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STATE OF WISCONSIN

IN SUPREME COURT

App. No. 2017AP1206-CR
Milwaukee County Circuit Court Case No. 2015CF3109

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EMMANUEL EARL TRAMMELL,

Defendant-Appellant-Petitioner.

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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INTRODUCTION

Emmanuel Earl Trammell ("Trammell") asks the Supreme Court of Wisconsin, pursuant to Wis. Stat. Sections 808.10, 809.62, and 751.06 to review his convictions and the decision upholding such convictions issued by the Court of Appeals, District I, in *State v. Emmanuel Earl Trammell*, Appeal No. 2017AP1206-CR, on May 8, 2018 ("Decision").

ISSUES PRESENTED

I. WHETHER *AVILA*'S UPHOLDING OF J.I.140 MAY STAND.

This issue was not properly before the Court of Appeals.

II. WHETHER J.I.140 IS CONSTITUTIONALLY CRIPPLED FOR BEING BLIGHTED BY MULTIPLE COMPOUNDING BURDEN-REDUCING ERRORS, *AND* CONFUSING AND MIS-DIRECTING THE JURY.

This issue was not properly before the Court of Appeals.

III. WHETHER SECTION 805.13(3) BARS DEFENDANTS FROM RAISING, POST-INSTRUCTIONS-CONFERENCE, INSTRUCTIONAL OBJECTIONS NOT RAISED DURING SUCH CONFERENCE, IF THE OBJECTIONS WERE NOT KNOWABLE AT THE TIME OF THE CONFERENCE.

The Court of Appeals answered: yes.

IV. WHETHER DISCRETIONARY REVERSAL UNDER SECTION 705.06 OR COMMON LAW IS WARRANTED.

This issue was not before the Court of Appeals.

STATEMENT OF THE CASE

Trammell was charged with one count each of armed robbery of a vehicle and operating a vehicle without owner's consent. The underlying Incident occurred in July 2015, at a Milwaukee food store. (1:1).

T.R. reported that he came to the store in his mother's car and walked inside, leaving his girlfriend in the car. Inside, T.R. was approached Trammell, whom T.R. knew and later identified. Trammell asked what money and property T.R. had on him, reached for T.R.'s phone, but only took coins from T.R.'s hand. When leaving the store, Trammell asked whose car T.R. was driving. T.R. told Trammell not to take the car "because it belonged to [T.R.'s] mother." Trammell walked to the driver's side. T.R. followed. Trammell displayed a firearm, pointed it at T.R., and said: "back off." T.R. complied and got his girlfriend out of the car. Trammell got in and drove off. T.R. called his mother and the police. (1:1-2).[1]

The car was recovered after police pursuit, stopped remotely by OnStar technology. The driver, Gabarie Silas, was identified as someone present during the Incident. (1:2). [2]

At trial, defense counsel argued that Trammell had taken the car as collateral, to leverage repayment of a debt

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[1] The girlfriend reported that Trammell walked into the store after T.R. and soon Trammel walked out, followed by T.R. Then Trammell got behind the wheel of the car and drove away, although T.R. said the car was T.R.'s mother's. (1:2).

[2] Charging papers alleged that Silas told the police *inter alia* that he saw Trammell and T.R. "intensely discussing" inside the store, then saw Trammell taking money from T.R. and patting him down. Silas reported that after the Incident he got T.R.'s car from Trammell and that during the police chase he was on the phone with T.R.'s friends. (1:3).

related to Trammell's missing weapon. There had been no "armed robbery," because there was no "intent to steal," as Trammell never intended *permanently* to keep the car: [3]

> And you're going to hear from the mouths of the State's own witnesses, [T.R.] and Silas, that there was a thing between my client and [T.R.] . . . That it was a debt between them. . . . And they were trying to resolve it. . . .
>
> Mr. Silas will tell you . . . 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).

Considerable evidence supported the collateral theory.

T.R. testified that: he had known that Trammell believed that T.R. owed him a gun because "word on the street was I took it . . . from him;" he knew Trammell wanted the gun back; the store meeting was accidental; Trammel asked about the gun and patted his pockets, but did not take his phone, since he wanted the gun back; after taking some change, Trammell asked about the car and walked to it, and T.R. followed. (54:13-15). [4]

Silas testified that Trammell and T.R. were discussing in the store and T.R. "gave [Trammell] some money. But then

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[3] Armed robbery is committed by someone who, "with intent to steal, takes property from the person or presence of the owner ... by use or threat of use of a dangerous weapon[.]" See WIS. STAT. § 943.32(2). "'Intent to steal' means that the defendant ... intended to deprive the owner permanently of possession of the property." WIS JI—CRIMINAL 1480.

[4] T.R. denied taking Trammell's gun, but agreed that Trammell had it in his head that T.R. had in fact taken the gun. (54:14). An officer testified that security camera footage showed T.R. and the male who reached for his pocket "look[ing] like they were talking back and forth the whole time." (53:65).

I guess it wasn't enough. . . . Then we had walked outside . . . Then [Trammell] was already in T.R.'s car," (54:48-49); "T.R. told [Trammell] . . . 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 the Incident "was about the collateral," (54:49); "word on the street" was that "T.R. owed [Trammell] for a gun but he never paid him," id.; at the store, T.R. and Trammell were "discussing their differences about what was going on," (54:56); post-Incident Trammell talked to Silas about "T.R. calling [Trammell]," indicating he planned to discuss the car with T.R., (54:62); when handing the car to Silas, Trammell promised to call Silas once he heard from T.R., (54:63); Silas gathered that Trammell and T.R. were going to negotiate and work things out, and Trammell would return the car, id.; while being chased in T.R.'s car, Silas got a call from T.R.'s associates and talked "about returning the car," (54:68); when taking T.R.'s car from Trammell, Silas believed that Trammell and T.R. would be working out a deal involving money or the car's return, (54:69). [5]

At the close of evidence the pattern Wis. JI—CRIMINAL 140 (hereafter "J.I.140") was given, which closed by telling jurors "not to search for doubt," but to "search for the truth." (55:3-5).

Defense counsel closed by arguing the collateral theory *and* asking the jurors to search for the truth: "… nothing is more important today. . . [than] *finding the truth*. *Your job, in your jury instructions, search for the truth*. Nothing is more important than right now. . . . " (emphasis added). (55:13).

[5] Silas was also charged in connection with the Incident. He testified after accepting a plea deal in exchange for testimony.

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

> Beyond a reasonable doubt. *My favorite part of that instruction* in that it strikes to the heart of everything we're here for . . . .You *are not to search for doubt, you are to search for the truth.*
>
> *And the truth here is that* [Trammell] robbed [T.R.] of the [car] at gunpoint. . . .

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

The court closed with its own truth-focusing 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 each of you to *seek the truth as to the facts from the evidence* . . . ." (55:33) (emphasis added). These were almost the last words the jury heard before deliberating and rendering "guilty" verdicts. (23). [7]

Post-sentencing, two behavioral-science research studies, published in academic journals, reported a

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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 were not yet published. (App. 7-35 and App. 36-49). The two studies empirically demonstrate 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 cannot claim that defense counsel's failure to object to the instructions was ineffective assistance of counsel. Trammell may not argue that defense counsel reasonably should have known the import of the studies and objected on that ground to the Dual Directives language prior to the publication of the studies.

[7] Trammell was sentenced to 12 years initial confinement and 8 years extended supervision. (33).

statistically-significant increase in conviction rates when the directives closing J.I.140 were included in definitions of the prosecution's burden: "You are not to search for doubt. You are to search for the truth." (hereafter "Dual Directives") [8]

The first study (App. 7-35) demonstrated that mock jurors first instructed only with plain "reasonable doubt" verbiage, but ultimately given the Dual Directives, convicted at much higher rates than mock jurors who received a reasonable-doubt instruction *without* the Dual Directives. (App. 34-35). The second study (App. 36-49) replicated those results, additionally discovering this cognitive link: 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." (App. 49).

Post-conviction Trammell invoked the two studies to argue that reliance on J.I.140 violated due process by measurably reducing the prosecution's burden to something like "preponderance of evidence;" [9] and that J.I.140 mis-stated the law and confused the jurors about their task; and that the resulting miscarriage of justice and "plain error" warranted remedy even when un-objected-to.

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[8] The same language here dubbed the "Dual Directives" was, in the courts below, referred to as the "truth language" or "search for the truth language." To clarify, that language is: "You are not to search for doubt. You are to search for the truth." Such language is part of the pattern J.I.140 given in this case and is the *one variable* whose effects on the jury are empirically tested in the studies addressed in this Brief, as explained throughout.

[9] Trammell cited the detailed findings of the two studies as support for the latest claim.

District I rejected Trammell's J.I.140 claim as contrary to *State v. Avila*, 192 Wis.2d 870, 532 N.W.2d 423 (1995). (App. 3-4). [10]

District I ruled that Trammell had waived his J.I.140 claim by not raising it at an instruction conference, holding that Section 805.13(3) bars defendants from raising *all* errors not raised during the instruction conference, including errors like Trammel's. (App. 6.)

Trammell seeks a science-informed review of J.I.140, of *Avila's* analysis and conclusions regarding J.I.140, and of his convictions stemming from J.I.140. He asserts that the two studies' findings, as well as additional authorities, *all* compel the conclusion that J.I.140 in fact mis-defines and reduces the prosecution's burden of proof/persuasion, to be constitutionally deficient and cause of structural error; and mis-directs and confuses jurors; and that his convictions are therefore constitutionally structurally invalid.

Trammell asks this Court to withdraw J.I.140 for being constitutionally invalid; to guide Wisconsin on correctly instructing criminal juries about the prosecution's due-process-mandated burden; and to reverse his convictions, because his jury was prevented from making the constitutionally-mandated analysis, determinations, and/or verdicts by J.I.140.

Trammell also seeks review of District I's absurdly broad and flawed interpretation of Section 805.13(3).

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[10] District I noted that "even if [it] agreed with this sentiment [that *Avila* should be overruled], [it] cannot act upon it," because only this Court could "overrule, modify or withdraw language from a previous supreme court case." Id. at P17 (citing to *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997)) (App. 4).

Lastly, Trammell seeks this Court's discretionary reversal under Section 751.06.

ARGUMENT

I. *AVILA*'S UPHOLDING OF J.I.140 MAY NOT STAND.

A. *AVILA'S* J.I.140 DETERMINATIONS AND HOLDING ARE REFUTED BY RELIABLE EMPIRICAL EVIDENCE FROM TWO SCIENTIFIC STUDIES.

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

The U.S. Supreme Court clarified that this prosecutorial burden is very high and serves "central purposes" in this Nation's justice system:

> The standard of proof beyond a reasonable doubt, said the [*Winship*] Court, "plays a vital role in the American scheme of criminal procedure," because it *operates to give "concrete substance" to the presumption of innocence to ensure against unjust convictions*, and to *reduce the risk of factual error in a criminal proceeding*. . . . by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself . . . .
>
> The constitutional standard recognized in the *Winship* case was expressly phrased as one that *protects an accused against a conviction except on "proof beyond a reasonable doubt* . . . ." . . . we have never departed from this definition of the rule or from the *Winship* understanding of the *central purposes it serves*. . . . In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that *no person shall be made to suffer the onus of a criminal*

> *conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense*.

Jackson v. Virginia, 443 U.S. 307, 315-16, 99 S.Ct. 2781 (1979) (superseded on other grounds by 28 U.S.C. § 2254(d)) (internal citations omitted) (emphasis added).

To secure a valid conviction, the prosecution must present sufficient evidence of every element to create in every juror's mind "a subjective state of near certitude of the guilt of the accused." Id. at 315.

Avila upheld J.I.140 upon concluding that "it is not reasonably likely that the jury understood [J.I.140] to allow conviction based on proof below the *Winship* reasonable doubt standard." *Avila*, 192 Wis.2d at 889.

Avila's determination and holding are refuted by reliable empirical findings and conclusions from two scientific studies.[11] This evidence shows that the Dual Directives verbiage in fact communicates to jurors – contrary to *Winship* -- that they may vote "guilty" even when reasonable doubt persist, producing markedly more "guilty" votes than an instruction without the Dual Directives. [12]

[11]The publication of these studies post-dates Trammell's convictions.

[12] It bears repeating that in Trammell's trial, the Dual Directives commanded the jurors: (1) "not to search for doubt," but instead (2) "to search for the truth." Subsequently, trial counsel, the prosecutor, and the court *all* emphatically restated these commands to the jurors. (55:3031; 55:32-33).

The Studies demonstrate that J.I.140 actually misdefines the prosecution's burden of proof/persuasion mandated by *Winshi*p, reducing it. [13]

This actual standard-reducing effect of J.I.140 is first demonstrated by the study jointly designed, executed, and published by Michael Cicchini, J.D., CPA, and Professor, Chair of Psychology, and Director of the Law & Justice Program at Beloit College, Dr. Lawrence T. White: *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. Richmond L. Rev. 1139 (2016) (App. 7-35). ("First Study").

The First Study is a controlled experiment to test the actual impact of the Dual Directives on jurors' decision-making when rendering their verdicts. The experiment demonstrates that mock jurors who receive the Dual Directives convict at a *significantly* higher rate than jurors who receive "reasonable doubt" 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. 36-49).

With the large sample size and the detected large difference in conviction rates, the First Study allows the scientists to conclude with more than 97 percent certainty—because of the obtained *p*-values of 0.023 and 0.028—that they did not commit a "Type I error." This translates into a

[13] To clarify: the evidence is found in the results of two studies published after Trammell's conviction, mentioned supra, and discussed in detail infra. (App. 7-35 and App. 36-49).

more than 97 percent certainty (1-*p*) that the authors did not obtain a "false positive" when testing their hypotheses about how the inclusion of the Dual Directives in a jury instruction on "beyond reasonable doubt" *in fact* impacts jurors' understanding of "reasonable doubt," its application, and the resulting conviction rates. (App. 22-24, passim). [14]

The standard-reducing effect of the Dual Directives was then *again empirically demonstrated* by Cicchini and White's follow-up replication study, which tested (and confirmed) the reliability of their original findings in the First Study. Michael D. Cicchini & Lawrence T. White, *Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication*, 117 Columbia L. Rev. Online 22 (2017) (App. 36-49) ("Second Study"). [15]

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[14] The statistical significance of the First Study's findings, and the study's limitations, are fully explained in that Study. (App. 7-35). Trammell respectfully refers this Court to the entire First Study for its complete description of the experiment's design and methodologies, its findings, and their implications. But the scientific robustness of the First Study is 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") See Appendix of Defendant-Appellant, filed in Court of Appeals, pp. 48-60. Trammell refers to Judge Bauer's Decision for its unique -- because legally-informed *and* scientifically-correct -- lucid explanation of the scientific validity of the First Study and its implications for criminal trials. Trammell does not rely on Judge Bauer's Decision as a binding or persuasive authority, but offers his uniquely informed remarks for the State's and the Court's consideration because Judge Bauer had received graduate education in statistics *as well as* legal training.

[15] "Replication," or reproducibility, is a key principle of the scientific method, and a key method for confirming the validity of certain findings, because the same/similar findings observed multiple times in differing conditions are known to be more reliable and valid than findings not "replicated" by repeated observation. See Stefan Schmidt, *Shall We Really Do It Again? The Powerful Concept of Replication Is*

The Second Study *again* finds a statistically significant difference between the lower conviction rates of mock jurors instructed on "reasonable doubt" *without the Dual Directives* vs. the higher conviction rates of jurors who were instructed about "reasonable doubt" *with the Dual Directives language*. (App. 37, 44-47, 49).

Moreover, the Second Study identifies a cognitive link between the Dual Directives and increased conviction rates: that jurors who received the Dual Directives were actually nearly *twice* as 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 legally-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. 47-48).

Jointly, the Two Studies supply reliable scientific evidence that the Dual Directives, when included in the instruction defining the prosecution's burden, *in fact* have these multiple measurable effects on jurors:

1. They cause some jurors to conclude that they may properly vote "guilty" even when reasonable doubt exists; then to vote on this basis,

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

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Neglected in the Social Sciences, 13 REV. GEN. PSYCHOL. 90, 90–91 (2009) (discussing the importance of replication).

3. They effectively reduce the prosecution's burden of persuasion: from the constitutionally-mandated "beyond reasonable doubt" to a low burden like "preponderance of evidence."

Thereby the Two Studies refute -- with reliable behavioral-science evidence -- *Avila's* J.I.140 analysis, conclusions, and holdings. Therefore, *Avila* cannot stand.

The *Avila* Court held -- without the benefit of the scientific evidence from the Two Studies -- that "it is not reasonably likely" that J.I.140 would reduce the prosecution's burden. Id. at 429.

This holding stands refuted by the Studies' cumulative scientific findings and conclusions: that J.I.140 *in fact has multiple measurable standard-reducing effects* on mock jurors' understanding of their tasks. See supra.

The Two Studies, summarized supra, now empirically demonstrate *Avila's* holding to be contrary to reliably observed, quantifiable facts. The Two Studies stand unrefuted. Both Studies are reliable science on which this Court should rely in reviewing and reversing *Avila*. [16]

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[16] The scientific findings of the Two Studies meet the standards for judicial notice, because the scientific methodologies and empirical data obtained are "not subject to reasonable dispute" and 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) (allowing court to take judicial notice in such circumstances). Judicial notice of the empirical facts proven by the Two Studies is warranted because the Two Studies are "sources whose accuracy cannot be reasonably questioned," as shown in Judge Bauer's Decision. See Appendix of Def.-Appellant, filed in Court of Appeals, at pp. 48-54. Judicial notice of the reliability of the underlying scientific principles, methodologies, and testing procedures of the Two Studies is warranted

One hallmark of reliability is that the Two Studies were correctly-designed "controlled experiments," whose participants received the same hypothetical fact patterns involving fictional parties and witnesses. Both experiments were designed to test selected hypotheses: (1) the First Study, 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, to test whether the results of the First Study were replicable; 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. [17]

Reliability is ensured by the Studies' reliance 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 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 defendants'

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because such reliability has not been validly challenged. See *State v. Hanson*, 85 Wis. 2d 233, 270 N.W.2d 212 (1978).

[17] 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.

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 in the social sciences, precisely because they are considered reliable and effective. By using random assignment, controlled experiments ensure confidence that precisely the one isolated variable under scrutiny (here: the Dual Directives) produces the given effect (here: the mis-understanding of the prosecution's required burden and the resulting lowering of such burden, with ultimately markedly increased conviction rates). Cicchini, The Battle over the Burden of Proof, at p. 10.

The Two Studies also reliably ensure that the increased conviction rate of jurors who received the Dual Directives was not accidental; and determine that such rate was "statistically significant," through the sound "underlying scientific principles" of mathematical and statistical analysis. Irrefutably reliable was 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 the widely-accepted algorithm, such calculation was done and resulted in the *p*-value of 0.028 and 0.033 in the Two Studies, respectively. (App. 44-48). This translates into the very scientifically reliable conclusion – made with over 96% certainty -- that the high conviction differential was caused precisely by the Dual Directives. (App. 45).

Reliability of the Two Studies is also assured by their publication in established academic journals that report pre-screened results of scientific inquiries without political or other biases.[18] In those academic publications the Two Studies are surrounded by other intellectually robust, unbiased reports authored by academics, professors, and researchers, presenting *research results* on legal concepts and issues. No scientific critiques of the Studies' methodologies or results have appeared.

Trammell submits that "science is real," and the Two Studies are real science. [19] Nothing in the sciences, the law, or reason indicates that the Two Studies are scientifically unsound or have yielded biased or otherwise unreliable data, findings, or conclusions.

For the above reasons, based on the findings and conclusions of the Studies, this Court should find that J.I.140 "as a whole" in fact mis-defines, and in fact causes a mis-understanding by a statistically significant number of jurors, of the prosecution's burden of proof/persuasion: as lower than constitutionally required; and consequently to hold that the

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[18] The First Article appeared in the University of Richmond Law Review, a general-interest flagship journal founded in 1958. See *History*, U. Rich. L. Rev., http://lawreview.richmond.edu/?page_id=2902, accessed 12/12/2018). The Second Article appeared in Columbia Law Review Online, the companion journal to the 117-year-old, general-interest flagship journal of the same name. *See About the Review*, COLUM. L. REV., http://columbialawreview.org/about-the-review-2/ (accessed Apr. 9, 2017); and was subject to the journal's peer-review policy. See *Submission Instructions: Peer Review*, COLUM. L. REV., http://columbialawreview.org/submissions-instructions/ (last visited Nov. 21, 2017) (stating "[b]ecause peer review of articles and essays improves the Columbia Law Review's selection process and helps to verify piece originality, the Review strongly prefers subjecting submitted pieces to peer review, contingent on piece–selection timeframes and other extenuating circumstances.").

[19] Judge Bauer's Decision so clearly explains, passim.

Dual Directives, and/or equivalent verbiage, must be excised from instructions defining the prosecution's burden of proof/persuasion; and to announce clear rules for properly defining the prosecution's burden, and/or recommendations of constitutionally-sound instructional verbiage.

This Court should rely on the Two Studies and other cited published research in fashioning the above-requested relief because it previously relied on similar social science research (published in analogous publications) and related secondary sources (including law review publications) to amend and develop the law. [20]

For example, in *State v. Dubose*, 2005 WI 126, 285 Wis.2d 143, 699 N.W.2d 582, this Court enacted into law a new approach to law enforcement's use of show-up identification procedures (previously admissible as evidence in prosecutions) upon concluding -- largely based on research studies in psychology/cognition and other secondary sources -- that such procedures were so unnecessarily suggestive and otherwise problematic, that their use could deny defendants due process of law. The new determinations, conclusions, and holding in *Dubose* firmly rested on secondary source research "evidence" in the social sciences, much like the Two Studies. The Court grounded its change of the law on the "impossible

[20] Also primary sources supported this Court's change of the law regarding show-up procedures, e.g. case law addressing federal courts' concern about the *un*reliability of identification procedures and its effect on due process when identifications were used in criminal prosecutions. This court relied on several United States Supreme Court cases predating Dubos' prosecution, which manifested such due process concern, including *United States v. Wade*, 388 U.S. 218 (1967), *Gilbert v. California*, 388 U.S. 263 (1967), and *Simmons v. United States*, 390 U.S. 377 (1968). *Dubose*, 2005 WI at PP.18-27. Trammell also submits, passim, primary sources supporting his requests for changes in the law of jury instructions defining the prosecution's burden of proof and in J.I.140, including U.S. Supreme Court precedent.

to ignore" science published in academic periodicals and law reviews:

> ¶29. We begin our assessment by recognizing that *much new information has been assembled since we last reviewed the showup procedure* . . . . Over the last decade, there have *been extensive studies on the issue of identification evidence, research that is now impossible for us to ignore*. [citing multiple research studies published in academic journals and law reviews like those in which the Two Studies are published]. . . .
>
> ¶30. These studies confirm that eyewitness testimony is often "hopelessly unreliable." . . . The research strongly supports the conclusion that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States . . . [citing multiple research studies published in academic journals] . . .
>
> ¶31. *In light of such evidence, we recognize that our current approach to eyewitness identification has significant flaws. . . . Studies have now shown that approach is unsound* . . . .

(emphasis added; internal citations to case law and research articles omitted).

Based firmly on such scientific "evidence" and science-informed analysis, the Court announced the new approach to show-up procedures. Id. at ¶34. [21] *Dubose* changed the law because the Court understood and accepted new secondary "impossible to ignore" research evidence proving certain facts in show-up procedures implicating due process rights. Id. at ¶¶34-38.

Trammell asks this Court to follow *Dubose* and accept the "evidence" from Two Studies and other cited secondary sources as firm basis for making due-process-required

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[21] The change in the law was also "based to some extent on the recommendations of the Wisconsin Innocence Project." Id.

changes in how Wisconsin defines the prosecution's burden of proof.

B. *AVILA'S* UPHOLDING OF J.I.140 IS CONTRARY TO U.S. SUPREME COURT PRECEDENT.

Avila's upholding of J.I.140 must be overruled because it is contrary to U.S. Supreme Court precedent interpreting the Fifth and Sixth Amendments.

Trammell's right to a jury trial is fundamental. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Its fundamental nature is reflected in the federal and state constitutions. U.S. Const., Am. VI; art. I, § 7 of the Wisconsin Constitution.

"Interrelated" with the Sixth Amendment right to trial by jury is the Fifth Amendment requirement that the prosecution persuade the jury "beyond a reasonable doubt" about guilt of every element. *Sullivan v. Louisiana*, 508 U.S. 275, 278-79, 113 S.Ct. 2078, 2081 (1993). The right to trial by jury includes, "as *its most important element*, the right to have *the jury*, rather than the judge, reach *the requisite finding of `guilty*.'" Id. at 277; *State v. Peete*, 185 Wis. 2d 4, 19, 517 N.W.2d 149 (1994). Therefore, a judge "may not direct a verdict for the State, no matter how overwhelming the evidence." Id.; see also *State v. Howard*, 211 Wis. 2d 269, 279, 564 N.W.2d 753 (1997).

The prosecution *must prove all elements* of the offense charged, see e.g., *Patterson v. New York*, 432 U.S. 197, 210, 97 S.Ct. 2319 2327 (1977); and *must also persuade* the factfinder "*beyond a reasonable doubt*" that the evidence presented establishes each of the elements, see *Winship*, 397 U.S. at 364. The prosecution's burdens require two determinations from jurors: (1) *whether evidence was presented of every elemental fact* to make guilt probable; and

(2) *whether sufficient evidence was presented* of every elemental fact *to eliminate reasonable doubt* as to guilt. See *Sullivan*, 508 U.S. 277-278 (discussing such duality of the prosecution's burden of proof/persuasion and the jury's distinct determinations).

In *Sullivan v. Louisiana*, supra, Sullivan's murder conviction was reversed because the instructions prevented the jury from determining whether the prosecution *sufficiently persuaded them -- "beyond a reasonable doubt"* -- of the facts necessary to establish each element. Essentially, the instructions *prevented the jury from determining correctly* whether the prosecution met its *requisite burden of persuasion*. The Court held: "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt. Our *per curiam* opinion in *Cage* [498 U.S. 39, 111 S. Ct. 328 (1993)], which we accept as controlling, held that *an instruction of the sort given here does not produce such a verdict*. Petitioner's Sixth Amendment right to jury trial was therefore denied." (footnote omitted) (emphasis added).

The Court so reasoned to reach these conclusions:

> . . . Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of . . . [harmless error] review is simply absent. *There being no jury verdict of guilty-beyond-a-reasonable-doubt,* the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. *There is no object, so to speak, upon which harmless-error scrutiny can operate. . . .*
>
> *. . . The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action,* or else directed verdicts for the State would be sustainable on appeal; *it requires an actual jury finding of guilty. . . .*

> . . . But *the essential connection to a "beyond a reasonable doubt" factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings. . . .*

Id. at 280-281 (emphases added; internal citations omitted).

Because Sullivan's instructions "misdescribed the burden of proof," they "vitiated all the jury's findings," requiring reversal. Id. at 282. Any attempt to review the verdicts was "utterly meaningless" and object-less: there were no "verdicts" to review because the jury had never done their constitutionally-required work. Id. *Sullivan* held that an instructional error "of the sort" found in *Sullivan* and *Cage* -- which *ab initio vitiates* the jury's requisite fact-finding and verdict-making work -- is a "structural error" that always invalidates the conviction, id. at 279-282; and that an instructional error "of [that] sort" always "defies analysis by 'harmless-error' standards," id. at 282. Hence *Sullivan*'s conviction had to be reversed.

Sullivan required *Avila* to reject J.I.140 as invalid, and reverse Avila's conviction; and requires the same results here.

The legal principles, reasoning, and holdings of *Cage* and *Sullivan* apply and control here. In *Avila* and here, the instructional error "misdescribed the burden of proof," to "vitiate *all* the jury's findings," so no constitutionally-required verdict exists to be reviewed under the harmless error analysis. Reversal is required under fundamental due process: in *Avila* and here. Id. at 281 (emphasis in *Sullivan).*

J.I.140 "misdescribed the burden of proof" because, despite first correctly instructing that every element must be proven "beyond reasonable doubt," it *ultimately forbade jurors from "searching for doubt" (thus considering each existing doubt) and required them to "search for the truth"* instead. These final Dual Directives -- directly contrary in import to the initial correct announcement of the reasonable

doubt standard – "vitiated" the required "reasonable doubt" analysis/determination by the jurors. Id. at 281, 2083. Jurors instructed not to "search for doubt" presumptively obeyed. [22] Therefore they never identified each "reasonable doubt," or made the required "reasonable doubt" persuasion determinations, or rendered the required reasonable-doubt-based verdicts.

The *Cage* and *Sullivan* analyses display precisely such reasoning, which Trammell here replicates.

Cage's instruction (and Sullivan's) -- just as Avila's and Trammell's – first correctly informed jurors that they "must acquit" "[e]ven where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt." *Cage*, 498 U.S. at 40. But later, Cage's instruction defined "reasonable doubt" too narrowly and stringently: as "a grave uncertainty," "an actual substantial doubt," the opposite of "moral certainty." Id.

Such narrow definition of "reasonable doubt" improperly mis-stated the requisite burden of persuasion:

> It is plain to us that the words 'substantial' and 'grave,' as they are commonly used, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. . . . it *becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.*

Id. at 41 (emphasis added).

Upon thus finding the instruction unconstitutional under *Winship*, the Court reversed Cage's murder conviction. Id., passim. Sullivan's instruction was "essentially identical to the one in *Cage*," and his conviction was reversed too, as

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[22] Juries are presumed to "follow the instructions given to [them]." *State v. Truax*, 151 Wis.2d 354, 362, 444 N.W.2d 432, 436 (Ct.App.1989).

not subject to "harmless error" analysis. *Sullivan*, 508 U.S. at 277.

J.I.140 replicates the errors of the *Cage/Sullivan* instruction, in *Avila* and here: it too first correctly announces the prosecution's burden of proving all elements of the charge, but then *mis-instructs about how the prosecution must persuade* the jury about the facts necessary to establish each element. It thus "vitiates" the jurors' correct understanding/application of the requisite burden of persuasion. In fact, J.I.140 allows jurors to convict even when reasonable doubt persists, as shown by the Studies. See supra.

The *Cage* court saw "plainly" that the late overly-narrow description of "reasonable doubt" allowed "*a reasonable juror*" to find guilt "based on a degree of proof" "below that required" by Due Process -- *despite* the earlier correct instruction on reasonable doubt. *Cage*, 498 U.S. at 41. The instruction was unconstitutional *because, despite being partially correct, it allowed "a juror" to misunderstand one absolute pre-requisite for a valid "guilty."*

The same unconstitutional error "plainly" exists in J.I.140, and has the same standard-lowering effect, discussed supra: allowing "a reasonable juror" to find guilt based on a truth-based standard "below that required" by Due Process.

When the giving of the *Cage/Sullivan* instruction did not satisfy the "interrelated" Fifth and Sixth Amendments, *Sullivan*, 113 S.Ct. at 2081, so also the giving of J.I.140 does not satisfy those Amendments or their state-counterparts. *Avila's* upholding of J.I.140 was contrary to *Cage* and *Sullivan*.

As in *Cage* and *Sullivan*, the giving of J.I.140 in *Avila* and here did "not produce" the required verdict on which a constitutionally valid conviction could rest. Trammell's convictions must be reversed; and *Avila's* upholding of J.I.140 as constitutionally valid may not stand.

C. *AVILA* UPHELD J.I.140 ERRONEOUSLY, BECAUSE IT MIS-APPLIED THE CONTROLLING LEGAL TEST.

Avila upholds J.I.140 as a result of mis-applying the legal test for reviewing the validity of jury instructions. The same test, correctly applied in *Cage*, yielded the opposite result. This is another ground for reversing *Avila's*.

In *Cage* the reviewing court considered "how reasonable jurors could have understood the charge as a whole." *Cage, 498 U.S. at* 41 (citation omitted). The *Avila* court applied the same test, at p. 889:

> When faced with this type of challenge, our duty is to examine the jury instruction as a whole, *see Victor v. Nebraska*, 114 S. Ct. 1239, 1243 (1994), to determine "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." Id.

Cage reached the opposite result upon applying the test differently than the *Avila* court: correctly. *Avila's* flawed application of the test produced its erroneous conclusion and result.

The *Cage* Court reviewed the instruction "as a whole" by assessing all its components equally: those "at one point" correctly explaining the burden, *alongside* those later defining "reasonable doubt" too narrowly and mandating "moral certainty"-based determinations of guilt. The Court found the charge invalid "as a whole" after accounting *fairly for all its parts*. Id. at 40-41.

Avila, instead, focused on the "points" correctly naming the burden of proof, to justify the charge's validity, ignoring the erroneous points and their import. *Avila* concluded, at pp. 889-90, that J.I.140 was valid because *some points* correctly identified the "beyond reasonable doubt" standard:

> *Throughout, the instruction underscores that . . . the State bears the burden of proving the defendant's guilt beyond a reasonable doubt*. The instruction *begins by recognizing the burden* which must be overcome in order to find the defendant guilty. . . Immediately *thereafter, the instruction indicates who bears that burden . . . .*
>
> Having defined "reasonable doubt," the *instruction again reminds the jury that "it is your duty to give the defendant the benefit of every reasonable doubt." **And finally, the instruction tells the jury not to search for doubt, but search for the truth.** The instruction as a whole emphasizes . . . that the State bears the burden of proving the defendant's guilt beyond a reasonable doubt.* . . In the context of the entire instruction, we conclude that [J.I.140] . . . did not dilute the State's burden . . . .

This analysis acknowledges the existence of the Dual Directives (in bolded cursive, supra), but not of their erroneous, nullifying impact on the preceding sections, nor their import for the meaning of J.I.140 "as a whole." The correct "points" are taken *out of the context* of the Dual Directives, so they may support the ruling. J.I.140 is not analyzed "as a whole" correctly, as modeled by the *Cage* court, see supra.

Nor does *Avila* perform Wisconsin's "as a whole" analysis: of considering *all* portions of the charge to determine whether the erroneous part invalidates the entire instruction or is rendered "harmlessly" erroneous by the correct parts. *See State v. Hoover*, 2003 WI App 117, ¶ 29, 265 Wis.2d 607, 666 N.W.2d 74 (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). *Avila* no-where assesses, determines, or concludes that the correct statement of the prosecution's burden early in J.I.140 "renders" the incorrect statement in the Dual Directives "harmless error." *Avila* never even acknowledges the errors in the Dual Directives. It does not perform the required "as a whole" analysis. *Hoover*, 2003 WI App ¶29.

Therefore Trammell asks this Court to: (1) overrule *Avila* as incorrectly decided, and (2) reverse Trammell's convictions as stemming from an instruction which prevented his jury from making the constitutionally-mandated analysis, determinations, and verdicts.

II. J.I.140 IS CONSTITUTIONALLY CRIPPLED FOR BEING BLIGHTED BY MULTIPLE COMPOUNDING BURDEN-REDUCING ERRORS, *AND* CONFUSING AND MIS-DIRECTING THE JURY.

The Two Studies demonstrate that the Dual Directives in J.I.140 actually reduce the prosecution's burden and increase the conviction rates. See supra. Multiple additional flaws cripple J.I.140's constitutional validity.

A. MULTIPLE MAJOR ERRORS COMPOUND TO CONSTITUTIONALLY CRIPPLE THE DEFINITION OF "REASONABLE DOUBT" IN J.I.140

"Important affairs of life" analogy flaw**.**

J.I.140 directs jurors to make "beyond reasonable doubt" determinations as they make determinations concerning the important affairs of their lives: "a reasonable doubt" is "such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life."

This is a false analogy with burden-reducing effects.

Common sense says that this is a false analogy: the stringently-prescribed (by due process), strictly evidence-based, strictly rational "beyond reasonable doubt" determinations about a prosecution are *unlike* our decisions about ourselves: largely intuitive, bias-driven, based on

varying factors, imperfect data, and unique personal experience.

The Federal Judicial Center warns against using this false analogy: "decisions we make in the most important affairs of our lives -- choosing a spouse, a job, a place to live, and the like -- generally involve a heavy element of uncertainty and risk-taking. They are *wholly unlike* the decisions jurors ought to make in criminal cases." Fed. Jud. Ctr. Pattern Crim. Jury Instructions No.21 (1987) (emphasis added).

Judges and courts agree. In *U.S. v. Jaramillo-Suarez*, 950 F.2d 1378, 1386 (9th Cir., 1991), in deciding a "reasonable doubt" due process instruction challenge, the court concluded that instructions on reasonable doubt should not analogize "beyond reasonable doubt" determinations with making "the most important decisions" of life, "because the most important decisions in life--choosing a spouse, buying a house, borrowing money, and the like--may involve a heavy element of uncertainty and risk-taking and are wholly unlike the decisions jurors ought to make in criminal cases." The 9th Circuit's opinion "urged" courts not to give instructions based on such analogy. Id.

In *People v. Johnson*, 115 Cal.App.4th 1169, 1171-1172 (Cal. App., 2004), the appellate court relied on earlier California decisions to hold that the court, during jury selection, improperly "amplified" the concept of "reasonable doubt" by extensively comparing the "beyond-reasonable-doubt" determination-making to making decisions of everyday living. The appellate court concluded that this judicial amplification reduced the prosecution's burden to a

preponderance of the evidence, and reversed on this ground, remanding for a new trial. Id. at 1171-1173. [23]

Research confirms that the "important affairs of life" analogy in definitions of "reasonable doubt" "considerably" reduces the requisite heightened burden, by focusing on *what kind of doubt* causes one to hesitate, as opposed to on *what kind of proof* suffices to convict. Mandeep K. Dhami, et al., Instructions on Reasonable Doubt: Defining the Standard of Proof and the Jurors' Task, 21 Psychol. Pub. Pol'y & L., 169, 175 (2015); see also Michael D. Cicchini, *Instructing Jurors on Reasonable Doubt: It's All Relative*, 8 Calif. L. Rev. Online, 72, 74-76 (2017) (discussing this false analogy as a burden-reducing flaw).[24]

"The alternative hypothesis" flaw

J.I.140 instructs jurors to decide whether the presented evidence can be "reconciled upon any reasonable hypothesis consistent with the defendant's innocence," and acquit if it can be. This creates two problems:

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[23] This court relied on *People v. Nguyen*, 46 Cal. Rptr. 2d 840, 845 (1996) and *People v. Brannon*, 47 Cal. 96, 97 (1873). The *Nguyen* court stated: "The judgment of a reasonable person in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence. . . But in the decision of a criminal case involving life or liberty, something further is required." *People v. Nguyen*, 46 Cal. Rptr. 2d 840, 845 (1996) (emphasis added) (quoting *People v. Brannon*, 47 Cal. 96, 97 (1873)). The *Ngyuen* court, relying *Brannon*, found that the court incorrectly defined the prosecution's burden, and impermissibly lowered it, by analogizing the jurors' task to making important life decisions. Relief was denied because the error was waived.

[24] This Cicchini article, passim, presents a useful overview and discussions of other major flaws in commonly-used reasonable doubt definitions, as identified and critiqued by researchers, judges, jury instructions committees, and courts nationwide. Dhami's findings indicate that the "doubt-hesitate" instruction is "likely to lead to false convictions." Instructions on Reasonable Doubt, 21 Psych. Pub. at 175.

- when the defense puts on evidence and presents a defense theory, this directive requires the jury to balance two competing theories, effecting the "preponderance of the evidence" standard. This problem was identified in *U. S. v. Khan*, 821 F.2d 90, 93 (2d Cir. 1987), and described in the study by Lawrence Solan, *Refocusing the Buren of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 Tex. L. Rev. 105, 119-120 (1999).

- It shifts the burden to the defense, by focusing jurors on "the defendant's ability to produce alternatives to the government's case." Solan, *Refocusing the Buren*, 78 Tex. L. Rev. at 105. Such focus unfairly burdens the defense, whose development/presentation of alternative hypotheses is already hobbled by the prosecution's control over the physical evidence and witnesses, see Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. SCH. L. REV. 912, 912–14 (2011), and by truth-suppressing trial rules, such as witness-privacy statutes that hobble presentation of alternative theories, see e.g., *State v. Carter*, 782 N.W.2d 695 (Wis. 2010) (statute prevents defendant from presenting an alternative source of child accuser's "detailed sexual knowledge"). [25]

[25] The defense is also prejudiced in this manner by the judicial tools for excluding evidence of third-party guilt, see David Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 WIS. L. REV. 337, 378 (2016) ("The argument that evidence of third-party guilt is excludable because it is a waste of time is breathtaking in its disregard for a criminal defendant's due process rights."). See Cicchini, Instructing Jurors, 8 Cal. Law R. Online at 73-80, for a detailed discussion of these major instructional flaws, based on extensive research and supported by authority citations.

The unsavory "unreasonable doubt" flaw.

J.I.140 describes "reasonable doubt" negatively, by disparaging as *un*reasonable doubt based on personal "softer feelings," such as "sympathy or from fear to return a verdict of guilt."

Such negative definition discourages acquittals based on pro-defense biases. Unfairly, it does *not* discourage convictions on pro-prosecution biases, such as fear of crime and mayhem.

Moreover, it dissuades from doubt-based determinations and puts on the defense the burden of refuting/overcoming all *un*reasonable doubts:

> The weight of the instruction conveys a message to the jurors: The judge would not have presented so many ways in which the juror's doubts can be used improperly if this were not the main problem to avoid. [This will] likely . . . focus jurors on the strength of the defendant's case as a criterion for acquittal rather than on whether the government has proven its case with near certitude.

Solan, *Refocusing the Buren of Proof*, 78 Tex. L. Rev. at 144.

The truth-focus flaw

J.I.140 ends with the Dual Directives: "You are not to search for doubt. You are to search for the truth." This puts criminal juries in the position of civil juries: deciding what allegations are proven "true," or which narrative is more true: the prosecution's or the defense's. See supra.

But weighing the relative "truth" of narratives is not the criminal jury's task. Their task is to determine whether

the prosecutor's accusations have been *sufficiently proven to remove every "reasonable doubt"* and attain a "subjective state of certitude" that the prosecution's evidence establishes guilt of every element. *Winship*, 397 U.S. at 364.

Courts have recognized that "seeking the truth" equals deciding based on a preponderance of evidence standard: "'seeking 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 evidence standard*." *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1223 (5th Cir. 1994) (emphasis added).

> The multiple flaws of J.I.140 compound to make it "possibly the worst [jury instruction on reasonable doubt] in the nation"

J.I.140 boasts all the grave flaws described supra, each of which has a burden-reducing/shifting effect noted by the courts and researchers. These several burden-reducing/shifting effects compound, making J.I.140 a veritable showcase of burden-reducing verbiage. [26]

The Two Studies quantify the burden-reducing effects of just the last-discussed flaw: the truth-focus flaw manifest in the Dual Directives. It is reasonable to infer that the added effects of the additional flaws in J.I.140 compound, *gravely* to under-state the prosecution's burden of proof/persuasion, and shift it. Based on extensive research of "reasonable doubt" instructions in all U.S. jurisdictions, Cicchini writes that "Wisconsin's pattern jury instruction on the burden of proof

[26]See Michael D. Cicchini, Instructing Jurors on Reasonable Doubt: It's All Relative, 8 Cal. L. Rev Online, at pp. 72-87, for a well-researched and extensive discussion of the various flaws found in instructions on the prosecution's burden, and for proposed instructional language that avoids such flaws.

is, quite possible, the worst in the county." *Instructing Juror*s, 8 Cal. L. Rev. Online at 80.

B. J.I.140 CONFUSES THE JURY

"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).

As shown supra, the Two Studies demonstrate -- in a scientifically reliable manner -- that J.I.140 *in fact mis-directs/confuses* jurors regarding the prosecution's burden of proof, "to the detriment of the defendant's due process rights." *Dodson*, 219 Wis.2d at 86. The Studies demonstrate that the charge *as a whole* mis-directs the jury. *Hoover*, 2003 WI App at ¶ 29.

A plain language analysis of J.I.140 "as a whole" confirms the same. The Dual Directives give the jurors two final commands which confuse, because they conflict with the commands given earlier in J.I.140 "as a whole." [27] This internal conflict -- between the Dual Directives and the preceding portions -- gives the jurors a task impossible to perform. No juror could "give [Trammell] the benefit of *every* reasonable doubt" (as J.I.140 first demanded) without first identifying every reasonable doubt, by means of "searching" for it (forbidden by the Dual Directives).

Trammell's jurors were confused -- to his prejudice -- when the Dual Directives *flatly contradicted* the correct

[27] 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).

directives given earlier in J.I.140: (1) 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 (2) that jurors must consider every reasonable doubt and "give the defendant [its] benefit." (55:4).

Given such contradictory/confusing commands, the jurors could not rationally follow *all* the commands. When directed "not to search for doubt," they *obeyed the* f*inal instructional command, additionally reinforced in the court's and lawyers' closings* -- although it was incorrect. (55:30-31, 32-33).

In following *this final, reinforced, incorrect* command, the jurors could not give Trammell the benefit of *every* reasonable doubt. As commanded, they presumptively "searched for the truth," to decide (validly) that the prosecution's "robbery" narrative was probably "true," i.e. some evidence was presented supporting every element, including the contested element of intent to "permanently deprive." [28] This allowed them to vote "guilty" even though:

- various evidence had been presented supporting the *lack of intent* "permanently to deprive" T.R. of the car, see supra, so the evidence of the requisite "intent to steal" was mixed at best, supporting valid "reasonable doubts;"

- the jurors never asked or determined that the prosecution's evidence eliminated "every

[28] "We presume that the jury follows the instructions given to it." *State v. Truax*, 151 Wis.2d 354, 362, 444 N.W.2d 432, 436 (Ct.App.1989).

> reasonable doubt" on every element, particularly on the contested "intent to steal." [29]

Such verdicts were constitutionally invalid: they did not involve deciding *whether sufficient evidence was presented to resolve every reasonable doubt* about every element, especially the contested intent. This reduced standard yielded convictions when the mandated heightened burden of persuasion was unmet on the intent element: evidence on "intent to steal" was mixed and the evidence of intent to return the car was plentiful, as summarized supra. Reasonable doubts about the requisite intent were alive and kicking. Trammell's convictions epitomize the "*factual error in a criminal proceeding*" that proper definition of the prosecution's burden was intended to avoid. *Jackson*, 443 U.S. at 315.

The Dual Directives -- by commanding "reasonable jurors" to not search for doubt, but to search for the truth -- "misinterpreted the instructions [on the prosecution's burden of proof] to the detriment of [Trammell's] due process rights." *Dodson,* 219 Wis.2d at 86. This caused the jurors to apply the near-preponderance standard, which in turn allowed them to vote "guilty" even when reasonable doubts as to he requisite intent persisted -- contrary to due process.

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[29] As explained supra, defense counsel argued that Trammell had lacked the requisite intent for "armed robbery," because he only took the car as collateral, to leverage repayment of a debt. Counsel elicited testimony from T.R. and Silas supported the collateral theory. The allegations in the charging papers were not inconsistent with the collateral theory. Therefore, evidence existed to support the defense's collateral theory and also to support the armed robbery charge, making the "intent" element of robbery the most contested one, and most difficult for the State to prove.

C. J.I.140 MIS-DIRECTS THE JURY

Reversal is proper when the reviewing court is "persuaded that the instructions, when viewed as a whole, misstated the law or misdirected the jury." *State v. Pettit*, 171 Wis. 2d 627, 638, 492 N.W.2d 633 (Ct. App. 1992).

As shown supra, the Instruction "as a whole" mis-described the task of the jury, mis-directing them towards applying the preponderance standard of civil cases: the final Dual Directives overrode the earlier, *Winship*-compliant instruction: (1) by barring the jurors from seeking out, identifying, and considering "reasonable doubt," thus from applying the "beyond reasonable doubt" standard of *Winship*; and (2) by requiring the jurors *instead* to decide "guilt/innocence" based on an irrelevant, improper, and arbitrary standard based on truth-searching.

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 *criminal juries* with searching for, or finding, "the truth" based on their analysis of the evidence. No valid legal authority supports that the such *jurors' prescribed* task is accomplished by searching for "the truth," or that such *jurors* may/should be searching for "the truth" in verdict-making.

Courts recognize that "truth" is *not* the jurors' concern, nor part of their task in criminal cases. See e.g. *State v. Berube*, 286 P.3d 402, 411 (Wash. App., 2012) ("truth is not the jury's job"). The jurors' task -- of rendering verdict consistent with *Winship* – involves *determining whether the defendant has been satisfactorily proven "guilty" by the prosecution's evidence*: "beyond reasonable doubt." A criminal "guilty" verdict and "conviction [are] *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).

One court clearly stated: "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).

In Trammell's case, telling the jurors "*not* to search for *doubt*" but "to search for the *truth*" misstated the law *and* mis-directed them, in ways stated supra. J.I.140 as a whole thus *doubly* led the jurors astray about the prosecution's requisite burden (for convicting), resulting in "guilty" verdicts not meeting *Winship's* requirements.

In the evidentiary landscape before them, the jurors saw reasonable doubts about the element of "intent to steal," as shown supra. But the Dual Directives obscured or erased those reasonable doubts, instead focusing the jurors' attention on "truth," i.e. on deciding whether the prosecution's "robbery" accusations were probably true. Thus, the jurors never reached the second determination required of them: whether the presented evidence *sufficiently persuaded them* about guilt of every element, including the contested element of "intent to steal." *Sullivan*, 508 U.S. 278 (discussing the second determination juries must make). Trammell's jury never performed their requisite task of holding the prosecution to its burden of persuasion on the element of "intent to steal."

Due to all the above-identified compounding burden-reducing/shifting errors in J.I.140, this Court should reverse

Trammell's convictions, because J.I.140 -- viewed as a whole, with the multiple compounding burden-reducing errors described supra – here so confused and mis-directed the jury, and mis-stated the law, that Trammell was found guilty based on an unfairly reduced burden; but would not have been found guilty if the requisite burden had been applied by correctly-instructed jurors: because reasonable doubts as to the "intent to steal" element persistent in the evidentiary landscape here presented and were consistent with the defense theory of collateral.

III. SECTION 805.13(3) DOES NOT BAR DEFENDANTS FROM RAISING, POST-INSTRUCTIONS-CONFERENCE, INSTRUCTION OBJECTIONS NOT RAISED DURING SUCH CONFERENCE, IF THE OBJECTIONS WERE NOT KNOWABLE AT THE TIME OF THE CONFERENCE.

A. THE PLAIN LANGUAGE OF SECTION 805.13(3) DOES NOT FORECLOSE POST-INSTRUCTIONS-CONFERENCE INSTRUCTIONAL OBJECTIONS NOT RAISED DURING THE CONFERENCE, IF THE OBJECTIONS WERE NOT KNOWABLE AT CONFERENCE TIME.

Correct statutory interpretation dictates that Section 805.13(3) does not foreclose the raising, post-instructions-conference, of instructional objections not raised during such conference, if the objections were not knowable at the time of the conference.

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶44, 271 Wis.2d 633, 681 N.W.2d 110. This Court "assume[s] that the legislature's intent is expressed in the statutory language." Id.

Therefore, statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *Seider v. O'Connell*, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d at ¶46.

Statutes are read, where possible, to give reasonable effect to every word, to avoid surplusage. Id. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." *Bruno v. Milwaukee County*, 2003 WI 28, ¶20, 260 Wis. 2d 633, 660 N.W.2d 656.

"[S]scope, context, and purpose are perfectly relevant to a plain meaning interpretation of an unambiguous statute as long as the scope, context, and purpose are ascertainable from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history." *Kalal*, 271 Wis. 2d at ¶48.

Considering every word to avoid surplusage, the language of Section 805.13(3) is plain and unambiguous, and does not foreclose post-verdict review of instructional errors not raised at pre-instruction conference when the errors were

not knowable, nor capable of being raised "with particularity," at the conference.

Section 805.13(3) ("Section") states in relevant parts:

> . . . At the conference . . . counsel may file written motions that the court instruct the jury . . . . The court shall inform counsel on the record of . . . the instructions . . . it proposes to submit. Counsel may object to the proposed instructions . . . on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. Failure to object at the conference constitutes a waiver of any error in the proposed instructions . . . . [30]

The language plainly addresses only instructional errors that can be identified pre-conference and raised "with particularity" at the conference. It plainly creates three mandates:

1. *allows* trial counsel to object to court-proposed jury instructions at a pre-instructions conference;

2. *requires* trial counsel to raise the allowed objections "with particularity" at the pre-instructions conference;

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[30] Wis. Stats Section 805.13(3) ("Section") in toto states as follows: "Instruction and verdict conference. At the close of the evidence and before arguments to the jury, the court shall conduct a conference with counsel outside the presence of the jury. At the conference, or at such earlier time as the court reasonably directs, counsel may file written motions that the court instruct the jury on the law, and submit verdict questions, as set forth in the motions. The court shall inform counsel on the record of its proposed action on the motions and of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict."

3. *considers "waived"* all allowed objections *not* raised "with particularity" at the pre-instructions conference.

The three mandates presumptively express "the legislature's intent [as plainly] expressed in the statutory language." *Kalal*, 271 Wis. 2d at ¶44. They constitute the "meaning" of the Section's "waiver rule," which is to be "given . . . full, proper, and intended effect." Id. They unambiguously emerge from plain reading of the Section, "giving reasonable effect to every word, to avoid surplusage." Id. at ¶6.

Because the three mandates are the "plain, clear statutory meaning . . . there is no ambiguity, and the [Section] is applied according to this ascertainment of its meaning." *Bruno*, 260 Wis. 2d at ¶20. The three mandates inhere in the Section's plain language with its "textually ascertainable context, scope, and purpose," so "primary intrinsic analysis" yields the non-ambiguous meaning of the Section. Secondary extrinsic sources of interpretation are irrelevant. The interpretation stops here. *Kalal*, 271 Wis. 2d at ¶52.

Nothing in the Section's plain language concerns -- directly or indirectly -- instructional errors that cannot be known or "stated with particularity" by/at conference time. The Section's language does not reach such instructional errors, or bar their review if first raised post-conference but otherwise timely, under the general law of timely objecting. See Section 901.03(1)(a) (making timely objections); *State v. Gove*, 148 Wis.2d 936, 940-41, 437 N.W.2d 218, 220 (1989) (timely objection preserves issue for appeal).

Therefore, instructional errors not knowable nor capable of being raised at conference time "with particularity," are outside the scope of Section 805.13(3).

Trammell's J.I.140 errors are not subject to the waiver rule of the Section.

B. THIS COURT'S DECISION IN *HOWARD* INDICATES THAT THE SECTION GOVERNS ONLY INSTRUCTIONAL OBJECTIONS CAPABLE OF BEING RAISED "WITH PARTICULARITY" AT THE INSTRUCTIONS CONFERENCE.

As shown supra, the Section's plain language, construed in light of the textually-ascertainable scope, context, and purpose, is unambiguous. That language states that instructional errors capable of being raised at the pre-instructions conference *may* be then raised, but *must then be "stated with particularity,"* to preserve their review.

It comports with reason, common sense, and the law of timely objections, that instructional errors unknowable and incapable of particularized statement at conference time cannot be waived/forfeited for being raised post-conference, when they first become identifiable and stateable "with particularity" post-conference.

This Court's decision in *State v. Howard*, 211 Wis.2d 269, 287-88, 564 N.W.2d 753 (1997), supports the above position.[31] Howard filed a Section 974.06 postconviction motion seeking a new trial, arguing that a post-verdict change in the law (this Court's decision in *State v. Peete*, 185 Wis. 2d 4, 19, 517 N.W.2d 149 (1994)) created grounds for review of the instructions in Howard's case, although instructional

[31] *Howard* was overruled in part on unrelated grounds by *State v. Gordon*, 2003 WI 69, P.40, 262 Wis.2d 380, 663 N.W.2d 765 ("We overrule *Howard* and *Avila* to the extent that those cases established a rule of automatic reversal where a jury instruction omits an element of the offense.").

errors were not raised in pre-instructions conference or on direct appeal. [32]

Rejecting the State's Section 805.13(3) and *Schumacher*-based waiver arguments, the Court ruled that Howard did "not waive" his late-arising instructional objections by not raising them in pre-instructions conference, because he could not have possibly known or raised them at conference time:

> … Howard's *counsel had an obligation to object at the instructions conference based on* incompleteness or other *error about which he knew or should have known*. We cannot agree that Howard's counsel could have stated grounds for an objection "with particularity," based on [a legal rule not then yet announced, announced later in *Peete*] and corresponding instruction. See 805.13(3). Howard has *not waived* this issue.

Howard, 211 Wis. 2d at 289, ¶43 (emphasis added).

Consistent with the plain language of the Section and with the Court's interpretation of it in *Howard*, this Court should hold that the Section governs only instructional objections capable of being raised at the instructions conference "with particularity" and requires preservation of only such objections by raising them at the instructions conference; and that Trammell's instructional objections are not waived for not being raised at conference time, because they were then unknowable.

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[32] The *Howard* court held that -- by invoking a post-direct-appeal change in the law -- he established a "sufficient reason" for failing to raise the claim during his first appeal: because the Supreme Court only post-verdict and post-direct appeal interpreted a governing statute in a way that created a "new rule of substantive law;" this allowed *Howard* to evade *Escalona-Naranjo's* bar on serial appeals. Id.

C. TRAMMELL'S CASE DOES NOT IMPLICATE THE *SCHUMACHER* FORFEITURE/WAIVER RULE.

Schumacher's forfeiture/waiver rule does not implicate, apply to, or govern Trammell's case. *State v. Schumacher,* 144 Wis.2d 388, 406, 424 N.W.2d 672, 679 (Wis. 1988).

Schumacher holds, partly relying on Section 805.13, that courts of appeals have no power to review jury instructions for plain error under the common law, where an objection was not preserved during the jury instruction conference, but could have been preserved by being raised "with particularity" "during the conference." Id. at 409, 424 N.W.2d 672; see also *State v. Langlois*, 377 Wis.2d 302, 901 N.W.2d 768, 2017 WI App 44, fn. 2 (Wis. App., 2017) (stating: "Our supreme court determined in *State v. Schumacher,* . . . that this court does not have the power to review jury instructions for plain error under the common law where an objection was not preserved.").

The policy behind, and purpose of, the waiver/forfeiture rule in common law and Section 805.13 is to deter counsel's failure to act when action is possible. Per such policy, the Section requires parties to marshal the relevant facts and law prior to trial, eliminating strategic post-trial raising of legal arguments, when the verdict disappoints. Trial counsels may not "sit on their hands" through trial, then play those hands post-verdict when unhappy with verdicts. Based on this policy, the waiver rule serves to cause trial counsel to prepare diligently and raise all available issues in trial court, for efficient resolution. *Air Wisconsin, Inc. v. North Central Airlines, Inc*., 98 Wis.2d 301, 311, 296 N.W.2d 749 (1980); see also *Schumacher,* 424 N.W.2d at 680;

Vollmer v. Luety, 456 N.W.2d 797, 804-5, 156 Wis.2d 1, 11 (Wis., 1990).

This waiver/forfeiture rule, and the policy behind it, do not apply here. Trammell's trial counsel did not "sit on his hands" during the instructions conference, and did not *belatedly* try to play his J.I.140 hand, when the verdict disappointed him. Trial counsel here was incapable of non-frivolously raising the J.I.140 objection during the instruction conference, because the factual and legal grounds were not yet in existence. This objection was not capable of being preserved timely at conference time. *Schumacher* does not control here.

D. THE COURT OF APPEALS' INTERPRETATION OF THE SECTION AND THE RESULTING RULING ARE ERRONEOUS.

The Court of Appeals, at ¶¶11-13, ruled that Trammell's J.I.140 challenges were "waived" when not raised during the instructions conference, consistent with the "plain language" of the statute as quoted by the Court of Appeals in ¶11. (App. 3). The Court of Appeals concluded that the plain language of Section 805.13(3) required *any* objection to be made at the instruction conference, including the objection raised by Trammell, for which "grounds" were unknowable nor stateable "with particularity" during the conference. Invoking its lack of "broad authority" to review an un-objected-to jury instruction, the Court of Appeals declined to perform such review. Id. at ¶13. (App.3).[33]

[33] The Court noted Trammell's failure to cite authorities supporting that the Court of Appeals could "avoid the plain language of the statute." Indeed, Trammell did not provide such authorities because he never believed, and the State never argued, that the "plain language of the statute" was as broad as the Court of Appeals asserted.

Statutory interpretation serves to determine the intent of the legislature. *See Mayo v. Boyd*, 2014 WI App 37, ¶8, 844 N.W.2d 652. To do so, courts start with the plain language of the statute and examine that language "*in the context in which it is used*; *not in isolation but as part of a whole*; . . . and reasonably, to *avoid absurd or unreasonable results*." *Kalal*, 2004 WI ¶46 (emphasis added).

The Court of Appeals violated these rules of construction, to reach an "absurd or unreasonable result." It construed the "Waiver Clause" *in isolation from the preceding modifying sentence* identifying what objections "may" be raised during the conference and how they must be raised: "Counsel may object to the proposed instruction . . . on the grounds of incompleteness or other error, *stating the grounds for objection with particularity on the record*." (emphasis added). That preceding sentence plainly, unambiguously instructs that any objections to be raised must have their grounds "stated with specificity." It follows that only such objections may be raised whose grounds *can* be "stated with specificity." The Court of Appeals ignores that previously-stated requirement, failing to give it effect -- with absurd results.

The Court of Appeals' interpretation is absurdly broad: the Statute does not – indeed cannot -- properly bar post-conference objections to jury instructions if the grounds for the objections come into being *post*-conference.

This cannot be the law, in light of the well-established due-process-based rules: (1) that "waiver" is "an intentional relinquishment or abandonment of a known right" and such waiver must be intelligent and competent, *Pickens v. State*, 96 Wis.2d 549, 561, 292 N.W.2d 601, 608 (1977); and (2) that valid waivers of constitutional rights must be

knowing and intelligent, see e.g. *State v. Klessig,* 211 Wis. 2vd 194, 201, 204, 564 N.W.2d 716 (1997).

Trammell asks this Court to review the Court of Appeals' absurdly broad and erroneous construction of the Section's Waiver Clause, which violates the rules of statutory construction, the doctrine of waiver, and the criminal defendant's due process rights.

IV. DISCRETIONARY REVERSAL IS WARRANTED BECAUSE JUSTICE MISCARRIED AND THE TRUE CONTROVERSY WAS NOT FULLY TRIED.

Section 751.06 grants this Court power of discretionary reversal when the record demonstrates that "the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Secs. 751.06 and 752.35. *Schiefer v. Keene Corp*., 433 N.W.2d 32, 146 Wis.2d 870 (Wis. App., 1988).

This Court also has the common law power to review waived errors, under the "integrity of the fact-finding" exception to the waiver rule. *Vollmer,* 456 N.W.2d at 804-5 (Wis., 1990). When a jury instruction error confuses the jury in a manner that goes to the integrity of the fact-finding process, discretionary reversal 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).

The giving of J.I.140 here warrants discretionary reversal because the Instruction confused the jury "in a manner that went to the integrity of the fact-finding process" by mis-stating the prosecution's burden and preventing the

jury from performing their requisite tasks, as argued supra; and prevented the real controversy -- of Trammell's guilt/innocence of the charged crimes -- from being "fully tried" according to the requisite standard of proof/persuasion. See *Vollmer*, 156 Wis.2d at 4.

Trammell was found "guilty" by jurors *misinformed* and *confused* about how and when they properly could convict him; based on a standard of proof *lower than* the constitutionally-mandated standard, because the jurors were led to believe by the Dual Directives that they could convict even when they still had reasonable doubt. Multiple standard-reducing effects of the Instruction -- those demonstrated by the Two Studies and others, summarized supra -- *compounded* to undercut "fairness.

This Court should grant Trammell discretionary relief as it did to the defendant in *State v. Perkins*, 2001 WI 46, 243 Wis. 2d 141, 626 N.W.2d 762, based on the same doctrines and reasoning.

The question in *Perkins* was whether a new trial should be granted because the jury instruction relating to the charged crime was constitutionally flawed, for failing to shield Perkins from a conviction based on constitutionally protected speech. Id. at ¶2. *Perkins* held: "the jury instruction in this case was inadequate. The real controversy in this case has not been fully tried and the defendant is entitled to a new trial. We therefore reverse the decision of the court of appeals and remand the cause for further proceedings not inconsistent with this opinion." Id.

Perkins' instructional error was waived, id. at ¶¶10-12, but was reviewed discretionarily, under statutory and inherent common law authority, because "the alleged error . . . [had]

some substantial significance in our institutional law-making responsibility as set forth in the statute and constitution;" and because the error made it "probable that the 'instruction obfuscate[d] the real issue or arguably caused the real issue not to be tried [and] reversal would be available in the discretion" of this court.*'"* (footnotes and internal citations omitted). Id. at ¶14.

The Court found the instruction defective for not defining the element, so the jury could not know how properly to decide whether the prosecution's burden on that element was met. Id. at ¶¶33-37. The lacking elemental definition created "a *reasonable likelihood . . . that the jury interpreted and applied the instruction to the detriment of the defendant's constitutional right to freedom of speech*." Id. at ¶43 (emphasis added).[34]

The instruction differed markedly from instructions used in other jurisdictions, federal and state, which correctly defined the element. Id. at ¶45.[35]

Due to the "deficiency in the jury instruction on the elements of the crime," the court "conclude[d] that the controversy was not fully tried" and, pursuant to Wis. Stat. § 751.06, reversed and remanded to the circuit court. Id. at ¶49.

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[34] The court relied on these clear rules: a "proper jury instruction is a crucial component of the fact-finding process," *State v. Howard*, 211 Wis. 2d 269, 290, 564 N.W.2d 763 (1997); and the "validity of the jury's verdict depends on the completeness of the instructions," *State v. Dodson*, 219 Wis. 2d 65, 87, 580 N.W.2d 181 (1998). P.40.

[35] Nothing indicated that the jury somehow avoided the dangers of the instructional flaw. Id. at ¶44. "If the jurors were following the jury instruction they would have" decided "guilt" incorrectly, based on a common-sense understanding of an elemental fact, thus without putting the prosecution to its burden of "beyond reasonable doubt." Id.

Like Perkins,' so also Trammell's instructional error effects a constitutional deficiency, as shown supra; and must be fixed similarly: by reversal of the unconstitutional convictions, and by prospective modifications to J.I.140 removing the burden-reducing Dual Directives and correctly define the prosecution's burden of proof-and-persuasion.

Like in *Perkins*, id. at ¶42, nothing in Trammell's trial remedied the constitutional deficiency of J.I.140. Rather, the court and attorneys *reinforced* the erroneous not-doubt-but-truth directive, *enhancing* the error.

Like in *Perkins*, id. at ¶¶43-44, J.I.140 "as a whole" incorrectly stated the law, "g[iving] the jury no [correct] definition" of how/when they may vote "guilty." Id. So here too "a reasonable likelihood exists that the jury interpreted [J.I.140] to the detriment of the defendant's constitutional right to [conviction only upon the requisite burden of proof/persuasion]." Id. at ¶43.

Here too, like in *Perkins*: "If the jurors were following the jury instruction [J.I.140] they would have concentrated simply on" subjectively deciding which story was more true, to vote "guilty" based on this preponderance-level decision. Id. at ¶44.

Here too, J.I.140 "stands in stark contrast to the suggested federal jury instruction" on "reasonable doubt" and to most counterpart state instructions. Id. at ¶45. [36]

He even *more than in Perkins*, the *alleged error* "*has substantial significance in [this Court's] body of statutory*

[36] As noted elsewhere, J.I.140 stands out amongst other jurisdictions' definitions of reasonable doubt, in the number of standard-lowering flaws. See Cicchini, *Introducing Jurors*, 8 Cal. L. Rev. Online, at pp. 72-80.

and constitutional law: namely *Avila*, Section 805.13(3) and due-process-compliant instructions on reasonable doubt. Furthermore, "if the jury instruction was erroneous, *it is probable* [here] *that the 'instruction obfuscate[d] the real issue* or arguably caused the real issue not to be tried [and] reversal would be available in the discretion" of the court. Id. at ¶14.

Trammell asks this Court to exercise its discretion and enter such orders as are necessary to accomplish the ends of justice in his case, consistent with *Perkins*.

CONCLUSION

For the reasons stated above, Emmanuel Trammell respectfully asks this Court to grant the requested relief or any proper relief from "suffering the onus of a criminal conviction upon [not] sufficient proof." *Jackson*, 443 U.S. at 316.

Dated this 12th day of December, 2018.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rules 809.19(8)(b) and 809.62(4) 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 petition is **10912** words.

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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.

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A P P E N D I X

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CERTIFICATION AS TO APPENDIX

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 § 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.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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