5AP1994

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

Case No.15-AP-1994-CR
14-CM-000698

v.

JEFFREY S. DECKER,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WINNEBAGO COUNTY, THE HONORABLE SCOTT C. WOLDT PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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Defendant-Appellant, *pro se*

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ISSUES PRESENTED

I

Was the evidence presented at trial sufficient to prove beyond a reasonable doubt that officers acted with legal authority known to Decker?

The trial court implicitly answered YES.

II

Was Decker denied the right to present a defense when the court refused to examine the foundation for any exclusion order, and then prevented Decker from offering complete closing arguments?

The trial court implicitly answered NO.

III

Should this court exercise its discretionary power to order a new trial in the interests of justice?

The trial court implicitly answered NO.

STATEMENT ON ARGUMENT AND PUBLICATION

Oral argument is not requested, but Defendant-Appellant will certainly not object if the court would deem it beneficial. Publication is requested because determination of the issues presented my provide better guidance to courts and litigants confronting these issues in the future.

STATEMENT OF THE CASE

On May 16, 2014, the general public was invited to the grand opening of the UW-Oshkosh Alumni Welcome and Conference Center. Decker attended and was promptly ordered to leave. He refused and was subsequently arrested and jailed. After a bench trial (R8, R24, R35), Decker was convicted of having obstructed an officer contrary to Wis. Stats., s. 946.41. (R15.) Decker was unrepresented at trial. (R35:3.)

STATEMENT OF FACTS

Defendant-Appellant Jeffrey Decker is former speaker of the UW-Stevens Point Student Government Association, with a history of advocating for student rights statewide. As a concerned alumnus, he urges others to object to UW officials overcharging millions of dollars of student fees in violation of sec. 36.09(5), Stats. (R35:63, line 15). Widespread opposition by elected student leaders to those illegal fee increases is summarized in a June news article found online at isthmus.com/news/news/uw-student-rights-take-a-hit-without-shared-governance/. At no time has he posed any risk to the well-being of students or staff, and nothing in the record suggests otherwise.

Soon after dismissing another case regarding Decker's presence on campus, the State prosecuted Decker for his conduct on May 16, 2014. The state presented one witness, Christopher Tarmann, and no exhibits. (R35:2.) Tarmann is a Lieutenant of the UW-Oshkosh Police Department. (R35:5.) He testified that on May 16, 2014, he was standing post at the entry to Alumni Welcome and Conference Center for the grand opening. (R35:5-6.) It was about 10 a.m. (R35:29.)

Tarmann said he was aware of a new directive excluding Decker from campus and that he might arrive at the Center. (R35:6,17.) It purportedly came from UW System officials. (R35:16.) He received written and email notice of the restriction.

(R35:6.) Because it came from officials that he ordinarily relied upon, he did not deem it necessary to further verify the existence or validity of the order. (R35:9, 11-12.) That directive was termed a "restriction on presence." (R35:15.) Campus police claim to enforce it by issuing a citation for unauthorized presence. (R35:11-12.)

Tarmann indicated his belief that a restriction against Decker being on campus had been in place for years. (R35:16.) In seeking further information, he learned there was no order of protection enjoining Decker from entry. (R35:15.) He was aware of restrictions on Decker having resulted in previous citations and court proceedings, but claimed to be unaware of each of those cases being dismissed. (R35:10,11.)

According to Tarmann's testimony, he was inside the Center when he saw Decker approach. He knew Decker by sight. (R35:6.) The two have live in the same neighborhood and have occasionally spoken on the sidewalk near Tarmann's home.

At the Center, Decker had on a suit and tie. (R35:7.) Tarmann recounted calling out Decker's name with a request to speak (R35:23.) Tarmann did not reference his identity as a police officer or direct Decker to stop. (R35:25, Line 20.) Decker did not verbally respond (R35:23.) and testified that he did not know who had called his name. Tarman acknowledged that because of the morning sunlight, Decker might only have seen his own reflection in the glass doors at this point. (R35:20.)

Decker played a recording of the initial encounter (or near miss) in which the only word from Tarmann audible to the recorder was "Hey, Jeff." (R35:51.) Decker also testified that all he heard was "Jeff." (R35:46.) He attempted to elaborate as to what had been audible from his perspective, but the court cut him off telling him it was not appropriate for him to be engaged in "argument." (R35:53.) After evidence was closed, Decker was able to note that the tone of voice he heard suggested whoever was speaking was someone he would not want to talk to. (R35:59-60.) The State offered no evidence that Decker was required to speak with anyone, police officer or otherwise, who had called out his name.

Decker spoke briefly with Chancellor Richard Wells and Athletic Director Darryl Sims before he was approached by Chief LeMire, who immediately ordered Decker to leave the premises. (R35:47,line 3) Having proven multiple times in several courts of law UW officials have no grounds to remove him from public

property, (R35:11) Decker felt confident in his right to attend the public event.

Chief LeMire made no effort to provide Decker with any order of exclusion or provide any justification for his order to leave. (R35:42 line 2) Decker invited the chief to carry him out of the building. LeMire refused, saying "Let's not play this game." (R35:51) Instead of merely applying minimal force to achieve complaince, LeMire tackled Decker. (R35:47 line 6) The force of hitting the ground deactivated Decker's digital recorder. Taking exception with the inappropriate physical contact, Decker refused to cooperate with the arrest (R35:8), such that it took several minutes to handcuff him and bring him under control.

Decker was transported to Winnebago County Jail, where Tarmann finally served him with a written order claiming to prohibit him from all UW System property statewide. Decker remained in jail for four days and was charged with Obstructing an Officer pursuant to Wis. Stats., §946.41. He was not charged with Trespassing or Unauthorized Presence.

Judge Scott Woldt was assigned the case and the matter was scheduled for jury trial. Decker requested a court trial, believing the case balanced on matters of law, rather than fact. Decker further believed Judge Woldt understood the political and financial motivation of UW officials and their lack of regard for civil liberties, since he had previously dismissed two Unauthorized Presence citations and a misdemeanor charge against Decker.

Decker mounted a defense intended to address, *inter alia*, whether the police had acted with lawful authority, and what he believed at the time concerning their lack of lawful authority. Decker attempted to introduce, during cross examination of the state's witness, that he had been subject to repeated legal actions regarding his presence on campus, with each failing to convict. But the court stated that such matters were irrelevant. (R35:11.) He managed to get into the record, because there was no objection, a letter from the prosecuting attorney that there was no proof two weeks earlier that Decker was subject to any valid restriction against his being on a UW campus. (R35:47; R14: Exhibit D) The court, however, did not apparently consider this in explaining its verdict. (R35:55ff.)

Decker called Chief Joseph LeMire as a witness. LeMire explained that there had been a "prior restriction" on Decker's presence that was found not to then be in

force (R35:15.) A separate restriction on presence had been "reissued...just prior to the event." (R35:32.) Asked if he was aware of failed attempts to prosecute Decker for violating prior restrictions, LeMire testified that he was aware of several court cases, but hastened to add that this was a "change in the restriction."

Tarmann stated the order that was reissued "just prior" to the event had not been formally served on Decker. (R35:33,44-45; R14:Exhibit C). LeMire made note of an email exchange between Decker and the new UW System President (R35:33, 35-36.) The exchange apparently suggested to the police that Decker had received some kind of notice of a new restriction, and the police concluded that Decker had "probably" seen the new restriction order. (R35:36.) The order was not entered into the record nor was any evidence presented that Decker ever received any indication that the basis of the new order was different from the old order which was deemed invalid and unenforceable. (R35.) LeMire claimed the email from Decker asked whether the order would be enforced, whether mediation could be undertaken to avoid that, and whether police should contact Decker's attorney. (R35:33,35,36.)

In fact, the email preceded any awareness by Decker that a new restriction had been issued. The purpose of the email to UW System President Ray Cross, copied to the UW Board of Regents, the Oshkosh Civility Project and Winnebago County District Attorney's office, was to point out the first order had been deemed invalid and to ask that no new order be issued. Decker suggested that the UW join him in mediation to work through their differences. This email is central to Decker's conviction, but it was never entered as evidence. Judge Woldt rejected Decker's attempts to explain its content and ordered him to stop speaking about it. (R35:62)

Decker also attempted to show that the police conduct as acknowledged by Tarmann was not consistent with the department's standard procedures, but was told by the court that whether or not the police followed procedure was also irrelevant. (R35:37.) Decker attempted to explain that the police began the encounter with force, which he believed was an unlawful means of addressing a citation offense. (R35:55.) The court told Decker that use of force was not an issue in the case. (R35:53.) Decker sought to show that the police conduct was contrary to the officers' oath of office, but the court ruled that was also irrelevant. (R35:39.)

Decker also sought to subpoena a witness, Oshkosh Northwestern photographer Joe Sienkiewicz, whom he said could have provided an account of this

encounter, but the court told Sienkiewicz that he did not need to appear, because Manager Editor James Fitzhenry had said (in an apparently unsworn, *ex parte* telephone conversation) that he was "not an eyewitness" – though Decker insisted otherwise. (R35:3-4.) The Compilation of Record includes a letter from the Oshkosh Northwestern regarding this subpoena, dated five days before trial. Decker was not informed until the beginning of trial that his witness had refused to appear.

Decker ended his testimony when the court indicated he would only be permitted to address the "facts of the day", *i.e.*, May 6, 2014. (R35:53.) The state's closing included an incomplete description of its burden, not mentioning the potential defense that a defendant did not believe that officers were acting with lawful authority. (R35:53-54.) To the state, the kernel of Decker's offense was in "running inside and resisting [police] contact with him." (R35:54.)

The court did not address the issue of whether Decker believed the police acted with lawful authority, except as reduced to an untenable legal theory: that if Decker had not been legally served with the restriction, that he then *per se* did not know they had legal authority to detain him. (R35:57,62.) Decker insisted that was not his whole theory. (R35:62.) He claimed that his exclusions from campus had been unlawful and politically motivated (R35:54-55) and that when tested in court previously, they repeatedly failed to show that the exclusion was lawful (R35:58) (Proven in all 13 listed cases of Wisconsin v. Decker). The court suggested that if he felt wrongfully excluded from campus, his appropriate option would be to abandon his rights and "don't go on campus." (R35:58.) Essentially: when in doubt, throw him out. Forceful retaliation should simply be expected, the judge said.

Despite Decker's claims of repeatedly enduring discrimination and violations of his civil liberties, the court reasoned that Decker knew he was prohibited from being on campus simply because someone had said so. It was unclear who made the claim, how they made it, and from where such authority is derived. The court found it "incredible" that Decker would choose not to talk with someone who had called his name, reasoning it would be more logical for a person hearing their name to approach the caller, because people naturally do this (R35:57). And if the caller knew his name and face, "aren't those the people that...we look at to correspond with or converse with?" (R35:59.) He should have wanted to talk to Tarmann because his purpose for attending the event was "for social niceties." (R35:60.)

The court twice referred to Decker's alleged conduct within the Alumni Center. (R35:55,58.) Though the testimony had been that Decker resisted removal from the Center after police forcibly "grabbed" him, the court recounted its understanding that "when the chief came up to you and talked to you, that's when you started locking out and grabbing..." (R35:58.) Yet the court explicitly found that the state had shown Decker obstructed officers based only on his "continuing to go in" to the Center after being called to by Tarmann. (R35:56.)

The court found Decker guilty. (R35:62.) The prosecutor recommended a sentence of 4 days (time served), but the court sentenced Decker to the maximum sanction of nine months in jail, stayed in lieu of 12 months probation. (R35:65.) This appeal followed. (R22, R24.) On March 2, 2015, Decker motioned for a stay of sentence pending appeal. Judge Woldt granted the stay, but issued a new bond prohibiting Decker's presence on campus and any contact with UW-employees. (R19.)

ARGUMENT

I. The evidence adduced against Decker at trial was insufficient to convict him.

A. Legal Standards Including Standard of Review

1. Insufficiency of the Evidence.

(a) *Generally.* The standard for sufficiency of the evidence is confidence that the finder of fact could reasonably be convinced beyond a reasonable doubt by evidence which it had a right to believe and accept as true. *State v. Hamilton*, 120 Wis.2d 532, 540-41 (1984). The factfinder is allowed reasonable inferences but not to ply inference upon inference to reach a determination of guilt. *See State v. Allbaugh*, 148 Wis.2d 807 (Ct. App., 1989). Evidence must exclude to a moral certainty every other reasonable hypothesis than guilt. *State v. Johnson*, 11 Wis.2d 130 (1960); *see also State v. Lindsey*, 53 Wis.2d 759, 768 (1972). Every element must be proven, by evidence and not through presumptions. *Sandstrom v. Montana*, 442 U.S. 510, (1979).

(b) *Multiple Theories of Guilt; Court's Obligation to Record Its Rationale.* In reviewing the sufficiency of evidence, an appellate court need only decide whether the theory of guilt accepted by the trier of fact, is supported by sufficient evidence; it

need not concern itself in any way with evidence which might support other theories of the crime. *State v. Poellinger*, 153 Wis. 2d 493, 507-08, 451 N.W.2d 752 (1990).

In limiting itself to the theory considered by the trier of fact, this court should not look to possible theories left unarticulated by the court in a bench trial. A trial court is required to explain its decisions on the record, in its own words:

> In all Anglo-American jurisprudence a principal obligation of the judge is to explain the reasons for his actions. His decisions will not be understood by the people and cannot be reviewed by the appellate courts unless the reasons for decisions can be examined.

State v. Gallion, 2004 WI 42, ¶1, 270 Wis. 2d 535, 678 N.W.2d 197, quoting *McCleary v. State*, 49 Wis. 2d 263, 280-81, 182 N.W.2d 512 (1971). *Accord Trieschmann v. Trieschmann*, 178 Wis.2d 538, 542,504 N.W.2d 433 (Ct. App. 1993) (court must "articulate the factors upon which it based its decision."). "Judicial opinions are the core work-product of judges... they constitute the logical and analytical explanations of why a judge arrived a specific decision." *Bright v. Westmoreland County*, 380 F.3d 729, 732 (3rd Cir. 2004). When a court fails to give independent reasons for decisions, it "obscures the reasoning process of the judge,... deprives the court of the findings that facilitate intelligent review,....and causes the losing litigants to conclude that they did not receive a fair shake from the court." *Walton v. United Consumers Club, Inc.,* 786 F.2d 303, 313 (7th Cir. 1986).

(c) *Credibility determinations.* Ordinarily, a trial court's findings of fact shall not be set aside unless clearly erroneous. *Lessor v. Wangelin*, 586 N.W.2d 1, 221 Wis. 2d 659, 665 (Ct. App. 1998); Section 805.17(2), Stats. The court's finding that Decker was clearly prohibited from campus could be seen as erroneous.

When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness's testimony. *Plesko v. Figgie Int'l*, 190 Wis.2d 764, 775, 528 N.W.2d 446, 450 (Ct. App. 1994). The trier of fact is in a far better position than an appellate court to make this determination, because it has the opportunity to observe the witnesses and their demeanor on the witness stand. *Pindel v. Czerniejewski*, 185 Wis.2d 892, 898-99, 519 N.W.2d 702, 705 (Ct. App. 1994).

However, that standard is affected here by the fact that the court did not

apparently rely on intangible factors, but on a train of logic that it made available to this court through the record. *See Vogt, Inc. v. International Broth. of Teamsters, Local 695, A.F.L.*, 270 Wis. 315, 74 N.W.2d 749, 754 (1956) (trial court's findings are "less conclusive" when based on inferences from practically undisputed facts rather than on observation of demeanor).

The court is also owed less deference because Decker could have corroborated his account of events if he had been allowed to compel the attendance of a witness. The court rejected Decker's attempt to call a corroborative witness and released the witness from subpoena because the witness asserted he did see Decker that day. (R35:3-4) This assertion occurred *ex parte*, off the record, not under oath, and over the telephone, thus not subject to the court's visual inspection of his demeanor, cross-examination, or certification of accuracy by a qualified reporter. Since it took officers several minutes to arrest Decker, it is highly unlikely that anyone present would not have seen police tackle him and struggle to apply handcuffs.

2. Elements of the Offense. The offense of obstructing has the following elements:

> (1) Defendant obstructed an officer;
>
> (2) The officer was acting in an official capacity;
>
> (3) The officer was acting with lawful authority; and
>
> (4) Defendant knew the officer was acting in his official capacity and with lawful authority and that his conduct would obstruct the officer.

See State v. Young, 2006 WI 98, ¶ 57, 294 Wis. 2d 1, 717 N.W.2d 729; Wis JI — Criminal 1766. The statement of the elements may vary, and elements two and three are often stated as a single element, but their substance is uncontroversial. *See State v. Elbaum*, 54 Wis.2d 213, 217, 194 N.W.2d 660, 662 (1972); *State v. Grobstick*, 200 Wis.2d 242, 248, 546 N.W.2d 187 (Ct. App. 1996); *State v. Caldwell*, 154 Wis. 2d 683, 689-90, 454 N.W.2d 13 (Ct. App. 1990); *State v. Hamilton*, 120 Wis.2d 532, 541, 356 N.W.2d 169, 174 (1984).

The *Hamilton* court noted that "not every barrier placed in the path of an officer gives rise to a violation of sec. 946.41(1)," *id.* at 535, and the statute did not reach un-civic-minded conduct that would leave officers "justifiably irritated and disturbed," *id.* at 534. *Hamilton* thus contains the latent proposition that obstruction

must entail consequences that are more than *de minimis*, since this would have affected police duties somewhat. A court may not presume that non-cooperation is *per se* obstructive; the onus is on the state to identify an effect. *Id.* at 542-43.

The statute has paired concepts of "official capacity" and "lawful authority." Official capacity reflects that police are acting within the granted scope of their role, as shown by such sigils as badge and uniform and the assertion or application of state power. *See State v. Barrett*, 96 Wis. 2d 174, 180-81, 291 N.W.2d 498 (1980) (official capacity means doing "police work" and acting with the vested powers of a peace officer). *See also Williams v. State*, 45 Wis.2d 44, 47-48, 172 N.W.2d 31 (1969). A uniformed officer doing police-related work is *not* acting in an official capacity when going beyond his proper duties. *Barrett*, 96 Wis.2d at 181.

Lawful authority imposes an additional requirement beyond this. "'Lawful authority,' as that term is used in sub. (1), requires that police conduct be in compliance with both the federal and state constitutions, in addition to any applicable statutes." *State v. Ferguson*, 2009 WI 50, ¶16, 317 Wis. 2d 586, 767 N.W.2d 187.

The scienter element includes knowledge that the accused's actions met each of the other three elements. *See State v. Lossman*, 118 Wis. 2d 526, 539-40, 348 N.W. 2d 159 (1984); *accord State v. Young*, 2006 WI at ¶57. Thus accords with the canon of *reddendo singula singulis*. *See Mutual Federal Sav. & Loan Ass'n of Milwaukee v. Sav. and Loan Advisory Committee*, 38 Wis.2d 381, 387, 157 N.W.2d 609 (1968). That canon has special application to scienter. *See Flores-Figueroa v. United States*, 556 U.S. 646, 652 129 S. Ct. 1886, 173 L.Ed.2d 853 (2009) ("courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element").

Under Wis. Stat. § 939.23(1), (2) the term "knowingly" in the criminal code "requires only that the actor believes that the specified fact exists." *Lossman* also held explicitly that "knowledge" in this context means actual subjective belief, 118 Wis. 2d at 542-43. See also *State v. Felton*, 2004 WI App 68, ¶10, 271 Wis.2d 821, 677 NW 2d 732.The weight of authority holds that a defendant's belief is not tested for reasonableness; it need only be "honest" or "genuine." *See, e.g., State v. Bougneit*, 97 Wis.2d 687, 690-92, 294 N.W.2d 675, 677-78 (1980). In fact, a defendant who has no

formed belief at all by definition does not meet the elements of the offense.

The import of the scienter element is sometimes difficult for courts to grasp, even though similar requirements appear throughout the criminal law. Even if the citizen knows that any given two of the other elements are met, and should reasonably believe the third, his or her conduct, however harmful, is simply not criminal because there is no sufficient *mens rea*.

B. Decker's avoidance of Tarmann was not criminal.

1. Obstruction. To meet the element of Decker having actually obstructed the officers' performance of their duties, the first question is - what duties were they attempting to perform? The answer depends upon what point in the course of events we are examining. Initially, Lieutenant Tarmann was seeking to ask Decker to leave. (R35:9.) The alleged obstruction was that Decker did not stop to converse.

In this encounter, there was no obstruction. Tarmann could have spoken to Decker with minimal additional effort. Not only did he not match Decker's walking pace to intercept him, Tarmann did not even bother to say "stop." He apparently decided at this point that speaking to Decker outside the Center was unnecessary and did not merit even negligible effort to pursue further. Nor did it merit contacting his superior by radio. (R35:26.) There was no testimony or other direct evidence that his duties were made more than negligibly more difficult at this point. The court pointed out no reason why it would think so. (R35:56.) Decker did essentially the same as Hamilton: simply not talking with police. There is no reason here to think the police were any more importuned here than in *Hamilton*.

2. Official Capacity. The evidence did not establish that when initially calling out "Jeff," that Lieutenant Tarmann was acting in his official capacity. All Tarmann wanted to do at that point was "talk with [Decker] about him not entering" – not to issue a citation. There was no testimony that the area outside the building was part of the zone from which he was restricted. There was undisputed testimony that he and Decker knew each other outside of his work, and his familiar address to Decker suggests the invocation of that personal relationship. Though Tarmann was on duty, and part of his duty was to prohibit Decker's presence, he was not under orders to

make conversation with him. Merely calling out "Jeff" did not *invoke* his official capacity. He could just as easily have been reaching out to Decker as a friend to warn him of what he *would* do in an official capacity *if* he entered.

The court cited only one piece of evidence on official capacity: "The official capacity comes in that the officer was dressed as he is today, in full uniform..." (R35:56.) That is not only insufficient, it suggests the court did not understand that a uniformed officer may be acting in connection with his duties, and still not within an official capacity.

3. Lawful Authority.

(a) Decker's right to be on campus had just been recognized by the prosecutor.

On May 5, 2014, Decker was issued a citation for Unauthorized Presence after being invited to attend a speech on environmental policy at the UW-Oshkosh Alumni Welcome and Conference Center. On May 9th Assistant District Attorney Adam Levin motioned for dismissal of that case, 2014FO-802. This was exactly one week before Decker's arrest in the same building in the matter now before the Appellate Court. The day he was released from jail, May 19, UW-Oshkosh police cited Decker with Unauthorized Presence regarding his April 29 attendance at a student government meeting. Once again, Assistant District Attorney Levin moved to dismiss the charge. Exhibit D provides Levin's rationale for requesting dismissal of that case, 14CMFO-911 (R14: Exhibit D):

> "The State cannot prove Mr. Decker was subject to a valid order of exclusion at the time of this offense."

Strangely, Mr. Levin's prosecution of this current case seems to assume that Decker was properly and lawfully prohibited from being on UW-Oshkosh property. Yet he made no effort to prove that any such lawful prohibition existed, or that Decker had been given notice of its existence. The police testify that a new order had been issued and that Decker had been verbally informed of it, but the state never offered a copy as evidence. Since no order was offered, the court must assume no such thing exists. If such an order was ever said to exist, its validity was not proven.

In reviewing the sufficiency of evidence, an appellate court need only decide

whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence; it need not concern itself in any way with evidence which might support other theories of the crime. *State v. Poellinger*, 153 Wis. 2d 493, 507-08, 451 N.W.2d 752 (1990).

If Mr. Levin believed Decker was properly prohibited from campus on May 16, he might have brought a charge of Unauthorized Presence or Trespassing. He did neither. According to the record, Nothing changed between May 9, when Mr. Levin acknowledged Decker's right to be on campus, and the arrest of May 16.

Decker firmly believes assertive patriots keep our nation free. If we don't exercize our rights we lose them. Judge Woldt seems to believe that any public servant with authority may wield as much authority as he or she cares to. The right to speak against injustice is so sacred to our way of life that it predates the Constitutions of the United States and the State of Wisconsin. Due process and rule of law are fundamental concepts in our legal system. (U.S. Constitution Amendment V, XIV).

The UW System may be the State of Wisconsin's largest agency, but it is not above the law. The court could have taken judicial notice of Decker's repeated victories in court and the barrage of desperate attempts by UW administrators to silence his advocacy for reform. The court might have concluded, as several district attorneys have, that the interests of justice are not furthered by suppressing dissent. The UW System claims to embrace dissent within the fearless sifting and winnowing through which alone the truth may be found.

(Footnote: Some might view Decker's persistence as either righteous and bold or simply obnoxious. Others view ruthless suppression of human rights as despicable and illegal.

Decker was only 19 when he was first charged with Obstructing an Officer on the assumption that citizens must comply with all police orders. A jury found Decker not guilty (98CM1320).

Fifteen years elapsed before Decker's second jury trial. Just one day before his Feb 5, 2015 conviction in Winnebago County, a Milwaukee jury found Decker not guilty. The assistant dean of students at UW-Milwaukee lied to campus police after assaulting Decker, who had ttried to film the open-meeting suspension of another student leader who objected to illegal fee increases. ("Jsonline.com: Decker acquitted of disorderly conduct," 13CM0003969). Milwaukee prosecutors pursued no charges against Decker for trespassing or unauthorized presence.

On April 10, 2014, one month before being charged in this case, the Kenosha County district attorney wrote regarding 13-CM-1520: "I will not oppose the Defendant's motion to dismiss. ... The Defendant apparently conducted himself peacefully while present (at UW-Parkside) on August 3, 2013. I do not believe that criminal prosecution is necessary to advance any clear public interest.")

(b) Reasonable Suspicion for a Stop. Because the alleged obstruction was a failure to stop, the element of lawful authority here means the authority to make him stop. Any other analysis would lead to an absurd result: that the police lacked authority to stop Decker, but they could nevertheless render his not stopping a crime by attempting to pursue their duties without stopping him.

To be a valid exercise of lawful authority under *Ferguson*, the stop had to be constitutional under the Fourth Amendment and under all other laws.

To Constitutionally effect a brief investigatory stop of a citizen, police do not need probable cause but require "reasonable suspicion" of an offense. *State v. Young*, 2006 WI 98, ¶20, 717 N.W.2d 729. This stop was not specifically investigatory, but was akin to such. A stop is "temporary ... and thus ... only a minor infringement on personal liberty", id., as opposed to an arrest requiring probable cause, which is "a more permanent detention that typically leads to 'a trip to the station house and prosecution for crime . . . .'" *Id.*, 2006 WI at ¶22, quoting *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Reasonable suspicion requires that a police officer possess specific and articulable facts that warrant a reasonable belief that criminal activity is afoot. *Id.* at ¶21. Otherwise, a person confronted by police "need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." *Florida v. Royer*, 460 U.S. 491, 498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983). The inquiry is directed to the totality of the circumstances known to the officer at the time. *State v. Washington*, 2005 WI App 123, ¶16, 284 Wis. 2d 456, 700 N.W.2d 305.

(c) UW System Officials' Authority. In this case, the evidence of reasonable suspicion consisted of internal police communications and ultimately an official letter from UW officials. (R35:9,13,15,16.) Chief LeMire believed that UW officials could issue an order restricting access. (R35:37.) The state evinced that officers of the UW-Oshkosh police department routinely rely upon such information. (R35:9.)

However, "UW officials" do not generally have the authority to ban a student

from campus, and UW police would not have the lawful power to enforce such a ban.

The UW System is created by Wis. Stats., sec. 36.03. The representatives of the central administration are the Board of Regents, the President, and his direct subordinates. The Regents' powers and responsibilities are set forth in sections 36.09(1) and 36.11 of the statutes. The presidents' are set forth in section 36.09(2).

The Regents do not ban anyone from campus by individual exclusion orders. Nor does the president. The sections just cited contain no such authority. The regents have the power to make rules and policies, which the president and authorities at the campus level are charged to administer. *See* Wis. Stats., §§36.09(2),(3). Section 36.11(2), and section UWS 18.03 of the Wisconsin Administrative Code govern the authority of UW Police: they protect the peace and enforce UW rules and laws. The UW System employs police at particular institutional campuses to serve under the control and supervision of those institutions' *chancellors*. Wis. Stats., §36.11(2)(b).

Wis. Stats., §36.11(1) relates to suspension of students. Wis. Stats., §36.11(2) and Wis. Stats., §36.11(3) clearly describe under what rare circumstances non-students may be prohibited from being present on the public lands of the UW System:

> **(2) Authority to restrict presence of persons on campus.** The chancellor of each institution or the chief security officer thereof during a period of immediate danger or disruption may designate periods of time during which the campus and designated buildings and facilities connected therewith are off limits to all persons who are not faculty, academic staff, employees, students or any other personnel authorized by the above named officials. Any person violating such order shall be subject to the penalties provided by law for criminal trespass.
>
> **(3) Requiring permission for presence on campus.** Any person who is convicted of any crime involving danger to property or persons as a result of conduct by that person which obstructs or seriously impairs activities run or authorized by an institution and who, as a result of such conduct, is in a state of suspension or expulsion from the institution, and who enters property of that institution without permission of the chancellor of the institution or the chancellor's designee within 2 years, may for each such offense be fined not more than $500 or imprisoned not more than 6 months, or both.

Here there was no evidence of Decker being subject to exclusion for a criminal conviction or prior student discipline, as he was not. There had been no determination to serve as a predicate for an order of exclusion from the chancellor or any other official.

The only evidence in the record was a second-hand account of there being a letter from UW System. That letter was not in evidence, and its precise origin was never stated. The court did not even receive such basic testimony as, "The letter came from X. We get letters from X periodically and know that they are lawful and enforcible, and have enforced them many times." Nothing in the record suggests why a UW System official would have the power to issue an order enjoining Decker's presence on campus, a power which ordinarily resides with a circuit court judge.

In what appears to be a genuine effort to respect due process, UW General Counsel's office in Madison attempted to contact Decker via registered mail on May 16, the day of his arrest. (R:14 Exhibit C) The receipt of non-service shows that letter remained undelivered as of May 21. Whatever its contents may have been they are irrelevant to this case, except to note that the top lawyers for the UW System were attempting to contact Decker and had failed to do so.

As Chief LeMire clearly states, his intent at the grand opening event on May 16 was to physically remove Decker from the building, not to provide official notice of any order of prohibtion.

> (R:35:35:line 10)
>
> Decker: ...When you were at the event, neither of you had a copy of this supposed restriction on my presence?
> LeMire: May not -- may not have. It would have been reviewed beforehand. I had a copy through my email when we prepared for the event.
> (R35:41:Line 25)
> Decker: So it was -- it was never your intent at this event to serve me with this document?
> LeMire: No. ...
>
> (R35:34, line 25)
> Decker: Chief, what's the manner of service for a ban on someone's presence?
> Mr. Levin: Objection, relevance.
> The Court: Sustained.
>
> (R35:42 line 8)
> Decker: Are you familiar, Chief, with the difference between someone being aware of a subpoena, or being aware of a summons, or being aware of a restriction from campus and them actually receiving it?
> Mr. Levin: Objection, relevance.
> The Court: Sustained.
>
> (R35:45 line 21)
> The Court: So, you're saying after this incident is when you first received a copy of it?
> The Defendant (Witness): That's exactly what I'm saying, your honor.

The fact that the prohibition order itself was not presented at trial leads to an inference that it was not real or not valid. If a party makes an unexplained failure to present evidence that is within its control or which it would be naturally expected to present, then the fact-finder may infer that the evidence would be unfavorable to that party. *See* Wis. JI-Criminal 345.

The proscecution's original rationale for filing the Obstructing charge seems to be that Decker resisted or impeded the officer's attempts to serve him with a prohibition order. Since LeMire admits he made no such attempt and skipped right to brute force, one wonders why Mr. Levin prosecuted this case. If a valid order existed, one wonders why Mr. Levin did not attempt to enter it as evidence.

Decker attempted to argue how a lack of due process would have affected the lawful authority of the officers, and the court erred in rejecting questioning and arguments related to service. (R35:40)

> Decker: Are you familiar with the Fifth Amendment to the U.S Constitution regarding due process?
> The Court: Not relevant.

The State's case would be stronger if Chief LeMire had simply shown Decker a copy of the order before tackling him. He did not.

The mere posited existence of such a letter, without more, does not make police action to prevent Decker's entry to the Center reasonable. Lawful authority is an element of the offense, so the state had to prove the officers' authority beyond a reasonable doubt. Here, that meant proving that it was reasonable to credit as enforceable an order from an official with no clear power in the law to ever issue one.

However, Decker's attempts during questioning and argument to assert that no authority existed for anyone to issue such a ban were ruled irrelevant.

> (R35:41:line 7)
> Decker: "Restriction from campus." That's -- is that a legal definition, or is that something someone made up somewhere?
> Levin: Objection, relevance.
> The Court: Sustained.
>
> (R35:12 , line 10)
> Decker ...Under what authority might anyone ever ban a citizen from being present on the public property of the university?
> Mr. Levin: Object for relevance.

The Court: Sustained.

(R35:37, line 19)
Decker: Is it possible there is no such basis for that authority?
Mr. Levin: Objection, relevance.
The Court: Sustained.

With any legally-binding notification service of some sort is required. For any such notification to be supported in court, its foundation must be proven. Since "prohibition on presence" is not a legally-recognized term no procedures exist for proper implementation. Normally, this indicates a complete lack of authority. The trial court ruled otherwise, but offered no explanation.

(d) Reliance on Official Source. Here there was not an anonymous tip, or a tip from an informant or a citizen. Nor a judicial order. The contention that Decker was banned came from a superior in the UW hierarchy. No direct case law indicates the proper standard for this precise case, but the closest analogy here is to a fact passed through police ranks. In that instance, the information shared within the police organization cannot be relied upon unless independently demonstrated reliable.

The fact that police rely on fellow officers (or other routine sources) does not in itself either undermine or establish the basis for an arrest or detention. "[A] police officer, acting on information from a fellow officer, may assume probable cause has been established. If that underlying assumption proves, however, to be false, the arrest is illegal." *State v. Taylor*, 60 Wis.2d 506, 515-16, 210 N.W.2d 873 (1973). "[A]n otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Whiteley v. Warden*, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971).

Professor LaFave's treatise *Search and Seizure* makes the point that it also applies fully to stops on reasonable suspicion:

> But when a police bulletin is accepted at face value when it is utilized only for purposes of making a stop, then there is no determination at all of reliability. Such acceptance is not only wrong; it could lead to ludicrous results.... Nor can it be said that reliability may be assured because police would not disperse a bulletin on a suspect unless they had at least the quantum of evidence needed to make a stop. This approach is inconsistent with the philosophy of *Whiteley*, and is also contrary to fact.

Search & Seizure, § 9.5(i) at 600n502; *see also* 599-601 (4th ed., 2004).

Hence the ultimate source of the information and the content of that information are indispensable to a determination of the authority to detain.

> Reasonable suspicion is dependent upon both the content of information possessed by police and its degree of reliability. Both factors--quantity and quality--are considered in the totality of the circumstances... that *must be taken into account* when evaluating whether there is reasonable suspicion.

State v. Williams, 225 Wis.2d 159, 169, 591 N.W.2d 823 (1999) (internal quotes omitted and emphasis added). For reasonable suspicion to flow validly from information possessed by an officer, that information has to be reliable. *Id.* The police department is considered as a unit, and knowledge of other officers is imputed to the one who acts on the information. *Id.*, 225 Wis.2d at 188 (Prosser, J., concurring). The totality of the circumstances from the perspective of the police here, so far as presented in court, did not give rise to a reasonable suspicion that Decker was in fact excluded from campus. The police knew that Decker had been subject to prior orders, had been issued previous citations, but these had failed to hold up in court. (State of Wisconsin vs. Decker) The only details on the record were the general sourcing of the order to one or more system officials. This is clearly not enough.

Institutions of higher learning are generally bastions of tolerance. Political and business leaders, community groups, parents and students often host public events at UW campuses specifically for the warm, inviting atmosphere where all ideas are shared. Guests are confident such events are in buildings where civil rights are cherished. Clearly, they are wrong.

4. Scienter. Even if all the other elements of the offense of obstructing an officer were present, the state would be required to show that Decker *knew* all these elements were in place. That was not proven here.

Where the evidence did not establish official capacity, it even more clearly did not establish Decker's knowledge of that official capacity. The standard is effectively higher, because a hypothetical finder of fact could have concluded that Tarmann acted in an official capacity and, assuming for argument that such a conclusion would have been reasonable, that finder of fact could still have a reasonable doubt whether

Decker, in fact, knew this.

There was no sufficient evidence in the record from which to have concluded that Decker knew, particularly, that the police were acting with lawful authority. The whole presentation made by Decker in court revolved around a sincere argument that the police did not have lawful authority, mainly because the order excluding him could not have legal authority, as argued above. Also, because it was not served the way a judicial order would have been required to have been served.The evidence that might appear strongest on its face that Decker believed the police had lawful authority was not competent evidence at all for this proposition. Tarmann testified (R35:13) that Decker had admitted via email that he knew someone didn't want him on campus. But this has two problems:

First, no one claims Decker said he believed any exclusion from campus was lawful. The distinction here is between Decker believing that the UW administration lawfully could keep him off campus and would enforce this with lawful arrest, versus UW simply wanting him off campus and intending to enforce this with illegal arrest as it had done several times. The evidence of an "admission," even if fully credited, would not really support that Decker believed the police had lawful authority to act, only that they *would* act.

Second, the officer's testimony was hearsay, admissible to account for his own actions, but not to show Decker's state of belief. Although Decker's statements as party opponent would not be hearsay, this was not an oral statement referred to directly. Rather, it was an email. The writing would have been a statement of party opponent if presented in court. Here, however, we have only second-hand testimony of what the email said. A second layer of reference was added by speaking for the email which could have spoken for itself. Rather than produce the document, the court received only an unreliable interpretation from an interested party. Under the missing evidence rule Wis, JI—Criminal 345, it should be presumed that the state, having the burden of proof, would have submitted this alleged smoking gun if it did in fact support their argument. It would not have, and the State did not.

In its ruling, the court quickly mentions that Decker knew the police had lawful authority, but gives no reasoning for that conclusion. (R35:62). Moments later the court does address this critical matter, actually recognizing that Decker's belief did not meet the fourth element: "I know you have opinions on right and wrong, and it your

mind it's black and white." (R35:63.)

The seminal case on *scienter* and *mens rea* in America is *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), holding that statutes codifying most crimes, even when silent as to a required mental state, implicitly require consciousness of wrongdoing for an act to be criminal. The *Morissette* court noted that traditional criminal prohibitions are based on the "ability and duty of the normal individual to choose between good and evil." It cited Blackstone's statement that to constitute any crime there must first be a "vicious will." Crime, it said, is "a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand." It is basic to our system of laws that actions may be bad, even actionably so, without rising to the point of being criminal.

It is also in accord with the time-honored rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971). Whatever standard is used, *Lossman* and *Felton* agree the test of belief is fact intensive. One does not merely establish their belief by stating it. Proof is made by examining whether the believer spoke and acted in accord with that belief, whether it is consistent with what they were told and perceived, and all the other circumstances that might affect their belief, including their background, education and experience. Since defendant remains adament, and argues extensively in this document as well as in open court, that no lawful authority exists, it cannot be stated beyond a reasonable doubt that "Defendant knew that the officers were acting in an official capacity and with lawful authority..." as required by the criteria of 946.41(1).

C. Decker's struggle with officers in the Center was not criminal.

Under *Poellinger*, this court should not concern itself with the theory that Decker obstructed officers by his conduct inside the Center, since that was not the theory the court relied upon for its finding of guilt. But even assuming, *arguendo*, that the court were to consider that theory, the evidence was still not sufficient for the circuit court to have found Decker guilty beyond a reasonable doubt.

Inside the Center, the officers attempted to arrest Decker, and, according to the evidence, he dropped to the ground, locked his limbs around furniture, and actively

worked to make his removal from the center harder for officers. Actual obstruction and official capacity are not really at issue for this stage. However, the lawful authority and scienter pieces become much harder for the state to prove, and they were not proven. No attempt was made to prove them.

Lawful authority here suffers from two problems. The first is the same as for the analysis in Part I.B above, except that the standard is harder for the state to meet. When Decker became obstructive in fact, it was in response to more than a stop – it was in response to being tackled without warning or cause and the officers' forcible efforts to arrest and remove him. This was a full-blown arrest, and it required the police to have probable cause in support of their actions, not just reasonable suspicion. That meant that they had to prove a much higher degree of reliability in their information to suggest Decker was lawfully banned from the Center. As argued above, the evidence was so lacking in this regard, it could not even reach the lower standard. There is no way it could establish probable cause. For purposes of scienter, the question is whether the Defendant believed that the police had probable cause.

The second problem is similar: that the police at this point were using force, and therefore needed to prove beyond a reasonable doubt that the force they applied was reasonable, not excessive. The evidence in this regard was again minimal, even though the level of force allowed is generally a fact-intensive inquiry. *Johnson v. Ray*, 99 Wis. 2d 777, 781-83, 299 N.W.2d 849 (1981). The police did not testify that they used the minimum force they thought necessitated by the circumstances. They just testified that they simply acted. There was an empty hole in the record where there should have been at least perfunctory acknowledgement by the officers that they used that force that was necessary and permitted.

Except, not *exactly* an empty hole: the testimony was that Decker could have been issued a *ticket* for his presence. (R35:11, line 24) There was no testimony that Decker's presence was a danger that required him to be removed. Instead of ticketing Decker, they tackled him and dragged him out.

The requirement that the state prove scienter compounds these problems. Even if it had been within the lawful authority of the police to act as they did, clearly it was irregular. Decker submitted the policies of the UW-Oshkosh police to demonstrate

that their rules did not sanction the way the officers acted. The ordinary response to unauthorized presence is a ticket. How could the state prove, then, that Decker *knew* that the officers' unusually harsh behavior was lawful? They couldn't. There was no evidence suggesting he believed this was what the lawful response should have been. All the evidence pointed in the other direction. Rather than walk out of the Center, Decker offered to let officers carry him out, as has occurred several times in similar cases. Chief LeMire rejected the offer, calling it a "game," and promptly tackled Decker. (R35:51)

The court erred when stating "Use of force is not an issue in this case. It's not an issue." (R35:53, line 4.) Determined opposition to such force is central. UW-Oshkosh Police Department Standard Operating Procedures, clearly state when force is authorized. (R14, Exhibit A)

> Rules and Procedures
> 410.0 Officers are confronted often with situations requiring the use of force to affect an arrest or ensure public safety. The degree of force used depends on what the officer perceives as reasonable and necessary under the circumstances at the time he or she decides to use force. Except for deadly force, the application of any degree of force is justified only when the officer reasonably believes that is necessary.
> A. To precent the escape from custody, make an arrest or an investigative detention of a person the officer believes has committed a **crime;** or
> B. To defend himself or herself or another from what the officer believes is the use of force while trying to arrest another, prevent his or her escape, or otherwise lawfully take the person into custody.

As Tarmann conceded, someone prohibited from campus is not committing a crime by showing up anyway.

> (R35:28)
>
> Decker: Officer Tarmann, if --what -- what is the sanction for unauthorized presence?
> Tarmann: I don't know the answer to that question.
> Decker: Is it a crime? Is it a jailable offense?
> Tarmann: It's a forfeiture violation.
> Decker: So it's not a crime?
> Tarmann: It's not a crime.

R14 Exhibit A, UW Oshkosh Police Department Standard Operating Procedures:

> 410.1 Facts or circumstances known to the officer shall not be considered in later determining whether the force was justified. The department expects officers to observe the following three guidelines in all applications of force:
> A. Employ the minimum force reasonably necessary to accomplish a legal purpose.
> B. Officers may resort to more severe methods of force to overcome either increasing

resistance or an increasingly dangerous threat to public safety.
C. When a confrontation escalates suddenly, officers may use any means or device at hand for self-defense provided that the use of force is reasonable.

410.3 ....The objective of the use of any force is to overcome the suspect's resistance to an officer's **lawful** purpose: officers shall avoid unnecessary or excessive applications of force.

(R35:37)
Decker: Do you feel that your use of force was in compliance with standard operating procedures for your department?
The Court: Not relevant.

Use of police power in violation of constitutional due process is always unlawful. *City of Milwaukee v. Kilgore*, 193 Wis. 2d 168, 189, 532 N.W. 2d 690 (1995), just as acts that violate the constitution are unlawful. *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 146 (1984). Acts of an illegal nature would never fall within the scope of what the person was employed to do. *State v. Schmit,* 115 Wis. 2d 657, 665, 340 N.W. 2d 752 (ct. App. 1983).

II. The court's rulings prevented Decker from effectively defending himself.

A. Standard of review

Factual findings made by the court are reviewed for clear error, while the law and its application are owed no deference.

B. Legal Requirements for Effective Service

The theory that the order was either not real, not valid, or at least not reliably so from the perspective of officers sent to enforce it, was key to Decker's defense. He raised the issue directly and indirectly several times: (R35:31, R35:41, R:35:12)

A defendant has a right to present a defense. *State v. Dodson*, 219 Wis.2d 65, 72, 580 N.W.2d 181 (1998). Denial or "significant diminution" of these rights "calls into question the ultimate integrity of the fact finding process and requires that the competing interest be closely examined." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). If evidence is competent and necessary to a defense, it can only be excluded to serve a compelling state interest. *State v. Pulizzano*, 155 Wis.2d 633, 654, 456

N.W.2d 325 (1990).

A defense must be available for consideration "if under any reasonable view of the evidence the jury could have a reasonable doubt as to the nonexistence of the mitigating circumstance, the burden has been met." *State v. Head*, 2002 WI 99, ¶113, 648 N.W.2d 413, 255 Wis.2d 194; *see generally id.* at ¶¶112-15. "[T]he evidence is to be viewed in the most favorable light it will reasonably admit from the standpoint of the accused." *Johnson v. State*, 85 Wis.2d 22, 28, 270 N.W.2d 153, 156 (1978).

Not only was Decker prevented from cross-examining the author of the order, or even seeing the order, to be able to dispute its validity and the geographic and temporal scope of its purported exclusion and any limits or exceptions to that exclusion, but Decker was not even allowed to testify directly as to facts bearing on his knowledge or lack of knowledge of the order, or reasons why he reasonably believed it not to be valid. When testifying, Decker was told over and over (R36:45,46,48,53) to avoid "argument." What the court meant by this, or what Decker could reasonably make of it as a non-lawyer is unclear. Decker was told that it would be argument to tell the court what he personally heard Lieutenant Tarmann say to him on the day of his arrest in terms of directives to him to stop, or identifying himself as an officer. (R36:53.) This clearly would not have been argument. He was explicitly told to limit himself to the facts "of that day" (R36:48), meaning that he was explicitly prohibited by the court from relating earlier occurrences that shaped his understanding of the status of any orders against him.

He was told that the earlier cases where the university had tried to exclude him were not relevant. (R36:11.) That was not true. Such cases demonstrate that Decker understood that the university was trying to enforce an exclusion against him, but had repeatedly failed to demonstrate that any valid exclusion existed. Although Decker was not allowed to present much evidence in this regard, some did enter the record. (R14, Trial Ex. D.)

It is noteworthy that although the element of Decker's knowledge that the police had lawful authority was mentioned briefly by the court, it was in practical terms ignored. The state, for example, erroneously failed to include this element in describing its burden of proof to the court (R36:54). The court's logic in reaching its

ruling also ignored every distinction between Decker acting with knowledge of a valid order against him, and his fearing the unlawful enforcement of an invalid order. (R35:56-58.)

C. Decker was prevented from giving complete closing arguments and from offering precedents and caselaw.

The court erred by preventing Decker from offering arguments. When attempting to offer relevant testimony the court repeatedly said "save it for argument," preventing several important points from being part of the record.

> (R35:48, line 24)
> The Court: Now is not the time to argue.
> (R35:52 line 17)
> The Court: This is not the time for argument.

During futher proceedings months earlier, Decker had asked that four hours be scheduled for trial. Judge Woldt replied, "It'll be a whole day you get." (R:29:3). But Decker was not given an entire day, or even an entire trial. After being told several times to save his arguments for closing, Decker was prevented from speaking at that time, as well.

> (R35:61, line 7)
> Decker: May I continue my argument please, your honor?
> The court. No.
> Decker: I have - -I have laws to read. I have - - I have precedent to cite.
> The Court: I've heard enough.

Once again, Decker's 14th Amendment right to due process was denied. His right to present a defense was denied.

III. If for no other reason, Decker's conviction should be overturned in the interests of justice.

The fact that Decker's scienter of the officers' lawful authority was largely excluded from the trial – most evidence explicitly rejected as irrelevant, other evidence admitted but subsequently ignored, the state's incomplete explanation of the offense elements and the court's rationale for finding guilt both overlooking these

issues, compounded by the court refusing to allow closing arguments show that this case was not fully tried. This court has the inherent and statutory power, then, to reverse the circuit court and order a new trial in the interests of justice. *State v. Hicks*, 202 Wis. 2d 150, 549 N.W.2d 435 (1996), §752.35 Wis. Stats.

CONCLUSION

For the reasons stated above, this Court should overturn the conviction of the Appellant or order a new trial.

Dated at Oshkosh, Wisconsin, February 8, 2016.

Respectfully Submitted,

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STATE OF WISCONSIN,
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Case No.15-AP-1994-CR
14-CM-000698

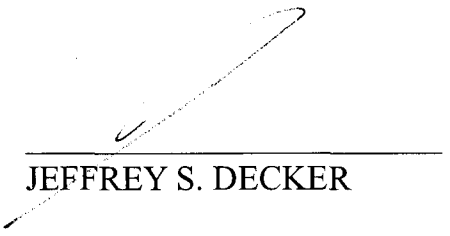
v.

JEFFREY S. DECKER,
Defendant-Appellant.

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,759 words.

Respectfully Submitted,



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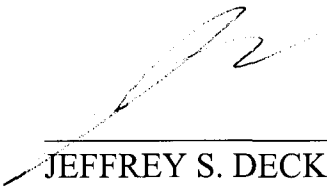
CERTIFICATE OF MAILING

I hereby certify pursuant to Wisconsin Statutes (Rule) 809.80(4) that on the 8th day of February, 2016, I caused five copies of the Brief of Respondent-Appellant to be mailed by first class mail, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O.Box 1688, Madison, Wisconsin 53701-1688.



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