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STATE OF WISCONSIN

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

DISTRICT I

Appeal No. 17AP001723CR
Milwaukee County Cir. Court Case No. 2013CF0569

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

KEITH J. BROOKS,
Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION, SENTENCE, AND THE DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED BY BRANCH 25, MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE STEPHANIE ROTHSTEIN PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. WHETHER DEFENSE COUNSELS WERE CONSTITUTIONALLY INEFFECTIVE

The postconviction court answered: no.

II. WHETHER THE JURY INSTRUCTION DEFINING THE STATE'S BURDEN OF PROOF REDUCED SUCH BURDEN *BELOW* THAT MANDATED FOR CRIMINAL PROSECUTIONS.

The postconviction court answered: no

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

The postconviction court answered: no.

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

The postconviction court answered: no.

V. WHETHER NEW TRIAL IS WARRANTED IN THE INTEREST OF JUSTICE BECAUSE THE TRUE CONTROVERSY WAS NOT FULLY TRIED

The postconviction court answered: no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

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

STATEMENT ON PUBLICATION

Publication may be warranted pursuant to Wis. Stat. § 809.23, so this Court's published opinion could:

- correct a constitutional error in Wisconsin's criminal jury instruction defining the State's burden of proof; and
- correct and prevent ineffectiveness of defense counsel stemming from erroneous understanding of the law, defective strategizing, and defective execution of defense theories.

STATEMENT OF THE CASE

This appeal seeks vacatur of Brooks' convictions on due process grounds and in the interest of justice.

Brooks was charged with one count of first degree intentional homicide, use of a dangerous weapon; and one count of misdemeanor battery. (1). The charges stemmed from the death of Brooks' wife, A.B., from a gunshot wound to the head. A. B. died in the couple's home, after prolonged

turbulent clashes between the spouses, in which Brooks was angry and verbally/emotionally abusive. Id. [1]

This was a multi-day trial. (135, 136, 137, 138, 139, 140, 141, 142).

Based on various forensic evidence, evidence of A.B.'s destroyed property, Brooks' self-filmed interrogations of his wife, and Brooks' spontaneous statements to investigators detailing the couple's arguments (admitted through the investigators), the prosecution argued that Brooks killed A.B. in a domestic violence spree, which progressed from verbal abuse to destroying A.B.'s property, to destroying her relationships, to hitting her, and finally killing her. (See e.g. 140:15-17 (video played); 141:30, 32-34, 40-42, 47-48) (closing summary of evidence and argument)).

Three Milwaukee medical examiners testified that the autopsy and other forensic evidence allowed the conclusion that the bullet was fired from an "intermediate distance" and A.B. died from "homicide." (See e.g. 139:5-117; 140:70-132).

To support that A.B. did not kill herself, the State presented testimony of friends and family: about her future plans; creative, life-loving disposition; and motherly love. (139: 238-290).

Two highly experienced public defenders served as Brooks' counsels: Deborah Vishny and J.C. Moore.

[1] The couple's young daughter was at the apartment when A.B. died, but did not witness the death. Nothing in this appeal addresses or concerns the child.

The defense theory was that Brooks' abuse had "pushed [A.B.] over the edge" to suicide. (See e.g. 141: 49, 61, 74).

The defense presented rebuttal forensic evidence via expert testimony stating that sub-standard, unreliable methodologies were used during the autopsy, but reliable testing was not done; that the autopsy report was unreliable; and that physical data indicated that the bullet was fired from an "indeterminate" distance consistent with suicide. (See e.g. 139:173-237).

To support the suicide theory, the defense presented medical records of A.B.'s prior mental health struggles, including anxiety and depression. This evidence showed that A.B. had attempted suicide at college and subsequently – a few years before her death -- had mental health diagnoses for which she was prescribed antidepressants and anti-anxiety medications, but was not taking them in January 2013. (139:206-211). The evidence showed that Brooks knew of A.B.'s prior suicide attempt and continuing mental health-based fragility. (See e.g. 141:49, 61-64, 74).

The defense also presented Brooks' voluntary statements to investigators (through investigators) describing how A.B. shot herself, insisting Brooks did not shoot her, and relaying the fighting that preceded the death. See e.g. 138:10-16, 20-21, 30-32.

Overall, evidence existed to support both theories: homicide and suicide.

After receiving the standard Wis. JI—Criminal 140 instruction ("J.I.140") and lesser included instruction on 1st degree reckless homicide, (141:18-21, 25-27), the jury found Brooks guilty of reckless homicide, (65, 66, 52).

For the homicide Brooks was sentenced to 40 years initial confinement and 20 years extended supervision. (65). He timely filed a Notice of Intent to Pursue Postconviction Relief. (67). [2]

In postconviction court Brooks argued, inter alia, that his counsels were ineffective in implementing the theory of defense so that it enabled, thus precipitated or caused, conviction of reckless homicide. (102:7-11).

Brooks also sought new trial on the grounds that the jury instruction defining the State's burden of proof misstated the law, confused the jurors, and impermissibly lowered the standard to something closer to "beyond reasonable doubt," (102:12-16); and in the interest of justice, (102:16-17).

After a *Machner* hearing at which Brooks and both counsels testified, postconviction relief on the issue of counsels' ineffectiveness related to jury instructions was denied for reasons stated on the record. (144:112-120; App.112-120; 123: App. 122).

The remaining claims for relief were denied in a Decision and Order Granting Evidentiary Hearing on Counsel's Request for Lesser Included Jury Instructions and

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[2] Once convicted, Brooks first sought postconviction discovery, but was denied after court-ordered briefing. (77, 79, 81, 82, 83). His petition for leave to appeal the denial was denied. (85, 88). He then filed a Motion for Postconviction Relief and a Supplemental Motion for Postconviction Relief. (96, 98). Because such motions cumulatively exceeded the page/length limit allowed by the local rules, Brooks withdrew the two motions and filed -- as replacement -- the Amended Motion for Postconviction Relief (hereafter "Amended Motion"). (102). All arguments in this appeal rely on, and address, Brooks' claims in the Amended Motion.

Denying Remainder of Motion for Postconviction Relief. (110:14-22) (App. 2-10).

This appeal seeks to correct compounded due process errors underlying Brooks' convictions: defense counsels' ineffectiveness and the due process-violating jury instruction J.I.-140, which presented for the jury's use a standard of proof lower than that mandated for criminal prosecution. Vacatur is also sought in the interest of justice.

STATEMENT OF FACTS

Brooks and A.B. had met in Arkansas when she was in college. They married and had a daughter. To gain steady income and better job prospects, Brooks joined the Army and was deployed to Afghanistan, where he worked in intelligence collecting. While Brooks was deployed, A.B. stayed in the U.S., eventually returning to Milwaukee. She found work and lived with her daughter. The marriage was often strained. During deployment, the spouses' communications were difficult and adversarial. Brooks had difficulty adjusting to his deployment situation, in part because of the strain with A.B. On one occasion he ingested pills and alcohol, and passed out at the base. He was ultimately transferred to an Army medical facility in the States, for mental health treatment. Brooks was diagnosed with PTSD, major depression, and anxiety, and was prescribed medications. Brooks then ultimately joined A.B. and the child in Milwaukee. The three had co-habited for several months by the time A.B. shot herself. [3] (137:119-130).

[3] Those medical diagnoses and treatments were presented to the jury through Brooks' recorded custodial statements (summarized and played to the jury) and through testimony about Brooks' medications at the scene. See also 138:96 (D.A. in closing reminding the jury about a

On 1/27/2013, Brooks called 911 just before 1 a.m., extremely distraught, to report that his wife had just shot herself.[4] (See e.g. 141:56-58 (summarizing evidence from the 911 call)). When the police arrived, Brooks, still distraught, spontaneously talked to the officers. After being later arrested and *Mirandized*, Brooks (not seeking counsel) had several long interviews with detectives. In all his statements Brooks insisted that A.B. had grasped the gun, raised it to her head, and pulled the trigger. He lunged to intervene, but to no avail. (See e.g. 141:54-60) (summarizing evidence of Brooks' conduct and spontaneous statements after arrest, presented through police officers)).

Brooks spontaneously recounted that for days before A.B.'s death the couple had fought intensely; that he had been suspicious and angry due to A.B.'s self-admitted infidelities and lies; that he vengefully destroyed A.B.'s property, brutally "interrogated" her (and filmed such "interrogations") and told her to kill herself; that the evening of A.B.'s death he decided to leave and started packing; and that he had rebuffed and hit A.B. moments before she picked up and fired the gun. (1; 136:110; 137:126-127, 163-169).[5]

In the 911 call, played to the jury, Brooks sounds frantic and distraught: begging for help, trying to administer

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"bag of drugs siting on the bed [and belonging to Brooks] at the time he was leaving" A.B. and his diagnoses of "mood adjustment disorder, anxiety, PTSD").

[4] The couple's young daughter was present at the apartment, but did not witness the shooting, death, or Brooks' efforts to revive A.B. Nothing in this postconviction motion concerns the daughter.

[5] Still at the scene, Brooks also volunteered that he had been growing marijuana and had disposed of the plants before the police arrived. He admitted he had mental health issues and had been prescribed medications, but instead was self-mediating with THC. (137:122, 171).

CPR according to instructions, wailing and throwing up; as well as pleading with and expostulating against A.B., e.g.: "Why did you do it?," and "You selfish bitch," and "Baby, I love you." (See e.g. 141:58).

Additional facts are reported below, as needed to support the arguments.

ARGUMENT

I. DEFENSE COUNSELS WERE CONSTITUTIONALLY INEFFECTIVE

A. Standard of review

This Court reviews ineffective assistance claims as a mixed question of law and fact. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. The circuit court's findings of fact will be upheld unless they are clearly erroneous. *Id.* Findings of fact include "the circumstances of the case and the counsel's conduct and strategy." *Id.* (citation omitted). Whether a given set of facts constitutes ineffective assistance is a question of law, which this Court reviews de novo. *Id.*

B. The legal standards

To succeed on a claim of ineffective assistance of counsel, Brooks must show that counsel's performance was deficient and the deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is deficient when it falls below objective standards of reasonableness. *Strickland*, 466 U.S. at 687-88; *State v. McMahon*, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice Brooks must show a reasonable probability that, but for counsel's deficient performance, the trial's result would have been different, and

a reasonable probability is one sufficient to undermine confidence in the outcome of the trial. *State v. Johnson*, 153 Wis. 2d 121, 129, 449 N.W.2d 845 (1990).

C. Facts of record relevant to this argument

The postconviction court made the following clearly erroneous findings unsupported by the record:

- "The theory of defense was that [A.B.] committed suicide and that [Brooks] did not physically shoot her." (110:19).

The record shows that the theory of defense was this: "Brooks did not cause A.B.'s death, did not kill A.B., and is not responsible for A.B.'s death. A.B. killed herself because she was unstable and depressed and Brooks abused her mentally/verbally when she was in that state." ((144: 13-14) (counsel's summary: "The theory if the defense was that Mr. Brooks' wife Anita had a history of clinical depression and that there were serious marital problems and that Mr. Brooks was engaged shortly before [A.B.'s] death in a course of mentally abusive conduct . . . and that she took her own life."); 48, 50 (theory was: "not responsible for" wife's death "despite" the fact that he knew she was unstable and yet did "increasing things in order to cause – to become more unstable")).

- Counsel were not deficient because "… there is no way anyone . . . can eliminate the risk of jurors taking something the wrong way. To assert . . . that somehow any attorney should be able to eliminate the risk that another individual who is 1 of 12 that he has to reach a unanimous verdict . . . might or might not interpret or perceive an argument or a word in one way or another

> ignored human nature;" and not deficient "… with regard to the strategies employed by the defense attorneys in this matter … they did the best with what they had." (144: 116-118).

The following facts are supported by the record.

Brooks knew and insisted that he did not shoot A.B. and did not feel responsible for her death, and above all sought acquittal of homicide. (144:12, 31, 47) (App. 22, 41, 53).

The defense repeatedly stated that Brooks' "despicable" abuse "pushed [the unstable A.B.] over the edge" to suicide. (See e.g. 141:49 (closing); 136:76-81 (opening narrative); 144: 13-15, 17-25 (explaining choice of the "theory/story/theme" that Brooks' abuse "had pushed [the depressed A.B.] over the edge" to suicide); 48-50; App. 23-25, 27-35, 54-56)). This "story," or "theme," was chosen because counsels believed it supported innocence of homicide, while embracing the bad "facts beyond change:" of Brooks' mean abuse of A.B. ((144: 17-18, 21; App. 27-28, 31) (testifying such story addressed the unavoidable "bad facts" of Brooks' "conduct which caused the victim to become more and more unstable," allowed "connection" with jury); (144:50; App. 56) (stating such story "was the best way to be able to acknowledge those ["despicable"] things and still make a credible argument that he should not be held responsible for her death.")).

Counsels believed that admitting that Brooks' "despicable" abuse "pushed" his depressed wife "over the edge" to suicide -- hereafter referred to as "the Strategy" -- would *not* admit or concede that Brooks caused Anita's death or was responsible for it. ((144:29; App. 39) (counsel admits "not believing" "that the jury instruction on reckless homicide

[combined with claiming that Brooks pushed A.B. over the edge to suicide] "afforded" the possibility of conviction of reckless homicide); (144:37; App. 47) (not believing presenting the Strategy communicated that Brooks "caused" A.B. to "kill herself"); (144:48-50; App. 54-56) (disagreeing that such "story" could "encourage" the jurors to find Brooks guilty of "any degree of homicide" or make Brooks "responsible for" the death)).

Counsel believed that, under the law, "pushing someone over the edge" to suicide by abuse could *not* constitute homicide, so she never "worried" that the Strategy would facilitate a (reckless) homicide conviction:

> … *I didn't think that's how the jury would see it.* The issue in the case was who fired the fatal shot. . . And I did not view that that would be what the jury considered *and I did not believe that the jury instructions supported tha*t *as given by the Court would support [sic.] any view of the evidence that simply being mean to somebody and kind of setting off an internal set of depression would be -- make the person cause another human being's death*.
>
> (144:23-24; App. 33-34) (emphasis added). (See also 144:25, 29; App. 35, 39).

One counsel testified to some worry that the jury would "take [the Strategy] the wrong way" and conclude that Brooks was responsible for A.B.'s death. (144:55, 59-60; App. 61, 65-66). He thought that his attempt to get the jury instructed on assisting suicide, (22, Proposed Jury Instructions), probably stemmed from such worry:

> … it's an instruction that I know I attempted to craft . . . And specifically there is language in there that says -- . . . "Encouragement of suicide without further assistance by Keith brooks is not a crime. 'Assistance' means that Keith brooks in some method or manner helped or aided [A.B.] to commit suicide."

> … I can only assume based on that that it had something to do with the possibility that the jury might take [the Strategy] the wrong way. But I will say that I do recall some discussion that I had with Attorney Vishny. I believe we also had them with [Mr. Brooks] to the effect that it was -- it was a pretty far out there theory. It was very unlikely. But I suspect that we probably did that [proposed instruction on assisted suicide] as a safeguard…

(144:55-56; App. 61-62). (See also 144:58; App. 64).

Concern that "the jury might take it the wrong way" was concern "[t]hat the jury might use [the Strategy] as some sort of admission that [Brooks] was in fact guilty of this." (144:56; App. 62).

Counsel thought they had discussed with Brooks the risk that "the jury would take [the Strategy] the wrong way," as an admission of guilt of homicide or responsibility for A.B.'s death. (144:60; App. 66). Counsel opined that Brooks accepted the Strategy "because as we explained it to him, this was really the only way we were gonna be able to maintain credibility with the jury in advance of our theory of defense [of suicide]." (144:57; App. 63).[6]

The lesser included reckless homicide jury instruction was proposed by the defense, as an attempt to limit Brooks' prison exposure, if there were to be a conviction. Counsels did not believe that giving such jury instruction would

[6] Trial transcripts show that counsel sought the excerpt from J.I. 1195 to mitigate the risk of a guilty verdict of homicide for "encouraging Ms. Brooks to commit suicide, and obviously there was a concern that without a clear statement that this is not against the law to encourage suicide, that the jury might come back and somehow find him guilty of [homicide] based solely on the fact that he encouraged her to commit suicide." (144:87-88; App. 87-88).

facilitate a homicide conviction. (144:24-25, 29, 63-64, 70-72; App. 34-35, 39, 69-70, 76-78). The unmodified instruction was given. (141:18-21).

To sum up:

1. Counsels crafted and implemented the Strategy because they felt it made them credible (by embracing the "bad facts") and was "consistent with innocence" of homicide, Brooks' prime goal.

2. Counsels did not believe that the Strategy might precipitate a homicide conviction, even of reckless homicide.

3. Counsels understood the law to be this: *de jure* homicide (including reckless) cannot be committed by verbally and/or mentally abusing someone, even if such abuse contributes to the death by "pushing" the already-depressed deceased "over the edge to suicide," as in this case.

4. With that understanding of the law, counsels concluded that the standard reckless homicide jury instruction correctly and sufficiently stated the law, and required no clarifying or limiting amendments or additions tailored to the facts of this case and Brooks' goals.

Brooks knew and asserted that he did not kill his wife nor was responsible for her death, and sought acquittal of homicide. (144:83-85, 90-91; App.83-85, 90-91).

Brooks felt, and told counsels, that presenting the Strategy -- admitting that he "pushed" his wife "over the edge to suicide" -- was "almost like pleading" or "a quasi confession to killing [his] wife." (144:86-87, 96; App. 86-87,

96). To Brooks it sounded like admitting to homicide, "as if I was responsible for her death." (144: 90; App. 90). [7]

Counsels did not warn Brooks of any risks of the Strategy. ((144:90; App. 90) (Brooks' testimony); 18-22, 27, App. 28-32, 37 (counsel's testimony)). Brooks never consented to any defense action that would make a homicide conviction more likely. (144: 91; App. 91).[8] He accepted counsels' choice of the Strategy based on their explanations. (144:92; App. 91).

D. Defense counsels, ineffectively, enabled and likely precipitated conviction of reckless homicide, with the related long prison sentence.

Defense counsels effectively assisted Brooks in avoiding conviction of intentional homicide.

Counsels' ineffectively assisted Brooks when their labors -- unwittingly and contrary to Brooks' goal -- paved the way for a conviction of reckless homicide.

Counsels' objectively unreasonable (i.e. deficient) actions and inactions enabled and facilitated -- thus likely precipitated or caused -- the reckless homicide conviction and long prison sentence (hence prejudice). *Strickland*, 466 U.S. at 688, 694.

Deficiency occurred when counsels incorrectly interpreted the law, to conclude that abusing a vulnerable, unstable person to the point of "pushing her over the edge" to suicide could not, *de jure*, constitute "reckless homicide,"

[7] Counsels had no recall of Brooks expressing such concerns, but did not testify that he had not expressed them. (See e.g. 144:20; App. 30).

[8] Counsels' testimony, passim, did not indicate otherwise.

when such abuse was verbal and/or indirect (without physical engagement); and then built the Strategy on such erroneous understanding of the law. *See Thiel*, 264 Wis.2d at ¶51 (strategy based on an erroneous view of the law is deficient performance as a matter of law).

Counsels cited no legal authorities supporting their legal conclusion, or that they so concluded based on research or analysis of the laws. (144:59; App. 65). This indicates that counsels' Strategy -- although in some ways deliberate – lacked circumspection and caution, because counsels apparently had not verified their understanding of the law was correct; and was not based on rationality founded on the law. *State v. Felton,* 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). (counsel's conduct may not be based on a whim, "there must be deliberateness, caution, and circumspection," and a strategic decision must "be based upon rationality founded on the facts and law.").

Brooks has unearthed no authority stating that the facts of this case *de jure* cannot constitute reckless homicide. Neither the statutes not case law state that the conduct that led to Brooks' charges and was captured in the Strategy *cannot* constitute reckless homicide, or that such abuse cannot be a "substantial factor" in causing death by reckless homicide, or constitute "utter disregard for human life."

Brooks submits that, according to statutes as reflected in the plain language of the standard jury instruction, the crime of reckless homicide could arguably extend to his conduct. Based on such plain language, jurors could reasonably conclude that the conduct admitted in the Strategy and proven at trial was a "substantial factor in producing

A.B.'s death," was done "in utter disregard of human life," and met the remaining elements of reckless homicide. [9]

Counsels' failure to so determine, and to take corrective or protective action, was unreasonable because based on an incorrect view of the law, unsupported by any authority or research, and contrary to the plain meaning of the language of the jury instructions.

Nothing in the law, and nothing stated or done at trial, prevented the jurors from concluding (based on the plain language of the jury instructions given) that the elements of reckless homicide were met by the following facts admitted through the Strategy and proven and argued by the defense and State:

1. That A.B. had been mentally unstable and suicidal, and was mentally unstable prior to her death, when Brooks abused her. (See e.g. 136: 43-44; 139: 209, 234 (defense expert testimony of A.B.'s prior mental health prescriptions for depression and anxiety, and suicide attempt)).

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[9] The jury was instructed as follows:

"One, Keith Brooks caused the death of A.B. Brooks. "Cause" means that Keith Brooks was a *substantial factor in producing death*.

Two, Keith Brooks caused the death by criminally reckless conduct [which means that] *the conduct created a risk of death or great bodily harm* to [A.B. Brooks] *and the risk . . . was unreasonable and substantial*. And Keith Brooks *was aware that this conduct created the unreasonable and substantial risk of death or great bodily harm*.

And, three, the circumstances of Keith Brooks' *conduct showed utter disregard for human life*. . . ."

(141:19-20) (emphasis added).

2. That when Brooks abused A.B. he knew of her prior and depression and suicide attempt, and about her current depression, thus knew that sustained escalating abuse could further destabilize her, to the point of suicide. (See e.g. 137:171-173 (defense eliciting testimony of Brooks' custodial admissions that A.B. "was fucked up, but he made her more fucked up that she was," and that he "should have known better because of her past suicide attempt.")).

3. That – aware of such risks *and* keeping a gun in plain view -- Brooks continued to "push A.B. over the edge" to suicide through escalating abuse: from arguing to destroying her property, to being "horrible to her," "demeaning her," acting "despicably," finally pushing her away in her weakest hour. (See e.g. 136: 76-81 (defense's opening statement); 141:99-103).

The defense -- unwittingly -- encouraged a reckless homicide conviction, as defined in the jury instructions, by stating in closing:

> … *what you have to decide is did those despicable actions [of abuse] cause a woman who had a history of depression from her youth on forward to take her own life*? . . . Now, he drove her over the edge . . . The other times before that last week she would not have killed herself, he drove her over the edge to a suicide.

(141: 49 (emphasis added)) [10]

[10] The State tried to refute the defense Strategy by stating in closing: "This man wants you to believe that he's terrorizing his wife and that he's pushing her too far and that when he ultimately says 'I'm leaving,' that she takes her life because she cannot handle the fact . . ." (141: 44). Counsels' summaries of the Strategy disclose that it included the elements of reckless homicide, as argued supra.

Based on the plain English of the unmodified jury instructions, without "taking [anything] the wrong way," (144:55, 60; App. 61, 66), the jurors could reasonably conclude – based on the *defense's* admissions, evidence, and arguments -- that Brooks was guilty of reckless homicide. Nothing said, argued, or proven in postconviction court indicates otherwise.

Brooks submits that, taken "the right way," the unmodified standard instructions on reckless homicide would also allow a prosecutor reasonably to allege that Brooks' conduct fit that crime and to charge Brooks with reckless homicide. A prosecutor could reasonably expect that jurors would find guilt of reckless homicide upon sufficient proof of the facts admitted in the Strategy. This is proven by two recent prosecutions.

In 2017 Michelle Carter of Massachusetts was charged with "involuntary manslaughter." Prosecutors alleged that, aware of her boyfriend's prior suicide attempts and mental health struggles, Carter steadily, by texting and calling, nudged him to commit suicide, instructed him how to proceed, assuaged his misgivings, and chastised him for delaying. Prosecutors justified the charge by stating that Carter's proactive, sustained *verbal* campaign *directly led* to the death, making her an active participant. The Supreme Judicial Court held that the charges were properly supported by the alleged facts, although Carter's involvement in the death was only verbal. *Commonwealth v. Carter*, 52 N.E.3d 1054 (Mass., 2016) ("The principal question we consider in this case is whether the evidence was sufficient to warrant the return of an indictment for involuntary manslaughter where the defendant's conduct did not extend beyond words. We conclude that, on the evidence presented to the grand jury, the verbal conduct at issue was sufficient."). Carter stood trial,

was convicted of involuntary manslaughter, and in August 2017 sentenced to a term in custody, as reported by the media, e.g. by CNN at http://www.cnn.com/2017/08/03/us/michelle-carter-texting-suicide-sentencing/index.html. [11]

Carter's conviction of manslaughter proves that Brooks' conduct, captured in the Strategy and proven by the defense (of knowingly contributing to unstable A.B.'s suicide by recklessly harassing her, even without physically participating) supported a charge and conviction of reckless homicide.

The facts of Brooks' and Carter's cases are parallel: both involve suicide following from the defendant's sustained, knowing, inducing and/or encouraging engagement -- albeit indirect -- with an already unstable person, that "pushed" the deceased "over the edge" to suicide.

The key elements of reckless homicide have counterparts in those of manslaughter, as stated in *Carter*, 52 N.E. 3rd at 1060-1061. [12] The requirement of "intentional"

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[11] Last accessed on November 6, 2017.

[12] *Carter* so discusses the elements:

> "Involuntary manslaughter can be proved under [the theory of] wanton or reckless conduct . . .
>
> Wanton or reckless conduct is "*intentional conduct* ... involv[ing] a *high degree of likelihood that substantial harm will result* to another." . . . *Whether conduct is wanton or reckless is*
>
> *"determined based either on the defendant's specific knowledge or on what a reasonable person should have known in the circumstances*.... If based on the objective measure of recklessness, the defendant's actions constitute wanton or reckless conduct ... if an ordinary normal [person] under the same circumstances would have realized the gravity of the danger.... *If based on the subjective measure, i.e., the defendant's own knowledge, grave danger to others must have been*

conduct exists in both crimes: neither concerns conduct that is accidental, involuntary, or inadvertent but results in death. Manslaughter's requirement that the conduct "cause" the death, even if indirectly, remotely, or verbally, id. at 1061-1062, parallels Wisconsin's "substantial factor" in the death element. "Wanton or reckless conduct" is parallel to Wisconsin's "criminally reckless" conduct: both require awareness and assumption of the risk of harm posed by the conduct, and that the risk be substantial and unreasonable. Although the element of "utter disregard for human life" in first degree reckless homicide seems to be absent in involuntary manslaughter, the core parallel between Brooks' reckless homicide and Carter's manslaughter holds.

Carter's charge and conviction prove that counsels' interpretation of the law on which the Strategy rested -- that Brooks' conduct could not support the charge or conviction of reckless homicide -- was incorrect, unreasonable, thus deficient.[13]

> *apparent and the defendant must have chosen to run the risk rather than alter [his or her] conduct* so as to avoid the act or omission which caused the harm" (quotations and citations omitted)."
>
> . . .
>
> The [manslaughter] charge is warranted if sufficient evidence existed] to support a finding of probable cause that the defendant's conduct (1) was intentional; (2) was wanton or reckless; and (3) caused the victim's death.

Carter, 52 N.E.3rd at 1060-1061 (internal citations omitted) (emphasis added).

[13] The second prosecution supporting this point involved 2015 charges against Long Vang (of Olmstead City, MN) of third degree murder and second degree manslaughter charges, for physically and mentally abusing his girlfriend until she took her life. In so charging, the prosecutors relied on the theory that Vang's abuse *directly contributed* to the woman's death by suicide. News outlets reported that in 2017

Ironically, in passionately re-stating the Strategy, the defense -- unwittingly yet self-defeatingly – indirectly admitted that Brooks' conduct was a significant causal factor in A.B.'s death.

Deficiently, counsels did not ensure that the jurors were correctly, precisely instructed about the legal principle counsels believed correct: that reckless homicide could not, *de jure*, extend to Brooks' conduct.

Counsels did attempt such mitigation when they worried that the jury could misunderstand the law and "take things the wrong way" – to conclude, erroneously, that encouraging suicide could constitute homicide. (144: 55-60; App. 61-66). Similarly, if the facts here really de jure could not constitute reckless homicide, and the standard jury instruction did not clearly and correctly so say, then counsels had the duty to ensure that the instructions so stated by seeking clarifying amendment. *See State v. Robinson*, 145 Wis. 2d 273, 281, 426 N.W.2d 606 (Ct. App. 1988) (instruction is erroneous if it does not adequately cover the applicable law). Such motion would have been granted, if counsels' interpretation of the law was correct. *Miller v. Kim*, 191 Wis. 2d 187, 194, 582 N.W.2d 72 (Ct. App. 1995) (in reviewing challenged jury instructions, courts are to determine whether the meaning of the instruction as a whole is an incorrect statement of the law).

Olmsted County District Judge Debra A. Jacobson dismissed the murder and manslaughter charges, ruling that evidence was insufficient to proceed on those charges. http://www.nydailynews.com/news/national/murder-charges-tossed-minn-man-accused-partner-suicide-article-1.2874449. Last accessed November 10, 2017.

Counsels' failure to ensure that jury instructions consistent with counsels' understanding of the law as favorable to Brooks (because disallowing a reckless homicide conviction on the facts present here) were given is prejudicial, because it left the jury with the impression (incorrect, in counsels' opinion) that the facts *could* constitute reckless homicide under the law.

Counsels did not ask, or otherwise ensure, that the jury was instructed about the legal rule counsels believed correct: that suicidal death following from, and partially caused by, persistent, escalating *mental* and *verbal* abuse of a person known to be unstable could not, *de jure,* be reckless homicide. This was prejudicial, because it opened the path to a guilty verdict contrary with such rule, as argued supra.

Counsels overlooked that the Strategy -- as implemented -- was in fact consistent with *guilt* of reckless homicide, contrary to their assessment.[14] The Strategy's zealous implementation, ironically, paved the way for such guilty verdict, which was self-defeating because contrary to Brooks' prime goal of avoiding a homicide conviction. This is doubly prejudicial, because it culminated with an avoidable homicide conviction and because the verdict merits no confidence when it could stem from the *defense's* Strategy, argument, and evidence. *Johnson*, 153 Wis. 2d at 129

[14] Counsels believed that the Strategy was consistent with innocence of homicide. ((144: 17-18, 21, 66; App. 27-28, 31, 72) (testifying such story addressed the unavoidable "bad facts" of Brooks' "conduct which caused the victim to become more and more unstable," allowed "connection" with jury); (144:50; App. 56) (stating such story "was the best way to be able to acknowledge those ["despicable"] things and still make a credible argument that he should not be held responsible for her death.")).

Self-defeat -- thus prejudice -- ensued when the *defense's* Strategy, evidence, arguments, and jury instructions -- in concert -- opened a broad, straight path to a reckless homicide conviction, by allowing the jurors to conclude that Brooks' conduct fit the elements of reckless homicide, as stated in the standard instructions presented and approved by the defense. *Johnson*, 153 Wis. 2d at 129 (prejudice is when verdict merits no confidence).

The cumulative prejudice was multifaceted:

- counsels in effect admitted -- on Brooks' behalf but without his express consent -- responsibility for A.B.'s death, conceding that he caused A.B.'s death recklessly.

This arguably automatically ranks as prejudicial ineffective assistance of counsel necessitating a new trial under the standard announced in *United States* v. *Cronic*, 466 U. S. 648 (1984). Such concessions and admissions by counsels -- even though indirect and unwitting -- were arguably the functional equivalent of a guilty plea to reckless homicide, in that they allowed the prosecution's case on that charge to proceed essentially without opposition, but with help from the defense.

- by effectively doing the work of the prosecution, as detailed supra, counsels' in effect deprived Brooks of constitutionally effective counsel in the adversarial process, contrary to due process as interpreted in C*ronic*.

The *Cronic* court wrote: "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment

rights that makes the adversary process itself presumptively unreliable." Id., at 659.

On the record summarized supra, Brooks asserts that counsels' concessions/admissions via the Strategy, and counsels' provision of supporting evidence and arguments, coupled with the jury instructions on reckless homicide, cumulatively arguably amounted to a "fail[ure] to function in any meaningful sense as the Government's adversary," *id.,* at 666, on the issue of Brooks' guilt of reckless homicide.[5]

It was counsels who introduced for the jury's consideration the charge of reckless homicide. Counsels -- unwittingly -- met the State's burden of proving that charge, by proving facts meeting its elements. Counsels -- unwittingly – by presenting the Strategy, admitted conduct meeting those elements. Counsels therefore acted not as the defense, but as the prosecution, contrary to due process. *Cronic*, 466 U.S. at 659.

Even if some of the State's evidence supported reckless homicide, the defense by its actions multiplied such evidence, and also made admissions and arguments greatly facilitating a reckless homicide conviction, unwittingly. This constituted prosecutorial work. The defense acted not as the State's adversary *on this charge*, but as its helper, contrary to *Cronic*. A new trial is needed to remedy this due process fiasco. *Thiel,* 264 Wis.2d at ¶ 60.

Based largely on counsels' overall performance, Brooks did not receive a fair and reliable trial. *Thiel,* 264 Wis.2d at ¶62. A new trial with counsel performing overall effectively will be the fair, reliable trial due process guarantees Brooks.

II. THE JURY INSTRUCTION DEFINING THE STATE'S BURDEN OF PROOF REDUCED SUCH BURDEN *BELOW* THAT MANDATED FOR CRIMINAL PROSECUTIONS.

A. Standard of review.

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

B. By including the Dual Directives the Instruction lowered the State's burden of proof, violating due process.

Fundamental due process requires that Brooks' guilt be proven "beyond a reasonable doubt." See *In Re Winship*, 397 U.S. 358 (1970).

Wisconsin's standard J.I.140 ("Instruction") given by the trial court, (141:26-27), violated due process because it -- as a whole -- did *not* communicate to jurors that they *must* acquit if they have reasonable doubt.

The Instruction gave the jurors these dual directives: (1) "not to search for doubt," but instead (2) "to search for the truth." ("Dual Directives"). The inclusion of these Dual Directives allowed the jurors erroneously to conclude that the State's burden of proof is *lower than* "beyond a reasonable doubt" and allows conviction even when reasonable doubt exists.

This standard-lowering effect is scientifically proven by the study designed, executed, and published by Wisconsin

attorney Michael Cicchini and Professor, Chair of Psychology, and Director of the Law & Justice Program at Beloit College, Dr. Lawrence T. White. Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions,* 50 U. Richmond L. Rev., pp. 1139-1167 (2016) ("First Study"). (102:40-68).[15]

The First Study tests the impact of the Dual Directives found in J.I.140 on jurors' understanding of the State's burden and decision-making. This controlled Study proves that jurors who hear the Dual Directives in J.I.140 convict at a *significantly* higher rate than jurors who receive instructions *not* containing the Dual Directives. The conviction rate of jurors who received the Dual Directives was nearly *double* that of jurors who received a "beyond reasonable doubt" instruction without the Dual Directives, and was statistically *identical* to that of jurors who received *no* "reasonable doubt" instruction whatsoever. (102:67-68).

The statistical significance of the First Study's findings, and the Study's limitations, are fully explained in the First Study. (102: 40-68, passim). Brooks respectfully refers this Court to the entire First Study for the complete and correct description of the study's design and methodologies, its findings, and their implications.

Brooks points out that, with the large sample size and the revealed large difference in conviction rates, the First Study allows to conclude with more than 97 percent certainty—because of the obtained *p*-values of 0.023 and 0.028—that the authors did not commit a "Type I error." This translates into a more than 97 percent certainty (1-*p*) that

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[15] At the time of time Brief's drafting, the First Study is available at http://lawreview.richmond.edu/wp/wp-content/uploads/2016/06/Cicchini-504.pdf).

the authors did not obtain a "false positive" when testing their hypotheses regarding how the inclusion of the Dual Directives in a jury instruction on "beyond reasonable doubt" in fact impacts jurors' conviction rates. (102:55-57, passim).

The standard-of-proof-reducing effect of the Dual Directives is *again proven* by Cicchini and White's follow-up replication study, which confirms the reliability of their original findings in the First Study. *See* Michael D. Cicchini & Lawrence T. White, *Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication*, 117 Columbia L. Rev. Online, March 1, 2017, pp. 22-35. (102:69-82). ("Second Study").[16]

The Second Study again finds a statistically significant difference in conviction rates between mock jurors who were instructed on "reasonable doubt" *without* the Dual Directives language, and those who were instructed "not to search for doubt" but to "search for the truth." (102: 69, 78-82).

Moreover, the Second Study identifies a cognitive link between the Dual Directives and jurors' higher conviction rates. Specifically, jurors who received the Dual Directives were nearly *twice* more likely ($p = 0.01$) to indicate, in their response to a post-verdict question, that *"[e]ven if I have a reasonable doubt about the defendant's guilt, I may still convict the defendant*[.]" (emphasis added). Furthermore, jurors who held this erroneous belief, regardless of what instructions they received, actually convicted at a rate *2-1/2 times higher* ($p < .001$) than jurors who correctly understood the burden of proof (as requiring acquittal whenever reasonable doubt lingers). (App. 81-82).

[16] At the time of this Brief's drafting the pre-publication draft is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2813596).

Together, the First and Second Study supply *uncontroverted, scientifically solid, empirical proof* that the Dual Directives, when included in the instruction defining the State's burden of proof, have these effects:

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

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

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

The Two Studies thus refute and *empirically disprove* the legal analysis and conclusions of the Wisconsin Supreme Court in *State v. Avila*, 192 Wis.2d 870, 532 N.W.2d 423, 429 (1995). Thereby *Avila's* holding is proven contrary to empirical fact. Such holding may not stand, when it lacks scientific support and is in fact empirically proven false by the Two Studies, which show that the Dual Directives in J.I.140 *in fact* measurably reduce the State's burden of proof to something like the "preponderance of evidence" standard of civil cases. See supra.

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

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

Brooks asks this Court to take judicial notice of the Two Studies' empirical data, results and conclusions. This Court may take judicial notice of facts not subject to reasonable dispute, if they are generally known within the territorial jurisdiction of the court *or* are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. See Sec. 902.01(1) and (2), Stats; *State ex rel. Cholka v. Johnson*, 85 Wis. 2d 400, 402, 270 N.W.2d 438, 440 (Ct. App. 1978), rev'd on other grounds, 96 Wis. 2d 704, 292 N.W.2d 835 (1980).

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

This Court should take judicial notice of the facts proven by the Two Studies, because the Two Studies are "sources whose accuracy cannot be reasonably questioned," and whose accuracy has not in fact been substantively questioned.

The Two Studies stand unrefuted. The underlying scientific principles and methodologies of the First Study are generally accepted in the scientific community and widely practiced in social sciences as reliable. (102: 51-57). The Second Study has the same underlying scientific principles

and methodologies, and replicates the First Study. (102: 74-77). Thus, both Studies warrant judicial notice.

One hallmark of reliability is that the Two Studies were well-designed "controlled experiments" where participants received the same hypothetical fact patterns involving fictional parties and witnesses. Both experiments were designed to test selected hypotheses: (1) the First Study was designed to test the hypothesis that "when truth-related language [i.e. the Dual Directives] is added to an otherwise proper beyond a reasonable doubt instruction, the truth language not only contradicts but also diminishes the government's burden of proof;" (2) the Second Study was designed to test whether the results of the First Study would be replicated; and if yes, to test what (if any) cognitive link existed between the Dual Directives and the mock jurors' "guilty" verdicts. See Michael D. Cicchini, The Battle over the Burden of Proof: A Report from the Trenches, 79 U. Pittsburgh L. Rev., No. 1 (2017), pp. 8-9. [17]

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

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

mock jurors to test the impact of a defendant's attractiveness on juror verdicts); Lawrence T. White, Juror Decision Making in the Capital Penalty Trial, 11 L. & Hum. Behav. 113 (1987) (using mock jurors to test the impact of various factors on jurors' willingness to impose the death penalty).

The Two Studies' underlying principles and methodologies are widely accepted and commonly used in the social sciences, precisely because they are proven efficient and effective. By using random assignment such controlled experiments ensure confidence that precisely the one isolated variable under scrutiny (here: the Dual Directives) produces the given effect (here: the higher conviction rate and lower burden of proof). Cicchini, The Battle Over the Burden of Proof, at p. 10.

The Two Studies also reliably ensure that the double rate of jurors exposed to the Dual Directives was not accidental, and determined that it was "statistically significant" through the sound "underlying scientific principles" of mathematical and statistical analysis. Scientifically reliable analysis consisted of the calculation of a statistic dubbed the "*p*-value," which depicts the probability that a false positive result was obtained in testing a hypothesis. Based on a well accepted method, or algorithm, such calculation was done and resulted in the *p*-value of 0.028 and 0.033 in the two studies, respectively. (102: 78-79). This translates into the reliable conclusion – made with over 96% certainty -- that the high conviction differential was caused precisely by the Dual Directives which culminate the instruction on the State's burden of proof. Id.

The validity and reliability of the Two Studies is also demonstrated by the fact that they appeared in academic publications designed to report the results of scientific

inquiries, the second one peer-reviewed. These are publications of solid intellectual integrity untainted by political or other biases. In those academic publications the Two Studies are surrounded by other intellectually robust reports authored by academics and researchers, presenting reliable *research* on various legal concepts and issues.

Nothing indicates that the Two Studies are scientifically unsound or yield biased, unreliable data or conclusions.

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

In light of the above, Brooks asks this Court to vacate his convictions as stemming from the jurors' reliance on an incorrect burden of proof, *lower* than the constitutionally-mandated "beyond a reasonable doubt" standard.

In the alternative, Brooks asks this Court to certify this issue to the Wisconsin Supreme Court, to review its analysis in *Avila* in light of the Two Studies and reassess the constitutional validity of J.I.140 (with the Dual Directives) consistent with such Studies.

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

A. Standard of Review.

When a jury instruction error – e.g. confusing wording -- goes to the integrity of the fact-finding process, discretionary reversal by this Court is warranted even though defense counsel did not object to the erroneous instruction. *State v. Hatch*, 144 Wis. 2d 810, 824, 425 N.W.2d 27 (Ct.

App 1988) ("We have the discretionary power to review a waived instructional error if the error goes to the `integrity of the fact-finding process.'" (citation omitted)).[18]

"A jury instruction is tainted and in error if 'a reasonable juror could misinterpret the instructions to the detriment of a defendant's due process rights.'" *State v. Dodson*, 219 Wis.2d 65, 86, 580 N.W.2d 181 (1998) (citation omitted). A correct statement of the law in another part of the charge can render an incorrect statement harmless when the charge *as a whole* does not misdirect the jury. *State v. Hoover*, 2003 WI App 117, ¶ 29, 265 Wis.2d 607, 666 N.W.2d 74.

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

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

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

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

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

J.I.140 first informed the jurors that the State bore the burden of proving every element "beyond a reasonable doubt" and defined "reasonable doubt." This first portion of the Instruction directed the jurors -- correctly -- to convict *only if* the evidence persuaded "beyond a reasonable doubt" that every element was so proven. It correctly directed the jurors to use "reasonable doubt" as *the* measure of the State's success/failure of proving every element.

But the Dual Directives that close the Instruction contradicted -- thus canceled -- the correct directives of the first portion. Contrary to the commands of the first portion, the Dual Directives commanded the jurors "*not to search for doubt*," i.e. not to consider whether any reasonable doubt remained after the evidence was presented. Moreover, contrary to the first portion, the Dual Directives commanded the jurors "to search for the truth," i.e. to decide which narrative -- the State's or the defendant's -- appeared more true, or better supported by the presented evidence.

Confusingly, the jurors were given contradictory, irreconcilable directives in J.I.140 "as a whole:" an impossible task to perform. No juror could "give the defendant the benefit of *every* reasonable doubt" (as commanded in the first portion of J.I.140) without first identifying every reasonable doubt in existence, by means of "searching" for every reasonable doubt (as forbidden in the Dual Directives).

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

The jurors were given contradictory -- thus confusing -- commands in J.I.140 "as a whole." They could not properly, rationally, logically follow *all* the commands given. When directed "not to search for doubt," they presumably obeyed, since this was one of the *final* commands they heard.

Therefore the "overall meaning" of the State's burden of proof was not correctly communicated by J.I.140 "as a whole." *Hatch*, 144 Wis.2d at 826. Unlike in *Hatch*, it cannot be concluded here that "the instructions, taken in their entirety, render[ed] any error harmless because the *overall meaning* communicated by the instructions was a correct statement of the law." *Id.* Rather, the overall meaning of *only the first portion* of J.I.140 -- the portion *preceding* the Dual Directives -- correctly stated the burden of proof the State bore. But, through its Dual Directives portion (which contradicted the preceding correct commands of the first part of the Instruction), J.I.140 "taken in its entirety" erroneously stated the law: ultimately relieving the jurors of the duty to search for and identify every reasonable doubt, and convict only if no such doubt persisted.

Through its Dual Directives (which contradicted/canceled the correct commands of the first part of the Instruction), J.I.140 "taken in its entirety" gave the jurors an impossible task inconsistent with due process: of giving Brooks the benefit of "every reasonable doubt" without searching for doubt, but by searching for the truth. See id.

Brooks submits that J.I.140 "as a whole" misdirected the jury. A correct statement of the law in the first part of J.I.140 the did not render harmless the *incorrect* statement in the Dual Directives, because J.I.140 *as a whole* gave the jury an impossible task inconsistent with due process, by

commanding contradictory and irreconcilable analyses. See *Hoover*, 2003 WI App at ¶ 29.

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

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

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

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

A. Standard of Review.

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

defendant's right to due process is a legal issue subject to de novo review. Id. at 639.

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

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

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

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

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

Nothing in the Constitution or the law makes "searching for the truth" or finding "the truth" a criminal *jury's* deliberative and/or determinative task. Nothing in the law tasks *juries* in criminal prosecutions with searching for, or finding, "the truth" based on their analysis of the evidence. No legal authority supports that such *jurors'* task can be accomplished by searching for "the truth," or that such *jurors* may embark on searching for "the truth" in deliberating or verdict-making. Under the constitution and the laws, "truth" is *not* the jurors' concern, nor part of their task in criminal cases. See e.g. *Berube*, 286 P.3d 402, 411 (Wash. Ct. App. 2012) at ("truth is not the jury's job"). The jurors' goal -- of rendering a verdict – is attained by determining whether the defendant has been proven "guilty" under the required burden of proof. In a criminal case, a "guilty" verdict and "[a] conviction is *not* a finding that an accused is *actually* guilty, but a finding that the State has met its burden of proof beyond a reasonable doubt." Erik R. Guenther, *What's Truth Got to Do with It? The Burden of Proof Instruction Violates the Presumption of Innocence*, 13 Wis. Defender, Fall 2005, at pp. 1-2 (emphasis added).

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

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

- directed the jurors to do the *opposite* of what due process required of them, as interpreted in *Winship*, and
- directed them instead to apply a truth-weighing burden of proof which is constitutionally deficient in criminal prosecutions and not supported by law.

J.I.140 as a whole, by including the Dual Directives in its finale, thus *doubly* led the jurors astray about the State's legal burden of proof, causing a fundamental constitutional defect.[19]

Insofar as here the jury instruction defining the State's burden of proof (1) forbade the jurors from searching for doubt in assessing whether the presented evidence extinguished every reasonable doubt, and (2) instead tasked the jurors with searching "for the truth," such instruction *doubly* misstated the law.[20]

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

[20] Brooks recognizes that this misstatement of the law (and its due process-violative result) stemmed from the general ignorance -- on the part of the defense counsel, and the prosecution, and the court -- of these scientifically proven, statistically significant facts: that the Dual Directives, included in the jury instruction defining the State's burden of proof, cause jurors to misunderstand and under-estimate the State's burden of proof in criminal prosecutions, and cause jurors to convict at double the rates of convictions found when jury instructions lack the Dual Directives, and to *convict even when reasonable doubt persists*.

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

V. NEW TRIAL IS WARRANTED IN THE INTEREST OF JUSTICE BECAUSE THE TRUE CONTROVERSY WAS NOT FULLY TRIED

A. Standard of Review.

This Court has independent authority to order a new trial under Wis. Stat. § 752.35, paying no deference to the circuit court's determinations. *See State v. Clutter*, 230 Wis. 2d 472, 475-76, 602 N.W.2d 324 (Ct. App. 1999). [21] If this Court concludes either that the real controversy has not been fully tried or that it is probable that justice has miscarried, it may, in the exercise of its own sound discretion, enter such order as is necessary to accomplish the ends of justice. *See id.*

These facts have been empirically proven, and confirmed, in the Two Studies, and have not been refuted, disproven, or validly challenged. Brooks asks this Court to take judicial notice of such facts, as stated supra.

[21] § 752.35, STATS. provides:

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

This Court need not find a substantial likelihood of a different result on retrial when considering whether a new trial should be granted because the real controversy was not fully tried. See id. at 775.

B. The Instruction prevented the true controversy – of Brooks' guilt/innocence of reckless homicide -- from being fully tried.

Discretionary reversal by this Court under Sec. 752.35, Stats is warranted because the jury's confusion by the misstatement of the law (through the Instruction) prevented the real controversy -- of Brooks' guilt/innocence of reckless homicide -- from being fully tried. See *Vollmer v. Luety*, 156 Wis.2d 1, 4, 456 N.W.2d 797, 799 (1990).

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

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

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

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

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

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

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

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

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

Austin that the instruction on self-defense was erroneous, invoking S*tate v. Patterson*, 2010 WI 130, ¶53, 329 Wis.2d 599, 790 N.W.2d 909. The error in *Austin* was that the jury instruction *implicitly miscommunicated* the State's burden of proof on self- defense. Id. at ¶¶ 16-17. [22] The court reversed and remanded for a new trial in the interest of justice, holding that "by not properly instructing the jury, the circuit court failed to provide it with the proper framework for analyzing that question." Id. at ¶23.

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

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

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

C. The true controversy – of Brooks' guilt/innocence of reckless homicide -- was not fully tried because ineffective counsels did not put the State's case to a test on this charge.

Justice was not "fairly administered" here, when ineffective assistance of counsel compounded with the due process error in the Instruction, contrary to fairness.

Counsels here -- unwittingly but effectively -- did the work of the prosecution in regards to the crime of reckless homicide. See supra. Through the Strategy counsels made admissions supporting Brooks' responsibility for A.B.'s death. Throughout counsels made arguments based on the Strategy supporting that Brooks' conduct met the elements of reckless homicide. It was counsels who introduced for the jury's consideration the charge or reckless homicide, by asking for the reckless homicide jury instruction. In doing all these things counsels -- relative to the charge of reckless homicide -- acted not as the defense, but as the prosecution, contrary to due process. *Cronic,* 466 U.S. at 659.

Even if some of the State's evidence supported reckless homicide, counsels multiplied such evidence and made admissions and arguments facilitating a reckless homicide conviction. Such work was prosecutorial work. Here, unwittingly, the defense acted not as the State's adversary on this charge, but as its helper, contrary to *Cronic*. A new trial is needed to remedy this due process violation. *Thiel,* 264 Wis.2d at ¶ 60.

The true controversy was not fully tried -- of guilt or innocence of reckless homicide – when it was not fairly tested in the adversarial process , because the defense – unwittingly -- performed the prosecutors' work, as argued supra.

Only a new trial -- free from the compounded fairness violations -- can ensure that "justice if fairly administered" in prosecuting Brooks in relation to A.B.'s tragic death.

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

CONCLUSION

For the reasons stated above, Brooks respectfully asks this Court to set aside his convictions and order a new trial in the interest of justice and/or because he received ineffective assistance of counsel, and/or because due process was violated by the Instruction, which *confusingly* and *incorrectly* instructed the jurors regarding when they could find Brooks "guilty," *improperly* reducing the due-process-mandated higher burden of proof for criminal prosecutions.

Dated this 13th day of November, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10076 words.

Dated this 13th day of November, 2017.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated this 13th day of November, 2017.

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A P P E N D I X

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Excerpt of
DECISION AND ORDER GRANTING
EVIDENTIARY HEARING ON COUNSELS'
REQUEST FOR LESSER INCLUDED JURY
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REMAINDER OF MOTION FOR
POSTCONVICTION RELIEF……. R.110; App. 1-10

EXCERPTS of Machner Hearing
held on May 26, 2017……R. 144: App.11-121

ORDER DENYING MOTION
FOR POSTOCNVICTION RELIEF……..…R. 123, App. 122

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.

Dated this 13th day of November, 2017.

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