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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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. ARGUMENTS FOR OVERRULING *AVILA* STAND UNREBUTTED.

A. M*ore than* a "reasonable likelihood" of mis-understanding the *Winship* standard from J.I.140.

Trammell argues that*:*

1. *more than* a "reasonable likelihood" exists of mis-understanding J.I.140 "to allow a conviction based on proof insufficient to meet the *Winship* standard," *Victor v. Nebraska*, 511 U.S. 1, 6 (1994); and existed during his trial, and
2. the Two Studies demonstrate the existence of *more than* such likelihoods.

The State neither denies nor rebuts these factual claims. [1]

Trammell asserts that, although some portions of J.I.140 accurately define reasonable doubt, J.I.140 "in its entirety" allows reasonable jurors to mis-understand *Winship's* standard reductively. The findings from the Studies so demonstrate.

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[1] These claims should be deemed admitted. *State v. Chu*, 2002 WI App 98, P41, 643 N.W.2d 878 (argument admitted when not rebutted or responded to). The State's Response Brief, at p. 15, agrees that the test applied in *Avila*, at p. 889, is the correct test for assessing the constitutional validity of jury instructions defining the *Winship* standard. *Avila* adopted the test of *Victor v. Nebraska*, 511 U.S. 1, 6 (1994). Id. The State, at p. 15, correctly cites that test: "whether there is a reasonable likelihood that the jury understood the instructions to allow a conviction based on proof insufficient to meet the *Winship* standard."

B. Erroneous legal *status quo* may not persist.

The legal *status quo* must go, because the Studies refute it: with findings of actual mis-understanding, from J.I.140, by a significant percentage of mock-jurors, that they may convict based on proof insufficient to meet *Winship*.

S*tare decisis* cannot protect *Avila*, when *Cage* and *Sullivan* compel the conclusion that J.I.140 "reasonably likely" allows jurors to mis-understand (reductively) *Winship's* standard. Despite *stare decisis*, "under limited conditions, courts find it necessary to overrule outmoded or erroneous holdings." *Linville v. City of Janesville,* 497 N.W.2d 465, 590, 174 Wis.2d 571 (Wis. App., 1993). The "limited conditions" for overruling *Avila* exist: *Avila's* factual determinations and holdings are shown demonstrably erroneous and contrary to *Cage* and *Sullivan*.

C. *Cage* and *Sullivan* require reversal of *Avila.* [2]

The State tries to distinguish *Cage* and *Sullivan* on a legally-irrelevant fact: that the verbiage challenged there "is not present" in J.I.140. Id. at 17.

Cage and *Sullivan* control here, because *all* the challenged verbiages result in *the same category of error*: preventing jurors from holding the prosecution to its burden.

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[2] The State does not deny or rebut that: (1) the jury instruction error here is of the "same sort" as the instructional error in *Cage* and *Sullivan*, S*ullivan* 508 U.S. at 282, because each instruction incorrectly defines "reasonable doubt," to reduce the prosecution's burdens; (2) *Avila's* analysis of J.I.140, and its conclusions, are contrary to and inconsistent with the analysis and conclusions of *Cage* and *Sullivan*; and (3) pursuant to *Cage* and *Sullivan*, and based on the analysis modeled there, J.I.140 is constitutionally flawed for the same reasons their instructions were ruled flawed. Trammel makes these arguments at pp. 19 et seq. of his Brief. These arguments should be deemed admitted. *Chu,* 2002 WI App 98, P41.

Each gives a "misdescription [of] the burden of proof" that "vitiates all the jury's findings." *Sullivan v. Louisiana*, 508 U.S. 275, 279-282 (1993).

D. Trammell meets his burdens

The State wants Trammell to present evidence of "specific facts" from his "prosecution" showing that his jury "was confused." Response Brief at 20.

Such burden is contrary to *Cage* and *Sullivan*: neither articulates such requirement or holds the claimant to it. Each resolves its verbiage challenge by analyzing the verbiage's *effect on a hypothetical juror*. See e.g. *Cage*, 498 U.S. at 41.

Also the *Victor* court, passim, applying the "clarified" post-*Cage* standard, did *not* look at/for specific facts of the cases before it. Based *only* on the verbiages' historical origins and reasonably-inferred meanings to hypothetical jurors, the court made the "reasonable likelihood" findings. [3]

E. Trammell poses questions of fact and law.

The State mis-characterizes Trammell's challenge as this purely legal question which cannot be "informed" by research: does J.I.140 correctly state the law? Response Brief 8-22, 23. [4]

But this Court must also make factual determinations about the *existence of "a reasonable likelihood* that the jury

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[3] *Victor*, 511 U.S. at p. 6, clarifies that, post-*Cage* and -*Sullivan*, "the proper inquiry . . . is whether there is a reasonable likelihood that the jury . . . understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard."

[4] The State also dismisses the Studies (and other research) as "not helpful or relevant" to this Court's analysis, id. at p. 19; and "superfluous," id. at p. 20. The State also asserts that Trammell's submitted research -- the Two Studies -- is "inherently flawed," id., passim.

understood the instructions" inconsistent with *Winship*. *Victor*, 511 U.S. at 6. The same mixed questions of fact-and-law arose in *Avila*, requiring factual determinations to undergird the legal conclusion. [5]

The Studies demonstrate that J.I.140 *almost certainly* caused a significant percentage of mock-jurors to mis-understand/mis-apply the *Winship* standard, reductively. The Studies' findings *quantify the actual occurrence* of such mis-understanding.

Because they assist in making the required factual determinations – about the existence of the prohibited "likelihood" -- the findings from the Two Studies are *relevant* to this review of J.I.140.[6]

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[5] Also *Cage*, *Sullivan*, and *Victor* made parallel factual determinations, based on which the instructions in *Cage and Sullivan* were ruled unconstitutional. See also *State v. Hibl*, 2006 WI 52, PP.40-41,714 N.W.2d 194, 2006 WI 52 (Wis., 2006) (recognizing the importance of addressing newly "proffered or recognized" "phenomena" that "may affect" the legal question of the reliability of identifications, by courts; incorporating such "phenomena" in its analysis to conclude that a prior precedent "may need to be modified"); PP. 54-56, passim (discussing the key role of new scientific developments in supporting factual findings on which the ultimate legal conclusions rest, regarding the constitutional validity of show-up procedures).

[6] Trammell does not claim that the Studies constitute "expert evidence" offered at trial; but he does assert that they would meet the admissibility standards of such evidence, consistent with *State v. Pico*, 2018 WI 66, PP. 41-42, 914 N.W.2d 95 (Wis. 2018) (citing the rule that "Expert [evidence] is admissible to address questions of fact; relying on the rule that expert testimony can be presented and admitted to explain facts that the court is "incapable of understanding on its own").

F. The scientific merits of the Studies stand unrebutted.

The State fails to rebut the scientific validity of the Studies: their methodology and formulae; the obtained data or their processing; or the determinations/conclusions themselves.[7] Noting indicates that the Studies depart from the relevant scientific standards. [8]

But the State launches inaccurate and irrelevant attacks that leave the merits unscathed, e.g. irrationally accusing the Studies of having evaded peer review *and* having been rejected on peer review. Response Br. 24, fn. 7. [9] Other such attacks are rebuffed below.

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[7] The State overall fails to challenge or refute the "internal validity" of the Studies, as discussed infra in more detail. Judge Bauer's analysis of the First Study scrutinizes the scientific merits of that study -- and finds no flaws. Judge Bauer's Decision models an *informed* impartial review of the scientific merits of a study's methodologies, doctrines, and principles. The State never performs such on-the-scientific-merits analysis. Trammell had included Judge Bauer's Decision in his Appendix before the Court of Appeals, pp. 48-60. He discussed such inclusion, and his reasons for it, at page 11, ft. 14, of his Brief of Defendant-Appellant in this Court.

[8] The State does not challenge the scientific expertise, credentials, neutrality, or acumen of the scientist co-author of the Studies, Dr. Lawrence White, which all should be deemed admitted. *Chu,* 2002 WI App P41. As discussed infra, the State casts specious, innuendo aspersions against the *person* of the Studies' co-author, Attorney Cicchini -- but cannot demonstrate that/how the scientific validity of the Studies may have suffered due to the alleged aspersions. Such validity stands unscathed.

[9] The Second Study was subject to peer-review, as explained in Trammell's Brief, at p. 16, fn. 18. The publication's peer-review policy is stated in *Submission Instructions: Peer Review*, COLUM. L. REV., http://columbialawreview.org/submissions-instructions/ (last visited Nov. 21, 2017): "[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." Contrary to the State's claims at p. 16 of its

1. Accusing an author of bias, seeking confirmation of preconceived theses. Id. at 25.

This is an unsupported, improper *ad hominem* attack, speciously used to discredit the *Studies* by attacking a *person* associated with them. [10] This attack violates the "fundamental" rule: "[i]n argumentation we respond to the argument, not to the person behind the argument." D.Q. MCINERY, BEING LOGICAL: A GUIDE TO GOOD THINKING, 115 (2004).[11]

This attack fails because: (1) scientists need not be neutral, only their *methods and procedures* must be; and (2) a researcher's desire to find X affects the likelihood of finding X *only* when the researcher does something *scientifically improper* to influence the outcome; and (3) *nothing* indicates that the methods/procedures used by the authors were biased *or* that the authors improperly influenced the outcome of the Studies.

Brief, rejection of the Second Study by the Wisconsin Jury Instruction Committee does not, and cannot, constitute rejection on peer-review, because the members of the Committee are not peer-scientists capable of peer-reviewing the scientific merits of a study. The State does not indicate otherwise.

[10] The State does not attack the scientific expertise or neutrality of the co-author of the Studies, Dr. Lawrence White, Ph. D., of Beloit College, conceding that the Studies are the work of at least one "neutral scientist" with proper scientific credentials and a scientific-professional reputation to maintain. Dr. Lawrence's expertise and neutrality should be deemed admitted. *Chu*, 2002 WI App 98, P41.

[11] See e.g.: The Law Dictionary, *Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.*, https://thelawdictionary.org/ad-hominem/ ("What is AD HOMINEM? "To the person. A term used in logic with reference to a personal argument."); Hans Hansen, Fallacies, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (May 29, 2015), http://plato.stanford.edu/entries/fallacies/ (an *ad hominem* attack "involves bringing negative aspects of an arguer, or their situation, to bear on the view they are advancing").

2. Accusing the Studies of lacking "sufficient controls," for using Amazon Mechanical Turk and not supervising the mock-jurors. See Response Br. 25-26.

No scientific flaws are named here.[12] Amazon Turk is routinely-used in science experiments, and accepted as valid. See Michael D. Buhrmester, et al., *An Evaluation of Amazon's Mechanical Turk, Its Rapid Rise, and Its Effective Use,* 13 Perspectives on Psychol. Sci. 149, 149 (2018). In both Studies, the mock-jurors' attention was checked by means of follow-up questions tailored to verify attentive reading, and showed high scores for attentive reading.

3. Attacking the Studies for: (1) not "randomly sampling" the participants, *and* (2) not screening the participants for biases. Id. at 26-27.

These attacks mis-fire. Neither is authority-supported, developed, or specific. Each disregards the scientific design and method of the Studies, and bespeaks failure to understand the scientific method.

Participants cannot be *both* "randomly sampled" *and* pre-screened (non-random sampled). "Random sampling" is crucial to *surveys*, not *experiments*. "Insufficient random sampling" does not disqualify the Studies, which were *experiments* designed to detect differences between two test conditions (here: the effect of receiving vs. not receiving the

[12] This Court need not address these vague, undeveloped, and unsupported claims: that the State's concept of "sufficient controls" is scientifically correct, unbiased, and applicable here; that Mechanical Turk does not provide "sufficient controls;" that supervision of the participants provides "sufficient controls;" and that the Studies are "not sufficiently controlled." Id. at 25-26.12 See *State v. Pettit*, 171 Wis.2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court may decline to address undeveloped arguments).

Directives). The Studies were jury-instruction *experiments*, designed to find the answer to this question: all else being equal, do mock-jurors who receive an instruction *with* the Dual Directives vote "guilty" more often than those who receive the instruction *without* the Directives? "Random sampling" was not required to scientifically-correctly answer this question. [13]

The "participant bias" attack (failure to screen via voir dire) ignores the substance of the Studies. The First Study explains that *participant bias in these (and all) experiments is addressed through random assignment*. Cicchini, Michael D. & Lawrence T. White, Truth or Doubt? An Empirical Test of Criminal Jury Instructions, 50 U. Richmond L. Rev. 1139, 1165 (2016).[14] See also BETH MORLING, RESEARCH

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[13] See e.g. Random Sampling vs. Random Assignment, published on the Statistical Consulting Blog of Statistics Solutions, a company supplying "Expert Guidance Every Step of the Way," to dissertation authors; found at https://www.statisticssolutions.com/random-sampling-vs-random-assignment/; last accessed 2/8/2019 (stating inter alia:
"Random sampling and random assignment are fundamental concepts in the realm of research methods and statistics. . . . random sampling means that you are randomly selecting individuals from the population to participate in your study. This type of sampling is typically done to help ensure the representativeness of the sample (i.e., external validity). . . . *Random assignment refers to the method you use to place participants into groups in an experimental study*. . . . Ideally, you would want to randomly assign the participants to be in the experimental group or the control group . . . *Random assignment is a fundamental part of a 'true' experiment because it helps ensure that any differences found between the groups are attributable to the treatment, rather than a confounding variable*. . . ." (emphasis added).

[14] The First Study states here: "The virtue of random assignment is that, when used with large numbers of study participants, it produces groups that are statistically equivalent to each other in all respects. Each group has roughly the same number of mock jurors, the same number of men and women, the same number of well-educated and poorly educated persons, and the same number of biased and unbiased individuals. When test groups are statistically equivalent at the outset, receive different jury

METHODS IN PSYCHOLOGY: EVALUATING A WORLD OF INFORMATION 173 (2012) (explaining that/how sample selection is crucial for surveys, but not for controlled experiments seeking to detect "associations and causes"). [15]

That the Studies' participants were not pre-screened for biases does not impact *the reliability of the results.* Participant bias could not impact the results of the Studies, because participants were *randomly assigned to different versions of the instruction*. Any participant biases were randomly (evenly) distributed between the two test conditions/groups and, therefore, could not have differentially affected the outcome.

Reliance on online research platforms helped to near-eliminate biases, making the Studies double-blind. See Matthew J. C. Crump, et al., Evaluating Amazon's Mechanical Turk as a Tool for Experimental Research, 8(3) PLOS ONE e57410 2 (2013) http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0057410 (when "the experimenter never directly meets or interacts with the anonymous participants, it minimizes the chance the experimenter can influence the results.").

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instructions, and then convict at different rates, we can be *quite certain* that the different conviction rates were produced by the different jury instructions and not by personal characteristics of the mock jurors in a particular group."

[15]For further discussion of random assignment, see Morling, supra, at pp. 251-52 (random assignment "creates a situation in which the experimental groups will become virtually equal . . . .").

4. Calling a "serious flaw" the fact that the results could be different with stronger evidence of guilt. Id. at 27-28.

This is not a flaw diminishing the validity or reliability of the results. The Studies allow validly to conclude that the Dual Directives, within J.I.140 as given to the mock-jurors, reduced the *Winship* burden. The State does not show otherwise.

The Studies do not support precise conclusions on how that reduced burden will translate into higher conviction rates *in different types of real-life cases*. The Authors recognize this and do not claim otherwise. Cicchini & White, Empirical Test, supra, at 1161 (stating: "we cannot know the extent to which this effect will also be observed in other cases"). Such recognition does not invalidate the findings of the Studies.

5. Attacking the case summary method and choice of case-scenarios (written summaries of evidence involving sexual assault, etc.). Id. at 26-27.

This attack fails: the challenged choices do not impact the substance or reliability of the results.

Participants' biases about sexual touching would/could explain the findings of the Studies *only if* most of those biased *against* sexual touching were in the "Dual Directives" group, *while/and* most of those biased *in favor* were in *the other* group. The State does not assert that this happened. [16]

[16] It almost certainly did not happen: the likelihood of such a coincidence is minuscule. And if it somehow did happen in the First Study, the odds of it re-occurring in the Second Study approach zero: assuming (conservatively) that the chance of getting really unbalanced groups is 5%, the chance of it happening two times in a row is 0.25% (5% multiplied by 5%). The State neither asserts nor shows otherwise.

Use of case summaries is not a flaw. The case summary method yields valid results regarding the *understanding of instructions by individual mock-jurors.* This method allows the scientists to increase the *salience of the jury instruction*, to test precisely *that variable's* effect on mock-jurors' understanding: the essence of a "*controlled* experiment." See Cicchini & White, supra, Empirical Test, at 1160-1161.

Inability to assess witness' credibility from typed testimony summaries is irrelevant, because: (a) (in)ability to observe testifying witnesses does not implicate the key psycho-linguistic question here, separate from all court procedures: *how an individual understands J.I.140 with* the Dual Directives vs. *how he understands J.I.140 without* them; and (b) inability to observe witnesses cannot explain why those who heard the Dual Directives voted "guilty" much more often than those who did not.

All the participants did *not* observe/assess the credibility of the witnesses or deliberate, not just those who heard the Directives. Those who heard them voted "guilty" more often due to the *sole* difference between them and the control group: receiving the Directives as part of J.I.140.

Lack of observations, deliberations, etc., cannot explain the different conviction rates (found in *both* Studies), or the different responses to the post-verdict question (found in the Second Study), *between the compared groups.*

The Studies' design follows the scientific norms considered effective and reliable. Most jury studies do not use deliberations. See RON C. MICHAELIS ET AL., A LITIGATOR'S GUIDE TO DNA: FROM THE LABORATORY TO THE COURTROOM 243 (2008) ("in mock jury studies, the jurors usually answer without deliberating with other jurors.").

6. Claiming that the Second Study "adds nothing of value."

The State, at pp. 28-31, claims the Second Study "adds nothing" to the First.[17] Not so.

The Second Study rendered the same core results, having used a different fact pattern and a different collection of participants. Such replication confirmed and verified the results of the First Study, demonstrating they were not a "fluke." The Second Study therefore solidified the reliability and validity of the First: a great scientific "value." [18]

The Studies demonstrate that the Directives *shaped the understanding* of the prosecution's burden reductively, in a significant percentage of mock-jurors. Trammell submits that the same shaped-understanding effect happened during his trial, contributing to the jury's conclusion that the "intent" element was proven sufficiently. The State does not assert otherwise, so these claims too should be deemed admitted.

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[17] The State also accuses the Second Study of being riddled with the alleged flaws of the First Study. Id. The alleged flaws are rebutted elsewhere in this Reply Brief. The alleged flaws are rebutted irrespective of which Study they allegedly plague.

[18] The State, throughout, questions the Studies' "ecological validity:" whether the circumstances of the experiments mirror real-world circumstances. But these concerns do not implicate the *internal validity* of the Studies' conclusions. The State does not attack the *internal validity* of the Studies' findings: that the Directives increased the rate of guilty votes, in both experiments of the Two Studies, by causing some jurors to understand that they could convict even when reasonable doubt persisted.

7. Wanting the Studies disregarded for not meeting *Daubert.* Id. at 31, passim. [19]

This Court does not need *Daubert* to decide whether the Studies supply sufficient data and conclusions, based on accepted methods reliably applied to obtaining and processing the data. In *Dubose* this Court -- sans *Daubert* -- considered and analyzed several periodical-published articles reporting findings and conclusions of research regarding individuals' recognition of pre-observed faces. The State did not *then* insist that such research pass *Daubert.*

Daubert does not apply here, because it governs admissibility of evidence for trial. See WIS.STAT. § 907.02 (governing the admissibility of expert testimony at trial; codifying *Daubert*); *State v. Kandutsch*, 2011 WI 78, ¶26 n.7, 336 Wis.2d 478, 799 N.W.2d 865.

Nevertheless, Wisconsin courts applying *Daubert* would find the Studies reliable and admissible. The underlying principles, and data-collection and -processing methodologies, all follow the applicable scientific principles, procedures, and safeguards, as explained in the Studies and throughout. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993) ("focus . . . solely on principles and methodology, not on the conclusions . . . "); see also *State v. Giese*, 2014 WI App 92, PP17-18, 356 Wis.2d 796. In Wisconsin, *Daubert* is flexibly applied, to allow admission. See e.g. *State v. Jones*, 2018 WI 44, PP34-36, passim, 381

[19] No cited authority states that *Daubert* applies here. This Court need not address this *Daubert* claim, for being undeveloped and unsupported. *State v. Pettit*, 171 Wis.2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Wis. 2d 284, 911 N.W.2d 97 (demonstrating minimal scrutiny). [20]

II. THE STATE FAILS TO REBUT THAT J.I.140 IS CONSTITUTIONALLY CRIPPLED BY MULTIPLE COMPOUNDING BURDEN-REDUCING FLAWS, CONFUSES JURORS, AND MIS-DIRECTS THEM.

The State cites *Avila* as controlling precedent, passim; but never rebuts that *Avila incorrectly analyzed J.I.140,* to make erroneous determinations/conclusions; or that *multiple other weaknesses compound* to constitutionally cripple J.I.140. [21]

The State asserts only, at pp. 32-33, that each individual weakness survived challenge, while the cited precedent does not "help" Trammell because it addresses verbiage not found in J.I.140. This does not rebut Trammell's incorrect-analysis argument, or compounded-crippling argument, or reliance on certain case law for propositions *unrelated* to specific verbiage. [22]

Unrebutted stands that J.I.140 "as a whole" confuses and mis-directs jurors, because the concluding Directives contradict and override the earlier-stated definition of reasonable doubt, mis-leading jurors into believing that they

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[20] No Wisconsin appellate court has ruled proffered scientific/expert evidence inadmissible under *Daubert*, according to counsel's research.

[21] See Trammell's Brief in this Court, at pp. 26-33. These arguments should be deemed admitted. Chu, 2002 WI App 98, P41.

[22] These arguments and analyses should be deemed admitted. Chu, 2002 WI App 98, P41.

may convict even when reasonable doubt persist. [23] Trammell here additionally supports these arguments.

A. The plain language, psychology, marketing, and communications *all support* that J.I.140 confuses and mis-directs jurors.

The language of J.I.140, logically read, leaves jurors believing they may convict without doubt-searching/analyzing, based on truth-searching.[24] The findings of the Studies demonstrate the existence of this effect. Psychology, marketing, and communications sciences further explain it.

Marketing recognizes that people remember information placed at the end of messages; *and* information associated with an emotionally-charged concept; *and* information easily graspable (simply stated). These marketing tenets populate marketing textbooks, journals, and blogs. [25]

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[23] The State, at pp. 33-34, begins by rebutting arguments Trammell does *not* make. Contrary to the State, Trammell does not "contend" that the "interplay of legally correct instructions impermissibly misled the jury." This *Lohmeier*-based would-be-rebuttal misfires. Neither does Trammell "assert" that "trials are not about truth." Id. at 34. The Response cites to pages 32-37 of the Brief as the situs of this alleged assertion. But those pages do not contain any such assertion, directly or indirectly made.

[24] Trammell discusses this interpretation of the Directives' plain language in his Brief, at pp. 32-36.

[25] See e.g. Julie Neidlinger's marketing advice on the blog Coschedule, in pieces titled "3 Memory Techniques That Get People To Remember Your Content" and "How do you make your content more memorable for your readers?" Last accessed on 1/7/2019. This marketing guru states inter alia: "What Gets Remembered The Best? . . . Something that makes an association to what the audience member already has in his memory. . . . Something that doesn't require long-term memory to grasp, i.e. isn't so complex or long that they forget what they've read at the beginning." Id.

The Directives implement these tenets of memorability: they conclude J.I.140; are simple and direct; *and* are associated to the emotionally-positive concept of "truth." Marketing explains that/why the Directives are better remembered than the rest of J.I.140. [26]

Communications and rhetoric agree that the *conclusions* of messages over-determine what audiences remember and do. Speech-writing courses inculcate this tenet, e.g.: "The *conclusion* of a speech functions as a summary of *the most important points so that the audience can best remember* them. . . . The end of your speech is going to be *the audience's lasting impression* [of what you want them to know]." [27]

Communications/rhetoric explain that the Directives specially over-determine verdict-making *because* they

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[26] This is not a new argument. Trammell so analyzed the Dual Directives in his Brief, pp. 32-37. Here he additionally supports and fleshes out his earlier analysis, by recourse to marketing, psychology, and speech/rhetoric sciences.

[27] Excerpted from an online speech-writing course titled "Boundless Communications," chapter on "Organizing and Outlining the Speech" devoted to "Conclusion" (emphasis added). Found at https://courses.lumenlearning.com/boundless-communications/chapter/conclusion/. Last accessed 1/7/2019. This chapter continues: " . . . [T]he conclusion is your *audience's final impression* . . . in their minds." These tenets of effective communication are taught in countless courses, including an online course offered at https://lumen.instructure.com/courses/218897/pages/linkedtext54136, titled "Conclusion," last accessed on 1/7/2019, which instructs: ". . . *Your conclusion is* . . . often what most people remember immediately after your speech has ended. [Compared to the opening] the conclusion is doubly important as it leaves the audience with a lasting impression. . . . It is especially important to remember that the conclusion of your speech is not the time to introduce new points or new supporting evidence; doing so will only confuse the audience. . . . Your conclusion is the last thing your audience hears from you. . . . *The conclusion is where you'll insert your take-away message*: what do you want the audience to remember . . . ?" (emphasis added).

broadcast the final, "lasting," "most important" take-aways of J.I.140.

Psychology explains this special effect of the Directives: "the most recently presented items or experiences will . . . be remembered best. If you hear a long list of words, *it is more likely that you will remember the words you heard last (at the end of the list) than words that occurred in the middle*. This is the recency effect." [28]

Communications, marketing, and psychology *all* explain *that*/*why* the Directives overshadow preceding clauses of J.I.140: because of their terminal placement, their simplicity, and their emotionally positive association with "the truth."

B. Legal analysis additionally supports Trammell.

The Directives operate as the "proviso" clause of J.I.140: to modify and limit the preceding clauses.[29] A proviso is "[a] *condition or provision* which is inserted in a deed, lease, mortgage, or contract, and *on the performance or nonperformance of which the validity* of the deed, etc.,

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[28] As stated in Alleydog.com, Psychology Students' Best Friend," found at https://www.alleydog.com/glossary/definition.php?term=Recency+Effect , last accessed 1/8/2019 (emphasis added). The memorability-forming effect of recency was identified in studies of recall of parking locations, which confirmed a "marked" short-term recency effect in free-recalling, in the short-term, of parking locations on multiple days. See European Journal of Cognitive Psychology, Volume 3, 1991, 297-313, "Where did you park your car? Analysis of a naturalistic long-term recency effect," by Amacaronncio da Costa Pinto & Alan D. Baddeley. Published online: 08 Nov 2007, at https://doi.org/10.1080/09541449108406231, last accessed on 1/7/2019.

[29] This is not a new argument. Trammell so analyzed the Dual Directives in his Brief, pp. 32-37; but without invoking legal terminology or doctrine. Here he additionally supports and fleshes out his earlier analysis, by recourse to legal analysis.

frequently depends. . .” [30] 8 Am.Jur. 242 defines “proviso” as “a clause” whose job is “either to *except something* from the enacting clause . . . or to *exclude some possible ground of misinterpretation* of its extent.”

The Studies demonstrate that the Directives operate as a proviso: restraining the generality of the preceding clauses of J.I.140; imposing a limitation without which the jurors’ task fails (to *not* search for doubt, but search for the truth); “excepting” searching for doubt from the jurors’ task. [31]

To paraphrase this Court in *State v. Vick*, 104 Wis.2d 678, 694, 312 N.W.2d 489 (Wis., 1981): with the Directives functioning as a proviso, reasonable jurors cannot, as a matter of law, examine all reasonable doubts in determining guilt/innocence, as required by the preceding clauses of J.I.140.

Trammell asks this Court not to disregard the consistent evidence -- from the Studies, legal analysis, marketing, communications, and psychology -- demonstrating and explaining the burden-reducing effect of the Directives.

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[30] The Law Dictionary, *Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed*. Found at *https://thelawdictionary.org/proviso/,* defines “proviso” thusly:

[31] An implied “provided that” conjunction between the Dual Directives and the preceding clauses connects and contrasts the Directives to/against the previously stated commands. With that implied “provided that” conjunction, the Dual Directives limit the broad message of the preceding clauses defining “reasonable doubt” and explaining the duty to acquit if/when “reasonable doubt” (as defined) lingers. Thereby they counteract the import of those preceding clauses, shifting focus to “the truth;” away from reasonable “doubt.”

III. TRAMMELL'S SECTION 805.13(3) CLAIMS STAND UNREBUTTED.

Trammel does not seek to overrule *Schumacher*. See Response Brief 10. He seeks clarification of whether the Section's "exclusionary rule" bars his objections.

The State cannot distinguish *Howard* by stacking mis-representations: that Trammell's "ground for the objection" "has been known . . . for nearly a century." Id. at 11-12.[32] Trammel's grounds are: that *recent empirical evidence* from experimental research supplies findings demonstrating reductive mis-understanding of the *Winship* standard from J.I.140, by a significant percentage of mock-jurors. These grounds could not have been raised at the 2016 instruction conference. [33]

IV. DISCRETIONARY REVERSAL IS WARRANTED.

Contrary to the State's claims at pp. 35-38:

- *Perkins* applies because the instructional errors are *of the same sort in both cases*: guiding jurors to make constitutionally-invalid verdicts. [34]
- J.I.140 prevented the real controversy from being tried fully -- consistent with *Winship* -- by causing

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[32] The State asserts, erroneously, that Trammell's sole ground is the *legal* claim that "the dual directives . . . unconstitutionally reduce the State's burden of proof." Id. Trammell in fact cites mixed *factual*-and-legal grounds, as discussed elsewhere in this Reply Brief.

[33] The Studies were published in 2016 and 2017; the conference was in April 2016, pre-publication.

[34] In *Perkins*, the instruction prevented guilt/innocence determinations on some element(s); and here J.I.140 prevented *Winship*-compliant guilt/innocence determinations on every element.

mock-jurors to assess the evidence with an unconstitutional yardstick: of civil trials. [35]

- The evidence supports the miscarriage-of-justice-claim. *No* witnesses testified that Trammel "stole" the vehicle, contrary to the State.[36] Two witnesses' testimony (including an officer's) indicated intent to return the car. Reasonable doubt as to intent remained, with *all* evidence fairly considered.

This Court should rule that the interests of justice require reversal.

CONCLUSION

For all the reasons asserted -- and not rebutted by the State -- Trammell's respectfully asks this Court for relief from "the onus of a criminal conviction upon [not] sufficient proof," *Jackson*, 443 U.S. at 316, of the intent element of robbery.

Dated this 8th day of February, 2019.

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[35] The State fails to deny or rebut this argument, so it should be deemed admitted. *Chu*, 2002 WI App 98, P41.

[36] See Response at p. 37: "… two eyewitnesses testified that Trammell *stole* the Buick…" (emphasis added). No such testimony appears in the transcript. No witness could admissibly so testify, as such testimony would include a legal conclusion and not reflect observations only.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this reply 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 reply brief is **2969** words.

Dated this 8th day of February, 2019.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated this 8th day of February, 2019.

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