt" but "to search for the truth," those jurors who felt that the State's version of events was *likely more "true"* than the defense's found Trammell "guilty," contrary to due process. Even if only *one*

[8] Moreover, courts have noted that "[j]ury instructions on reasonable doubt which charge the jury to seek the truth are disfavored because they run the *risk of unconstitutionally shifting* the burden of proof to a defendant." *State v. Aleksey*, 343 S.C. 20, 27 (2000) (emphasis added).

juror in Trammell's case cast the "guilty" ballot based on such rationale, the "guilty" verdict was not reached based on the correct statement of the State's burden of proof, or on the application of the correct burden of proof.

The above analysis is corroborated by the results of the Two Studies (App. 5-47), which prove that the Dual Directives in fact cause jurors to convict where they would *not* have convicted if instructed without the Dual Directives; and cause them to convict even when they have reasonable doubt -- thus based on a reduced standard of proof.

This standard-reducing effect is first proven by the study jointly designed, executed, and published by Wisconsin attorney Michael Cicchini and Professor, Chair of Psychology, and Director of the Law & Justice Program at Beloit College, Dr. Lawrence T. White. *See* Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. Richmond L. Rev., pp. 1139-1167 (2016) (available at http://lawreview.richmond.edu/wp/wp-content/uploads/2016/06/Cicchini-504.pdf) (App. 5-33). ("First Study").

The First Study tests the impact of the Dual Directives found in Wisconsin's standard instruction J.I.140 on jurors' decision-making. This controlled study proves that jurors who hear the Dual Directives (as found in J.I.140) convict at a *significantly* higher rate than jurors who receive jury instructions *not* containing the Dual Directives. The conviction rate of jurors who received the Dual Directives was nearly *double* that of the group that received a "beyond reasonable doubt" instruction without the Dual Directives, and was statistically *identical* to that of the group that

received *no* "reasonable doubt" instruction whatsoever. (App. 32-33).

The statistical significance of the First Study's findings, and the study's limitations, are best and most fully explained in the First Study. (App. 5-33). Trammell respectfully refers this Court to the entirety First Study (whose results are summarized supra) for the complete and correct description of the study's design and methodologies, its findings, and their implications.

The scientific robustness of the First Study and the legal implications of its results are also explained in the Decision Re Motion for Reconsideration of Decision Modifying Burden of Proof Jury Instruction, entered on August 10, 2017, by the Honorable Steven G. Bauer, Circuit Court Judge for Dodge County Circuit Court, in Case No. 16CF196. ("Judge Bauer's Decision") (App. 48-60). Trammell refers this Court to Judge Bauer's Decision for its user-friendly, comprehensible clarification of the scientific underpinnings of the First Study and its implications for criminal trials. [9]

Trammell wishes to point out that, with the large sample size and the revealed large difference in conviction rates, the First Study allows to conclude with more than 97 percent certainty—because of the obtained *p*-values of 0.023 and 0.028—that the authors did not commit a "Type I error." This translates into a more than 97 percent certainty (1-*p*) that the authors did not obtain a "false positive" when testing their hypotheses regarding how the inclusion of Dual Directive in

[9] Trammell does not rely on Judge Bauer's Decision as a binding or persuasive authority, but only offers Judge Bauer's clarifying remarks for this Court's consideration, in light of the fact that Judge Bauer had received graduate education in statistics.

the jury instruction on "beyond reasonable doubt" in fact impacted jurors' conviction rates. (App. 20-22, passim).

The standard-of-proof-reducing effect of the Dual Directives was then *again proven* by Cicchini and White's follow-up replication study, which tested (and confirmed) the reliability of their original findings in the First Study. *See* Michael D. Cicchini & Lawrence T. White, *Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication*, 117 Columbia L. Rev. Online, March 1, 2017, pp. 22-35 (pre-publication draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2813596) . (App. 34-47) ("Second Study").

The Second Study again finds a statistically significant difference in conviction rates between mock jurors who were properly instructed on "reasonable doubt" (without the Dual Directive) and the jurors who were instructed "not to search for doubt" but to "search for the truth." (App. 35, 42-45).

Moreover, the Second Study identifies a cognitive link between the Dual Directives (as appended to jury instruction defining "beyond reasonable doubt") and jurors' higher conviction rates. Specifically, jurors who received the Dual Directives were nearly *twice* more likely ($p = 0.01$) to indicate, in their response to a post-verdict question, that *"[e]ven if I have a reasonable doubt about the defendant's guilt, I may still convict the defendant[*.]" (emphasis added). Furthermore, jurors who held this erroneous belief, regardless of what instructions they received, actually convicted at a rate *2-1/2 times higher* ($p < .001$) than jurors who correctly understood the burden of proof (as requiring acquittal whenever reasonable doubt lingers). (App. 45-46).

Together, the First and Second Study supply *uncontroverted, scientifically solid, empirical proof* that the

Dual Directives, when included in the instruction defining the State's burden of proof, have these multiple effects:

1. They cause jurors to believe that they may properly convict even when reasonable doubt exists.

2. They cause jurors to convict at *significantly* higher -- double -- rates, compared to conviction rates after jury instructions *not* including the Dual Directives and only requiring the jury to focus on reasonable doubt, and

3. They in effect reduce the State's constitutionally-mandated burden of proof: from "beyond reasonable doubt" to something akin to "preponderance of evidence."

The Two Studies thus refute and disprove -- with unrebutted empirical, scientific evidence -- the legal-linguistic analysis and conclusions of the Wisconsin Supreme Court in *State v. Avila*, 532 N.W.2d 423, 429 (1995). Because the Two Studies empirically disprove and rebut the analysis and conclusions of *Avila's* court, *Avila's* holding is not sound and may not stand. Such holding lacks any scientific support and is in fact now empirically proven false by the Two Studies, which show that the Dual Directives in J.I.140 *in fact* measurably reduce the State's burden of proof, to something like the "preponderance of evidence" standard of civil cases. See supra.

The *Avila* court held that "it is not reasonably likely" that J.I.140 -- the instruction on "beyond reasonable doubt" including the Dual Directives -- would reduce the State's burden. Id. at 429. But the *Avila* court lacked access to the results of the Two Studies, summarized supra, which empirically prove otherwise.

Trammell asks this Court not to ignore the results of the Two Studies or under-estimate their scientific validity or import for Wisconsin's criminal trials.

Trammell asks this Court to take judicial notice of the Two Studies' empirical data results and conclusions.

This Court is authorized to take judicial notice of facts not subject to reasonable dispute, if they are generally known within the territorial jurisdiction of the court *or* are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. See Sec. 902.01(1) and (2), Stats; *State ex rel. Cholka v. Johnson*, 85 Wis. 2d 400, 402, 270 N.W.2d 438, 440 (Ct. App. 1978), rev'd on other grounds, 96 Wis. 2d 704, 292 N.W.2d 835 (1980). For example, courts took judicial notice of the reliability of underlying principles of speed radar detection. *State v. Hanson*, 85 Wis. 2d 233, 270 N.W.2d 212 (1978); *Sisson v. Hansen Storage Company*, 2008 WI App 111, 313 Wis. 2d 411, 756 N.W.2d 667, 07-1426 (judicial notice may be taken at any stage of the proceeding; an appellate court may take judicial notice when it is appropriate).

This Court may take judicial notice of the reliability of underlying scientific principles of the Two Studies, because courts can take judicial notice of the reliability of underlying principles of methodologies and testing procedures used in criminal prosecutions. See *State v. Hanson*, 85 Wis. 2d 233, 270 N.W.2d 212 (1978) (court properly took judicial notice of the reliability of underlying principles of speed radar detection).

This Court should take judicial notice of the facts proven by the Two Studies, because the Two Studies are "sources whose accuracy cannot be reasonably questioned," as shown in Judge Bauer's Decision. (App. 48-54).

The Two Studies stand unrefuted. Judge Bauer's Decision explains that the underlying scientific principles and methodologies of the First Study are generally accepted in the scientific community and widely practiced in social sciences as reliable. (App. 49-54). The Second Study has the same underlying scientific principles and methodologies, and replicates the First Study. Thus, both Studies warrant judicial notice.

One hallmark of reliability is that the Two Studies were well-designed "controlled experiments" where participants received the same hypothetical fact patterns involving fictional parties and witnesses. Both experiments were designed to test selected hypotheses: (1) the First Study was designed to test the hypothesis that "when truth-related language [i.e. the Dual Directives] is added to an otherwise proper beyond a reasonable doubt instruction, the truth language not only contradicts but also diminishes the government's burden of proof;" (2) the Second Study was designed to test whether the results of the First Study would be replicated; and if yes, to test what (if any) cognitive link existed between the Dual Directives and the mock jurors' "guilty" verdicts. See Michael D. Cicchini, The Battle over the Burden of Proof: A Report from the Trenches, 79 U. Pittsburgh L. Rev., No. 1 (2017), pp. 8-9. [10]

Reliability is ensured by the fact that the Studies relied on test subjects (mock jurors) in a controlled setting, consistent with the hallmark principles of social psychology research, and using procedures considered optimal by researchers studying the effects of jury instructions on

[10] At the time of this Brief's drafting this article was available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2916389. Trammell here cites to the pagination of the article as found at this source, which was the only pagination available.

verdicts. See e.g. Sheri S. Diamond, Illuminations and Shadows from Jury Simulations, 21 L. & Hum. Behav. 561 (1997) (discussing use of mock jurors and mock trial simulations to evaluate juror behavior); Marc W. Patry, Attractive But Guilty: Deliberation and the Physical Attractiveness Bias, 102 Psychol. Rep. 727 (2008) (using mock jurors to test the impact of a defendant's attractiveness on juror verdicts); Lawrence T. White, Juror Decision Making in the Capital Penalty Trial, 11 L. & Hum. Behav. 113 (1987) (using mock jurors to test the impact of various factors on jurors' willingness to impose the death penalty).

The Two Studies' underlying principles and methodologies -- of carefully designing controlled case-summary studies with mock jurors, and processing them through well-tested statistical algorithms -- are widely accepted and commonly used in the social sciences, precisely because they are proven efficient and effective. By using random assignment such controlled experiments ensure confidence that precisely the one isolated variable under scrutiny (here: the Dual Directives) produces the given effect (here: the higher conviction rate and lower burden of proof). Michael D. Cicchini, The Battle over the Burden of Proof, at p. 10.

The Two Studies also reliably ensure that the double rate of jurors exposed to the Dual Directives was not accidental, and determined that it was "statistically significant" through the sound "underlying scientific principles" of mathematical and statistical analysis. Scientifically reliable analysis consisted of the calculation of a statistic dubbed the "*p*-value," which depicts the probability that a false positive result was obtained in testing a hypothesis. Based on a well accepted method, or algorithm, such calculation was done and resulted in the *p*-value of 0.028

and 0.033 in the two studies, respectively. Id. at pp. 10-11. This translates into the reliable conclusion – made with over 96% certainty -- that the high conviction differential was caused precisely by the Dual Directives which culminate the instruction on the State's burden of proof. Id.

The validity and reliability of the Two Studies is also demonstrated by the fact that they appeared in respected academic publications designed to report the results of scientific inquiries; publications of solid intellectual integrity untainted by political or other biases. Id. at 14-15. In those academic publications the Two Studies are surrounded by other intellectually robust reports authored by academics, professors, and researchers, presenting reliable *research* on various legal concepts and issues.

Nothing indicates that the Two Studies are scientifically unsound or yield biased, unreliable data or conclusions. Judge Bauer's Decision so explains, passim.

For all the above reasons, this Court should take judicial notice of the facts discovered through the Two Studies and of the conclusions derived from such facts.

In light of such facts and conclusions, to be judicially noticed by a Wisconsin court, Trammell asks this Court to vacate his convictions as stemming from the jurors' reliance on an incorrect burden of proof, *lower* than the constitutionally-mandated "beyond a reasonable doubt" standard, because J.I.140 (through the Dual Directives it contained) overall misstated the State's burden of proof and lowered it impermissibly.

In the alternative, Trammell asks this Court to certify this issue to the Wisconsin Supreme Court, to review its analysis in *Avila* in light of the Two Studies and reassess the

constitutional validity of J.I.140 (with the Dual Directives) consistent with such Studies.

II. THE JURY INSTRUCTION DEFINING THE STATE'S BURDEN OF PROOF CONFUSED THE JURY.

A. Standard of Review.

When a jury instruction error – e.g. confusing wording -- goes to the integrity of the fact-finding process, discretionary reversal by this Court is warranted even though defense counsel did not object to the erroneous instruction. *State v. Hatch*, 144 Wis. 2d 810, 824, 425 N.W.2d 27 (Ct. App 1988) ("We have the discretionary power to review a waived instructional error if the error goes to the `integrity of the fact-finding process.'" (citation omitted)).[11]

To determine whether the challenged instruction was not harmless error, this Court may consider whether the "overall meaning" communicated to the jury correctly stated the law. *Id.* at 826 (court of appeals concluded that the "the instructions, taken in their entirety, render[ed] any error harmless because the overall meaning communicated by the instructions was a correct statement of the law.").

"A jury instruction is tainted and in error if 'a reasonable juror could misinterpret the instructions to the detriment of a defendant's due process rights.'" *State v. Dodson*, 219 Wis.2d 65, 86, 580 N.W.2d 181 (1998) (citation omitted). A correct statement of the law in another part of the charge can render an incorrect statement harmless when the charge *as a whole* does not misdirect the jury. *State v.*

[11] Here defense counsel did not object to the giving of J.I.140.

Hoover, 2003 WI App 117, ¶ 29, 265 Wis.2d 607, 666 N.W.2d 74.

B. The jury instruction defining the state's burden of proof confused the jury.

As shown supra, the Two Studies empirically prove -- in a scientifically uncontroverted manner -- that J.I.140, which contains the Dual Directives, *in fact confuses* jurors regarding the State's burden of proof, "to the detriment of the defendant's due process rights." *Dodson*, 219 Wis.2d at 86. The Studies prove that the charge *as a whole* -- because it contains the Dual Directives -- does misdirect the jury. *Hoover*, 2003 WI App at ¶ 29.

Trammell asserts that a plain language analysis of J.I.140 "as a whole" also confirms that such instruction was confusing, "to the detriment of [Trammell'] due process rights." Id.

The plain language of the Dual Directives in J.I.140 gave the jurors two final commands which confused the jurors, because they conflicted with the commands given earlier in J.I.140 "as a whole." [12] This internal conflict within J.I.140 gave the jurors a task impossible to perform.

J.I.140 first extensively informed the jurors that the State bore the burden of proving every element of the crimes "beyond a reasonable doubt" and defined "reasonable doubt." This early portion of the Instruction directed the jurors -- correctly -- to convict *only if* the evidence persuaded them "beyond a reasonable doubt" that every element was so

[12] This plain language was additionally emphatically restated to the jurors by the court and the prosecutor, which reinforced its impact on the jurors. (55:30-31, 32-33).

proven. It correctly directed the jurors to use "reasonable doubt" as *the* measure of the State's success/failure of proving every element.

But the Dual Directives, at the close of the Instruction, contradicted and canceled the correct directives of the preceding portion. First, contrary to the preceding commands of the initial portion, the Dual Directives commanded the jurors "*not to search for doubt*," i.e. not to consider whether any reasonable doubt remained after the evidence was presented. Second, also contrary to the preceding commands, the Dual Directives commanded the jurors "to search for the truth," i.e. to decide which narrative -- the State's or the defendant's -- appeared more true, or better supported by the presented evidence. See supra.

The Dual Directives confused the jurors because they *flatly contradicted* the directives given earlier in J.I.140:

- that the "state must prove by evidence which satisfies [the jurors] beyond a reasonable doubt" all elements of every charge, (54:104, et seq.; 55:3); and

- that jurors must "give the defendant the benefit of every reasonable doubt," (55:4).

The jurors were given contradictory, indeed irreconcilable, directives in J.I.140 "as a whole," thus an impossible task to perform.

Trammell submits that no juror could "give the defendant the benefit of *every* reasonable doubt" (as commanded in the first portion of J.I.140) without first identifying every reasonable doubt in existence, by means of "searching" for every reasonable doubt (as forbidden in the Dual Directives).

Trammell submits that "giving the benefit of *every* reasonable doubt" necessarily presupposes first "searching for" every reasonable doubt. After all, "every reasonable doubt" may be identified only through "searching" for it -- before its benefit can be given to the defendant.

Here, the jurors were given contradictory -- thus confusing -- commands in J.I.140 "as a whole." The jurors could not properly, rationally, logically follow *all* the commands given. When directed "not to search for doubt," they presumptively obeyed, especially that this was one of the *final* commands they heard; and especially that this command was reinforced by the court's and the prosecutor's emphatic restatement of it (55: 30-31, 32-33).

But in following *this variously reinforced* command, the jurors did not -- indeed they could not --- have given Trammell the benefit of *every* reasonable doubt, because they were barred from identifying every last reasonable doubt, by being told "not to search for doubt."

Therefore the "overall meaning" of the State's burden of proof was not correctly communicated by J.I.140 "as a whole," with the included Dual Directives. *Hatch*, at 826. Unlike in *Hatch*, it cannot be concluded here that "the instructions, taken in their entirety, render[ed] any error harmless because the *overall meaning* communicated by the instructions was a correct statement of the law." *Id.* Rather, the overall meaning of *only the first portion* of J.I.140 -- the portion *preceding* the Dual Directives -- correctly stated the burden of proof the State bore. But, through its Dual Directives portion (which contradicted and canceled the preceding correct commands of the first part of the Instruction), J.I.140 "taken in its entirety" erroneously stated the law: by ultimately relieving the jurors of the duty to

search for and identify every reasonable doubt, and to convict only if no such doubt persisted. Lastly, through its Dual Directives (which contradicted and canceled the preceding correct commands of the first part of the Instruction), J.I.140 "taken in its entirety" gave the jurors the impossible task inconsistent with due process: of giving Trammell the benefit of "every reasonable doubt" without searching for doubt, but by searching for the truth. See id.

Trammell submits that J.I.140 "as a whole" misdirected the jury. A correct statement of the law in the first part of J.I.140 the did not render harmless the incorrect statement in the Dual Directives, because J.I.140 *as a whole* gave the jury an impossible task inconsistent with due process, by commanding contradictory and irreconcilable analyses. See *Hoover*, 2003 WI App at ¶ 29.

Simply put, the Dual Directives -- within the whole J.I.140 -- commanded "a reasonable juror" to "misinterpret the instructions [on the State's burden of proof] to the detriment of [Trammell's] due process rights." *Dodson,* 219 Wis.2d at 86.

Such instructional error -- even when waived -- went to the "integrity of the fact-finding process," so this Court should review it and reverse, pursuant to *Hatch,* 144 Wis. 2d at 824 ("We have the discretionary power to review a waived instructional error if the error goes to the `integrity of the fact-finding process.'").

When the integrity of the fact-finding process was gravely compromised by such jury instruction error, the guilty verdicts here merit no confidence, the convictions should be vacated, and the case remanded for a new trial with jury instructions which will not confuse the jurors about the State's burden of proof, but will correctly state it.

III. THE JURY INSTRUCTION DEFINING THE STATE'S BURDEN OF PROOF MISSTATED THE LAW.

A. Standard of Review.

Whether a jury instruction is appropriate under the given facts of a case is a legal issue subject to independent review. *See State v. Pettit*, 171 Wis. 2d 627, 638, 492 N.W.2d 633 (Ct. App. 1992). On review, the challenged words of jury instructions are not evaluated in isolation. Id. at 637. Rather, jury instructions "must be viewed in the context of the overall charge." Id. Relief is warranted when this Court is "persuaded that the instructions, when viewed as a whole, misstated the law or misdirected the jury." Id. at 637-38. Whether a jury instruction violated a defendant's right to due process is a legal issue subject to de novo review. Id. at 639.

B. The jury instruction defining the State's burden of proof misstated the law.

The Instruction "as a whole" misstated the constitutional law of *Winship* and its progeny and misstated the role of the jury, in effect reducing the high "beyond reasonable doubt" burden of proof mandated in criminal prosecutions, to something akin to the lower "preponderance of evidence" burden of civil cases: by directing the jurors "not to search for doubt," but instead to "search for the truth."

The law was misstated when the two final clear commands of J.I.140, found in the Dual Directives, directly contradicted -- and canceled -- the correct commands of the earlier portions of J.I.140, which properly educated the jurors about the State's burden of proof.

Although earlier in J.I.140 the jury was correctly instructed about its role in eliminating "reasonable doubt," the culminating Dual Directives misstated and distorted that earlier-correctly-stated law, overriding it in the jurors' minds, by: (1) perversely – because contrary to *Winship*, contrary to the actual role of the jury, and contrary to the earlier, correct commands in J.I.140 – barring the jurors from seeking out, identifying, and considering "reasonable doubt," thus from applying the "beyond reasonable doubt" standard mandated in *Winship,* correctly stated in an earlier portion of J.I.140; and (2) by -- again contrary to *Winship*, contrary to the actual role of the jury, and contrary to the earlier, correct portions of J.I.140 – requiring the jurors instead to decide the question of "guilt/innocence" based on the irrelevant (to the jury's actual task) and arbitrary (never defined) standard of searching for/finding "the truth."

The law governing the task of a criminal jury was misstated when the jury was barred, by the Dual Directives, from searching for doubt and was instead sent on a search for "the truth."

Nothing in the Constitution or the law makes "searching for the truth" or finding "the truth" a criminal *jury's* deliberative and/or determinative task. Nothing in the law tasks *juries* in criminal prosecutions with searching for, or finding, "the truth" based on their analysis of the evidence. No legal authority supports that such *jurors'* task can be accomplished by searching for "the truth," or that such *jurors* may embark on searching for "the truth" in deliberating or verdict-making.

Under the constitution and the laws, "truth" is *not* the jurors' concern, nor part of their task in criminal cases. See e.g. *Berube*, 286 P.3d at 411 ("truth is not the jury's job").

The jurors' goal -- of rendering a verdict – is attained by determining whether the defendant has been proven "guilty" under the required burden of proof. In a criminal case, a "guilty" verdict and "[a] conviction is *not* a finding that an accused is *actually* guilty, but a finding that the State has met its burden of proof beyond a reasonable doubt." Erik R. Guenther, *What's Truth Got to Do with It? The Burden of Proof Instruction Violates the Presumption of Innocence*, 13 Wis. Defender, Fall 2005, at pp. 1-2 (emphasis added).

Courts have recognized that a criminal jury is not concerned with "the truth." "The question for any jury is whether the burden of proof has been carried by the party who bears it. In a criminal case . . . [t]he jury cannot discern whether that has occurred without examining the evidence for reasonable doubt." *Berube*, 286 P.3d at 411 (emphasis added).

Thus, in Trammell's case, telling the jurors "*not* to search for *doubt*" but "to search for the *truth*" misstated the law, because it:

- directed the jurors to do the *opposite* of what due process required of them, as interpreted in *Winship*, and
- directed them instead to apply a truth-weighing burden of proof which is constitutionally deficient in criminal prosecutions.

J.I.140 as a whole, by including the Dual Directives in its finale, thus *doubly* led the jurors astray about the State's

legal burden of proof, causing a fundamental constitutional defect.[13]

Insofar as here the jury instruction defining the State's burden of proof (1) forbade the jurors from searching for doubt in assessing whether the presented evidence extinguished every reasonable doubt, and (2) instead tasked the jurors with searching "for the truth," such instruction *doubly* misstated the law.[14]

Relief is warranted because such instruction -- viewed as a whole – violated due process by effectively reducing the State's burden of proof, as argued supra and shown in the Two Studies. *Pettit*, 171 Wis. 2d at 639.

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[13] Courts have warned against over-defining "reasonable doubt" to juries, on the grounds that the clause "reasonable doubt" "is self-defining, that there is no equivalent phrase more easily understood . . . that the *better practice is not to attempt the definition*, and that *any effort at further elucidation tends to misleading refinements*." *United States v. Lawson*, 507 F.2d 433, 443 (7th Cir. 1974) (emphasis added).

[14] Trammell recognizes that this misstatement of the law (and its due process-violative result) stemmed from the general ignorance -- on the part of the defense counsel, and the prosecution, and the court -- of these scientifically proven, statistically significant facts: that the Dual Directives, included in the jury instruction defining the State's burden of proof, cause jurors to misunderstand and under-estimate the State's burden of proof in criminal prosecutions, and cause jurors to convict at double the rates of convictions found when jury instructions lack the Dual Directives, and to *convict even when reasonable doubt persists*. These facts have been empirically proven, and confirmed, in the Two Studies, and have not been refuted, disproven, or validly challenged. Trammell asks this Court to take judicial notice of such facts, as stated supra.

IV. NEW TRIAL IS WARRANTED IN THE INTEREST OF JUSTICE BECAUSE THE TRUE CONTROVERSY WAS NOT FULLY TRIED DUE TO THE WORDING OF THE JURY INSTRUCTION DEFINING THE STATE'S BURDEN OF PROOF.

A. Standard of Review.

This Court is vested with independent authority to order a new trial under Wis. Stat. § 752.35, paying no deference to the circuit court's determinations. *See State v. Clutter*, 230 Wis. 2d 472, 475-76, 602 N.W.2d 324 (Ct. App. 1999). [15] If this Court believes either that the real controversy has not been fully tried or that it is probable that justice has miscarried, it may, in the exercise of its own sound discretion, enter such order as is necessary to accomplish the ends of justice. *See id.*

The authority to grant a new trial in the interest of justice extends to situations where the right to review is waived by failing to make a proper objection. See *State v. Harp*, 161 Wis. 2d 773, 776, 469 N.W.2d 210 (Ct. App. 1991) (Harp II). This Court need not find a substantial likelihood of a different result on retrial when considering

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[15] § 752.35, STATS. provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

whether a new trial should be granted because the real controversy was not fully tried. See id. at 775.

B. The Instruction, with its Dual Directives, prevented the true controversy – of Trammell's guilt/innocence of the charged crimes -- from being fully tried.

Trammell submits that the Instruction given here warrants discretionary reversal by this Court under Sec. 752.35, Stats, because the Instruction confused the jury and misstated the law, preventing the real controversy -- of Trammell's guilt/innocence of the charged crimes -- from being fully tried. See *Vollmer v. Luety*, 156 Wis.2d 1, 4, 456 N.W.2d 797, 799 (1990).

Trammell was found "guilty" by jurors *misinformed* and *confused* about how and when they properly might convict him. He was convicted based on an improperly reduced standard of proof, *lower than* the constitutionally-mandated "beyond reasonable doubt" standard, because the jurors were led to believe by the Dual Directives (despite the preceding correct definitions of "reasonable doubt") that they could convict even when they still had reasonable doubt. See supra.

Justice miscarried when the various effects of the Dual Directives found in the Instruction, proven by the Two Studies and summarized supra, *compounded* to undercut "fairness" as follows, as discussed supra:

1. The Dual Directives forbade the jurors from searching for "reasonable doubt," contrary to due process as defined in *Winship* and in direct contradiction to the immediately preceding

directives correctly defining the jurors' task relative to "reasonable doubt."

2. The Dual Directives *additionally* required the jurors to "search for the truth," when "searching for the truth" or finding "the truth" could not be reconciled with the due-process-compliant commands found in the earlier portions of Instruction; and when juror truth-searching is not due process-sanctioned.

3. Through the Dual Directives, the jury instruction defining the State's burden of proof ultimately, "as a whole," communicated to a statistically significant number of the jurors that they could properly convict Trammel even when they still had reasonable doubt.

4. For all the above reasons, Trammel was convicted based on a burden of proof lower than "beyond reasonable doubt," so the question of his guilt/innocence was not litigated "fully" consistent with due process.

Trammell's case parallels *State v. Austin*, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833, where the court of appeals reversed and remanded for a new trial in the interest of justice because the jury had been improperly instructed regarding the State's burden of proof, based on the giving of a standard jury instruction which misstated the law. See id. at ¶¶1, 12, 14-16, 18.

The *Austin* court independently reviewed the challenged jury instructions, relying on *State v Ziebart*, 268 Wis.2d 468, 2003 WI App 258, ¶ 16, 673 N.W.2d 369. Upon examining such instruction as a whole, the court agreed with

Austin that the instruction on self-defense was erroneou, invoking S*tate v. Patterson*, 2010 WI 130, ¶53, 329 Wis.2d 599, 790 N.W.2d 909. The error was that the jury instruction *implicitly miscommunicated* the State's burden of proof on self- defense:

> ¶17: "By itself . . . this standard instruction [Wisconsin JI—Criminal 801] implies that the *defendant* must satisfy the jury that he was acting in self-defense. In doing so, the instruction removes the burden of proof from the State to show that the defendant was engaged in criminally reckless conduct.
>
> ¶18 Consequently, we are not convinced that the jury instructions in this case provided the jury with a proper statement of the law of self-defense. [16]

The court reversed and remanded for a new trial in the interest of justice, holding that "by not properly instructing the jury, the circuit court failed to provide it with the proper framework for analyzing that question." Id. at ¶23.

Austin's analysis and holding control here. Essentially the same species of jury instruction error as in *Austin* tainted Trammell's prosecution: the standard instruction J.I.140 on the State's burden of proof, as a whole, also did not properly state the State's burden of proof, because the Dual Directives at its end implicitly cancelled the correct statement of such burden in the early part of the Instruction, as shown supra and proven by the Two Studies. Thus, as in *Austin*, also here "by not properly instructing the jury, the circuit court failed to provide it with the proper framework for analyzing that question," id. at ¶23, and new trial in the interest is proper.

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[16] The court also ruled that the wholly missing jury instruction on defense-of-other was not "proper," as the State asserted, but was error. P.19.

Only a new trial -- free from the above-described compounded jury instruction errors discussed supra -- can ensure that "justice is fairly administered" and the real controversy -- of Trammell's guilt/innocence -- is fully tried, consistent with the required burden of proof.

Trammell asks this Court, in the exercise of its sound discretion, to enter such order as is necessary to accomplish the ends of justice in his case. *See Clutter*, 230 Wis. 2d at 475-76.

V. NEW TRIAL IS WARRANTED DUE TO PLAIN ERROR, BECAUSE THE WORDING OF THE JURY INSTRUCTION DEFINING THE STATE'S BURDEN OF PROOF EFFECTED A FUNDAMENTAL ERROR WARRANTING RELIEF EVEN THOUGH THE WORDING WAS NOT TIMELY OBJECTED-TO.

A. Standard of review.

This Court reviews a trial court's denial of a postconviction motion for a new trial in the interest of justice for erroneous exercise of discretion. *See State v. Harp*, 150 Wis. 2d 861, 873, 443 N.W.2d 38 (Ct. App. 1989) (Harp I), overruled on other grounds by *State v. Camacho*, 176 Wis. 2d 860, 501 N.W.2d 380 (1993)

B. The postconviction court erroneously exercised discretion in denying new trial based on plain error.

Proper exercise of discretion is "a process of reasoning based on the facts of record and reasonable inferences from those facts, and a conclusion supported by a logical rationale founded upon proper legal standards." *McCleary v. State*, 49 Wis.2d 263, 277, 182 N.W.2d 512 (1971) (emphasis added).

Proper exercise of discretion requires that the court rely on facts of record, the applicable law, and, using a demonstrable rational process, reach a reasonable decision. *Martindale v. Ripp*, 2001 WI 113, P.28; 629 N.W. 2d 698 (emphasis added).

The postconviction court erroneously exercised discretion in its analysis and ruling:

> Although the studies performed by Cicchini and Lawrence make for interesting reading, the court is bound by the standard jury instruction implemented by the Jury Instruction Committee which has been accepted for years by Wisconsin's appellate courts. The court gave the standard accepted jury instruction to the jury in this case and rejects the defendant's argument that the instruction misstated the law, lowered the burden of proof, or confused the jury. *Consequently, the court declines to grant a new trial on this basis or on the basis that utilizing the standard instruction was plain error*.
>
> (40:2). (emphasis added).

This analysis and ruling exemplify erroneous exercise of discretion, because:

- they contain factual determinations unsupported by the facts of record: that authors of the Two Studies merely "theorize" that the Dual Directives in fact reduce the State's burden of proof. In fact, the Two Studies empirically prove this fact in a scientifically unrefuted manner.

- they include factual findings irrelevant to the decision-making at hand, but lack necessary relevant factual investigations, analyses, or findings on which such denial could rationally rest. Nothing addresses the legally relevant elements stated in *State v. Jorgensen*, 2008 WI 60, ¶21, 310 Wis.2d 138, 754 N.W.2d 77.

- Instead of pursuing relevant rational factual and legal analysis, the postconviction court merely announced that it was "not persuaded" by the Two Articles, without stating on the record anything rationally explaining/supporting the failure to persuade, and without any other "demonstrable rational process." The Decision demonstrates no decision-making process based on the relevant legal standards, reason, or logic.

- The denial rests on an erroneous understanding of the law: that trial courts are "bound by the standard jury instructions" from the Jury Instruction Committee. (40:2). No legal authorities support this stance. The law is clear: Wisconsin judges exercise wide discretion in issuing jury instructions based on the facts and circumstances of the case. State v. Vick, 104 Wis.2d 678, 690, 312 N.W.2d 489, 495 (1981). Modifying "standard" jury instructions lies within courts' discretion and, when granted, is subject to appellate review for erroneous exercise of discretion. *See, e.g.*, *State v. Paulson*, 106 Wis.2d 96, 108, 315 N.W.2d 350 (1982); *State v. Glenn*, 199 Wis.2d 575, 590, 545 N.W.2d 230 (1996); *Weborg v. Jenny*, 2012 WI 67, ¶¶ 73–74, 341 Wis.2d 668, 816 N.W.2d 191 (errors of law in modifying standard jury instructions are erroneous exercise of discretion). The postconviction court relied on incorrect legal standards when it denied relief based on the stance that courts are "bound" by "standard jury instructions," contrary to proper exercise of discretion.

C. New trial is warranted due to plain error, because the wording of the jury instruction defining the state's burden of proof effected a fundamental error warranting relief.

"Plain error is error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." Jorgensen, 2008 WI at ¶21. The error must be both "'obvious and substantial.'" Id. (citation omitted).

The Two Studies -- now available to the bar -- empirically and scientifically disprove and refute the linguistic analysis and conclusions of *State v. Avila*. See supra. Through empirical test data reliably processed, the Two Studies make "obvious" the errors of the Instruction given here, and their due process costs. Such errors were not "obvious" to the *Avila* court, because the Studies had not yet been published when *Avila* was decided.

The error here was "substantial," because it concerns jury instructions, which are "a *crucial component* of the fact-finding process," *State v. Schulz*, 102 Wis.2d 423, 426, 307 N.W.2d 151 (1981) (emphasis added).

The error is also "substantial" because the Two Studies show that the Instruction is *more than* "*reasonably likely" to be understood* as allowing the jury to convict based on insufficient burden of proof, *State v. Patterson*, 2010 WI 130, ¶53, 329 Wis.2d 599, 790 N.W.2d 909 (instruction is error if based on it jurors can "reasonably likely" convict based on insufficient proof). The Studies show that the Instruction as a whole, through the inclusion of the Dual Directives, *in fact communicates* to jurors that they *may convict even when they still have reasonable doubt;* causing jurors to convict at a *near-double* rate, compared to

instructions without the Dual Directives. Hence the substantiality of the error.

For the above reasons, the postconviction court erroneously applied discretion in declining relief for plain error, and Trammell deserves a new trial due to plain error. Trammell asks this Court to grant him new trial even though the jury instruction errors he now challenges were not timely objected-to. *Jorgensen*, 2008 WI at ¶21.

CONCLUSION

For the reasons stated above, Emmanuel Trammell respectfully asks this Court to set aside his convictions and order a new trial in the interest of justice, or due to "plain error," or because due process was violated by the Instruction, which *confusingly* and *incorrectly* -- as shown by the Studies -- instructed the jurors regarding when they could find Trammell "guilty" and *improperly* reduced the due-process-mandated higher burden of proof for criminal prosecutions.

Dated this 22nd day of September, 2017.

This corrected Brief re-submitted February 2, 2018.

Respectfully resubmitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 9922 words.

Dated this 22nd day of September, 2017.
Re-submitted and re-signed February 2, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of September, 2017.
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