STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2017AP1206-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,
v.

EMMANUEL EARL TRAMMELL,

Defendant-Appellant-Petitioner.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Appeal from the Judgment of Conviction, Sentence, and the Decision and Order Denying Motion for Postconviction Relief, Entered in the Circuit Court for Milwaukee County, the Honorable Jeffrey A. Wagner, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Rules, and Statutes

Other Authorities

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The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief to address whether this Court should exercise its "superintending and administrative authority over all courts," *see* Wis. Const. Article VII, §3(1), by deleting the closing mandate of WIS CRIM-JI 140 so that no future jurors will confuse the idea of finding the truth with the quantum of certainty about that truth needed for conviction.

WACDL takes no position on whether this Court should overrule ***State v. Avila,*** 192 Wis.2d 870, 532 N.W.2d 423 (1995), or whether the instruction is constitutionally deficient.

ARGUMENT

I.

THIS COURT SHOULD USE ITS SUPERVISORY POWER TO CHANGE WI CRIM-JI 140 TO AVOID JUROR CONFUSION.

Article VII, §3(1) of the Wisconsin Constitution provides that "[t]he supreme court shall have superintending and administrative authority over all courts.""The constitutional grant of superintending and administrative authority 'is a grant of power. It is unlimited in extent. It is indefinite in character.'" ***State v. Jennings***, 2002 WI 44, ¶ 13, 252 Wis. 2d 228, 647 N.W.2d 142 (quoting ***State ex rel. Fourth National Bank of Philadelphia v. Johnson***, 103 Wis. 591, 611, 79 N.W. 1081 (1899)). It also establishes a duty on the part of the Court to use these powers to promote the efficient and effective operation of the state's court's system. ***Id.***, ¶14.

Whether to use this supervisory power is more a matter of "judicial policy rather than one relating to the power of this court,"although the power "will not be invoked lightly." ***Id.,*** ¶15. This Court has used its supervisory powers to insure the fair administration of justice at least once this past year to require an automatic stay of involuntary medication orders pending appeal because otherwise a defendant's liberty interest in avoiding forced medication with antipsychotic drugs becomes "a nullity." ***State v. Scott***, 2018 WI 74, ¶¶43-44, 382 Wis.2d 476, 914 N.W.2d 141. In the past, this Court has used these powers to require circuit courts to inform counsel when they make changes to jury instructions after the instructions conference "to ensure that both parties are aware of the actual content of the jury instructions." ***State v. Kuntz***, 160 Wis.2d 722, 735, 467 N.W.2d 531 (1991). Jury instructions are judicial and changing them is well within the sphere of this Court.

The Constitution protects a defendant from criminal conviction unless the state proves guilt "beyond a reasonable doubt." ***In re Winship***, 397 U.S. 358, 361 (1970). This protection requires the jury to be in "a subjective state of near certitude" about the defendant's guilt. ***Jackson v. Virginia***, 443 U.S. 307, 315 (1979). Neither the United States Supreme Court nor this Court has ever held that courts must instruct jurors to search for the truth. Nevertheless, WIS CRIM-JI 140 explains reasonable doubt, but then issues this closing mandate: "you are not to search for doubt. You are to search for the truth." *See* App. 31- 35 for the full text.

Deciding whether to change a jury instruction is different from deciding whether that instruction is defective in any given case.[1] When deciding whether to overturn a case based upon a claim that a jury instruction was defective, this Court must consider whether the jury instruction *as a whole* actually caused confusion within the context of that case. *See* ***Avila***, 192 Wis. 2d at 8889 But, when deciding whether to change a jury instruction pursuant to supervisory powers, this Court need only decide whether a change would aid in the fair administration of justice. ***Jennings***, 2002 WI 44, ¶ 14.

Given the constitutional importance of the burden of proof in criminal cases, this Court should exercise its supervisory authority to change the instruction in future cases unless this Court believes, beyond a reasonable doubt, that juror misapprehension of this sentence never inadvertently lowers that burden of proof. The "search for truth" language serves no necessary purpose. Regardless whether the Court finds the

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[1] The Wisconsin Jury Instruction Committee decided after inquiry in 2016 not to change the language of WIS CRIM-JI 140, based upon caselaw affirming convictions using the language in question. The Committee did change some language in a footnote. *See* App. 35. WACDL is aware of no way to appeal from a Jury Instruction Committee decision.

instruction unconstitutional, this Court should not allow the continued possibility that any jurors will confuse the idea of finding the truth with the quantum of certainty about that truth needed for conviction.

II.

THIS COURT SHOULD DELETE THE CLOSING MANDATE OF WIS CRIM-JI 140 BECAUSE IT MAY CONFUSE JURORS AND LOWER THE BURDEN OF PROOF

A. Logic and Research Studies Support the Belief that WIS CRIM-JI 140 May Confuse Jurors and Lower the Burden of Proof.

Telling jurors that "you are not to search for doubt. You are to search for the truth," *see* WIS CRIM-JI 140, causes two problems. First, it misleads jurors. "The jury's task is not simply to determine the truth or falsity of the charge, to convict if it is true, acquit if it is false. The jury must acquit even when it thinks the charge is probably true." ***State v. Giroux***, 561 A.2d 403, 406 (Vt. 1989)."'[S]eeking the truth' suggests determining whose version of events is more likely true, the government's or the defendant's, and thereby intimates a preponderance of evidence standard. Such an instruction would be error if used in the explanation of the concept of proof beyond a reasonable doubt." ***U.S. v. Gonzalez-Balderas***, 11 F.3d 1218, 1223 (5th Cir. 1994).

More importantly, the closing mandate directs jurors to ignore their constitutionally-required duty by literally telling them "not to search for doubt." "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." ***State v. Berube***, 286 P.3d 402, 411 (Wash. Ct. App. 2012). Worse yet, the truth-not-doubt language "impermissibly

portray[s] the reasonable doubt standard as a defense tool for hiding the truth, and suggest[s] that a jury's scrutiny of the evidence for reasonable doubt is inconsistent with a search for the truth." ***Berube***, 286 P.3d at 411.

As one Wisconsin judge and former prosecutor explained, prosecutors intentionally exacerbate this harmful impact:

> During closing arguments . . . the prosecutor, on rebuttal, says "Defense counsel read you only part of the jury instruction on reasonable doubt. What counsel left out were these two lines: 'you are not to search for doubt. You are to search for the truth.'" Prosecutors make this argument because they know that the order prohibiting the search for doubt diminishes the beyond a reasonable doubt burden of proof and makes it easier for the State to obtain a conviction. I have had these lines used against me as a defense attorney, and mea culpa, mea culpa, I have used them against defense counsel as district attorney.

Hon. Steven Bauer, *Why Wisconsin's Criminal Burden of Proof Instruction Had to be Changed*, TO SPEAK THE TRUTH (Oct. 24, 2017), found at http://bauersteven.blogspot.com/2017/10/why-wisconsins-criminal-burden-of-proof.html.

But this Court need not rely on logic alone. Recent empirical evidence confirms that the closing mandate potentially confuses jurors and lowers the burden of proof. *See* Michael D. Cicchini & Lawrence T. White, Ph.D., *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. Rich. L. Rev. 1139 (2016) ["*Empirical Test*"] (App. 1-19); Michael D. Cicchini & Lawrence T. White, Ph.D., *Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication*, 117 Colum. L. Rev. Online 22 (2017) ["*Conceptual Replication*"] (App. 20-30).

The first of two studies of the problem found that a group given WIS CRIM-JI 140 convicted at nearly double the rate of the group given a reasonable doubt instruction without the truth-

not-doubt language and at approximately the same rate as a group told *only* to search for the truth. *Empirical Test* at 1166 (App. 12). It involved 298 participants who served as mock jurors, who were split into three groups. *Id*. at 1151 (App.5). Although each group received a different jury instruction on the burden of proof, all jurors read the same case summary, elements, and closing argument. *Id*. The information on the child sexual assault case included testimony from the child, the mother, and the defendant. *Id*. The first group was only told not to search for doubt, but for the truth and convicted at a rate of 29.6%. *Id*. at 1152 (App. 5). The second group was given an instruction similar to WIS CRIM-JI 140, but without the truth-not-doubt language and convicted at a rate of 16%. *Id*. at 1152-53 (App.5 -6). The third group was given WIS CRIM-JI 140 and convicted at a rate of 29%. *Id*. at 1153, 1155 (App. 6-8).

This second study replicated the first study, again showing that the group given the truth-not-doubt mandate convicted at a much higher rate, this time approximately 50% higher. This follow-up study used 250 participants and broke them into two groups: one instructed similarly to WIS CRIM-JI 140 and convicted at a rate of 33.1% and the other instructed without the "search for truth" language and convicted at a rate of 22.6%. *Conceptual Replication* at 28, 31 (App. 23, 25). This time the fact pattern involved an misdemeanor sexual assault between adults. *Id*. As before, although each group received a different jury instruction on the burden of proof, all jurors read the same case summary and elements. *Id*. The information on the misdemeanor adult sexual assault case included testimony from the accuser and the defendant, and a factual stipulation. *Id*.

In addition, the second study suggested that the source of the problem was that the truth-not-doubt instruction caused jurors to misunderstand the burden of proof. It added a

question, after verdict, that asked jurors to explain their understanding of the instructions. *Conceptual Replication* at 28-30 (App. 23-24). Comparing the answers, twice the number of participants in the group given the truth-not-doubt mandate believed that they could convict *even if they had a reasonable doubt about guilt*. *Id*. at 32 (App. 25). Significantly, this misunderstanding was a strong predictor of conviction. *Id*.

B. None of the Criticisms Made Undercut the Research.

These studies are sound even though one researcher was a criminal defense attorney. (The other was a professor of psychology.) Scientists are rarely neutral, although it is a common misbelief that they are. It is not the scientist who must be neutral, but the *methods and procedures*. "In real life, drug companies test vaccines; environmentalists study climate change . . . A study may be valid or invalid, but its validity does not depend on the researcher's employment." Michael D. Cicchini & Lawrence T. White, *Educating Judges and Lawyers in Behavioral Research: A Case Study*, 53 Gonz. L. Rev. 159, 165 (2017-18) ["*Case Study"]*.

Formulating and testing a hypothesis is not evidence of a biased study. "Initial bias" is not a real concept. "When conducting research, scientists use the scientific method to collect measurable, empirical evidence in an experiment related to a hypothesis..., the results aiming to support or contradict a theory." Alina Bradford, "What is Science?" LiveScience, Aug. 4, 2017, found at https://www.livescience.com/20896-science-scientific-method.html. All good scientists search for evidence to support their hypotheses and then accept the hypothesis if evidence exists or, if not, reject the hypothesis.

Imagine how the State would respond to a defendant who, after being picked out of a lineup, said, "The police thought I did

the crime. Their initial bias likely affected both the way the lineup was conducted and the way they construed the results." The State would rightly demand that the defendant show something the police did to influence the outcome.

In fact, no real flaw affects these studies' validity and the combination of them is more powerful than either alone. To argue otherwise is to misunderstand the concept of a flawed study. "All empirical studies are flawed in the sense that methodological decisions designed to solve one problem often exacerbate another." *Empirical Test* at 1159 (App.9). Although no one study can ever be perfect, the nature of research is that each study will be imperfect differently and repeated studies together will be more powerful than either alone. "The goal of social science is to arrive at conclusions that are supported by multiple converging lines of evidence, with each contributing study being necessarily flawed, but flawed in a different way." *Id*. at 1160 (App. 9).

Nor does it matter whether the variance in conviction rates might be different if researchers presented study participants with stronger or weaker fact patterns. First, the scientific method prevents studies from continuously varying the underlying fact pattern. A controlled experiment keeps the facts constant because otherwise the difference in conviction rates could be attributable *to different factual scenarios* rather than different jury instructions.

Second, an instruction which lowers the burden of proof logically will have more impact in cases in which the evidence of guilt is more balanced. In cases with stronger evidence, jurors are likely to find guilt under both the preponderance standard and the reasonable doubt standard. In cases with weaker evidence, jurors are likely to acquit under both standards. But even if the problems with WIS CRIM-JI 140 may not affect all

cases, "that is certainly not a justification for improperly [or even sub-optimally] instructing jurors on reasonable doubt...Rather, the court's duty is to properly instruct the jury in the first place." Michael D. Cicchini, *Spin Doctors: Prosecutor Sophistry and the Burden of Proof*, 87 U. Cin. L. Rev. 489, 507 (2018) ["*Spin Doctors*"].

The participants used in these studies also do not create any bias or defect in the findings. A researcher cannot use randomly selected participants *and* participants that have been screened. These are mutually exclusive. Conducting screening such as voir dire itself would introduce subjective bias. It introduces the biases of the people conducting voir dire. *See Spin Doctors* at 501.

Nor does it matter for this purpose whether any participants had preconceived notions about the subject matter of the case given. First, nothing explains why such biases would cause the *observed differences between test groups*.

Second, as explained in the studies, these experiments used random assignment to address possible participant bias. Unlike situations in which a researcher is attempting to forecast the frequency of a characteristic in the larger population and uses random *sampling,* testing for differences between groups requires random *assignment*. "Good experiments use random assignment," which "creates a situation in which the experimental groups will become virtually equal . . ." Beth Morling, RESEARCH METHODS IN PSYCHOLOGY: EVALUATING A WORLD OF INFORMATION 251 (W.W. Norton & Co. 2012). When used properly, as it was in these studies, it produces separate comparison groups that have roughly similar traits--including gender, education, and biases.

By creating roughly equivalent groups, "the effects of bias are distributed equally across the test conditions. Therefore, the

end result—a difference in conviction rates—can only be attributed to the type of jury instruction received. *Empirical Test*, at 1165.

Any criticism that the studies are not applicable because the participants did not deliberate also misses the mark. In the second study, in response to a post-verdict question, mock jurors who received the truth-not-doubt jury instruction were nearly *twice as likely* to indicate that conviction was proper, even if they had a reasonable doubt about guilt. *Conceptual Replication* at 30 (App. 24-25). This response demonstrates a serious, *pre-deliberation* misconception. This Court should not risk allowing trial courts' jury instructions to create "a serious, mistaken belief about the burden of proof, only to hope that the misconception will be corrected later during jury deliberations." *See Case Study* at 176.

The use of the MTurk research platform is well-accepted in research circles and supplies no reason to doubt the findings of the studies. "[T]housands of researchers across the social sciences have conducted research using MTurk." Michael 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) ["*An Evaluation*"]. In 2015, prominent social studies journals published more than 500 papers using data obtained from the MTurk platform. *Id*. at 150.

In addition, nothing about makeup of MTurk platform participants suggests they are significantly different from the general population or other participants in other studies in any way that would explain the differing reactions of the various groups. The study itself used attention-check questions to be sure that they attended as we hope jurors do. *See Empirical Test* at 1156. Like the general population, MTurk participants are diverse. They are "more demographically diverse than typical

undergraduate populations," *An Evaluation* at 150, which are often used for studies. MTurk participants also have "provided data that met or exceeded the psychometric standards set by data collected using other means (e.g., undergraduate samples)." *Id*. at 149. Like college students, they are compensated for their participation, albeit in money rather than college credit.

Finally, the use of written case materials rather than live testimony makes no difference to the findings of the studies either. The written case summary method is well suited to testing the impact of a jury instruction. In addition, although live testimony might produce a change in conviction rate overall, there is no rational reason to suggest it would change the opinions of some test groups but not others.

Even if these criticisms mean this Court is not confident that WIS CRIM-JI 140 confuses jurors, this Court should exercise its supervisory authority to change the instruction in future cases unless this Court knows, beyond a reasonable doubt, that the closing mandate never inadvertently lowers the burden of proof.

CONCLUSION

Because the concept of guilt beyond a reasonable doubt is so central to our criminal procedure, WACDL therefore asks that the Court change WIS CRIM-JI 140 for future cases by deleting the closing mandate to avoid the possibility of juror confusion about the quantum of certainty about that truth needed for conviction.

Dated at Milwaukee, Wisconsin, February 8, 2019.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,998 words.

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Ellen Henak

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