STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP001206-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EMMANUEL EARL TRAMMELL,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals,
District I, Affirming a Judgment of Conviction
Entered in Milwaukee County Circuit Court,
Judge Jeffrey A. Wagner, Presiding

AMICUS CURIAE BRIEF AND APPENDIX OF WISCONSIN STATE PUBLIC DEFENDER

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INTRODUCTION

One of the most basic and widely known protections guaranteed by the Constitution is the right not to be convicted of a crime unless the state proves guilt beyond a reasonable doubt. Wisconsin's pattern jury instruction on the burden of proof in criminal cases, Wis. JI—Criminal 140 (2017) (App. 101-05), fails to state the level of certitude jurors need to reach before they may conclude the presumption of innocence has been overcome by proof "beyond a reasonable doubt." The instruction instead focuses on defining the separate concept of "reasonable doubt" and then directs the jury not to search for doubt, but to search for the truth. At best, the instruction is misleading; at worst, it may result in jurors rendering guilty verdicts without reaching the "subjective state of near certitude" about guilt required by the Constitution. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979).[*]

[*] The Wisconsin Criminal Jury Instruction Committee consists of circuit court judges assisted by two reporters from the U.W. Law School and two nonvoting advisory members, one from the Attorney General's Office and one from the State Public Defender's Office. The signer of this brief is the current SPD advisory member, but the arguments represent the view of the State Public Defender, not the Committee.

ARGUMENT

Wisconsin JI—Criminal 140 fails to tell jurors what it means to find proof "beyond a reasonable doubt" and confuses and misleads jurors by directing them to search for truth, not doubt.

Almost 50 years ago the Supreme Court held that the Due Process Clause of the U.S. Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 359, 364 (1970). The beyond-reasonable-doubt standard plays "a vital role" in our scheme of criminal procedure. It is "a prime instrument for reducing the risk of convictions resting on factual error" and it "provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Id.* at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1898)).

As Justice Harlan explained in his *Winship* concurrence, "a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Id.* at 370. Incorrect factual conclusions lead either to acquittal of a guilty

person or conviction of an innocent one, so a standard of proof requiring a high degree of confidence before guilt is found reflects "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 72. Thus, the beyond-a-reasonable-doubt standard is a prerequisite of due process because of its important function in our criminal justice system.

In addition to recognizing the constitutional status of the standard, *Winship* explained what the standard requires. The government's proof, the Court said, must leave the factfinder's mind in a "'subjective state of certitude'" because proof beyond a reasonable doubt was the equivalent of proof to an "utmost certainty." 397 U.S. at 364 (quoted source omitted). *Winship*'s formulation was not novel. In *Coffin*, which *Winship* cited, the Court examined the relationship between the presumption of innocence and the burden of proof. *Coffin* relied on an early English case holding that "to overturn [the presumption of innocence] there must be legal evidence of guilt, carrying home a degree of conviction short only of absolute certainty." *Coffin*, 156 U.S. at 456, *quoting McKinley's Case*, 33 How. St. Tr. 275 (1817). Since *Winship* the Court has reiterated this standard, modifying it only slightly in *Jackson v. Virginia*, where the Court explained that effectively advising a jury of the standard requires "impressing upon the factfinder the need to reach a subjective state of *near* certitude." 443 U.S. at 315 (emphasis added).

Winship noted that the burden of proving guilt "beyond a reasonable doubt" has been recognized "at least from our early years as a Nation." 397 U.S. at 361. Scholarship published since *Winship* shows the standard enunciated there is fully consonant with the standard that evolved during the 17th and 18th centuries, when the law, religion, philosophy, and science were grappling with how to determine when knowledge derived from experiment, observation, or testimony could yield conclusions that were sufficiently true to serve as the basis for conduct of human affairs. *See* Barbara Shapiro, *"Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence* ch. 1 (1991), and "'Beyond Reasonable Doubt': The Neglected Eighteenth-Century Context," 8 *Law and Humanities* 19-52 (2014).

Theologians, philosophers, and scientists concluded that "reasonable men, employing their senses and rational faculties, could derive truths that they would have no reason to doubt." Shapiro, *"Beyond Reasonable Doubt"* at 7. Contrasted to "mathematical" knowledge, which was established by logical demonstration such as the proofs in geometry, was "moral" knowledge about events, based on testimony and secondhand reports of sense data. *Id.* at 7-8. While moral knowledge could not be proved absolutely true, it was also not merely guesswork or opinion; it could reach higher levels of certainty as the quantity and quality of the evidence increased, and so could form the basis for human conduct. *Id.* at

8, 33, 40-41. This "moral certainty" was the highest level of certainty attainable in human affairs. *Id.* at 7-8.

As criminal trials came to rely increasingly on witnesses and documents that had to be evaluated for truthfulness and accuracy, the concepts of knowledge developed in religion, philosophy, and science for assessing matters of fact were adopted in the law. Case reports and legal treatises spoke of how facts presented at trial may not be absolutely or certainly proven, but may be shown to a "high degree of probability" or "moral certainty," the next highest level of certainty attainable. In the late 18th century these concepts morphed into the "beyond reasonable doubt" standard. Shapiro, *"Beyond Reasonable Doubt"* at 18-41, and "Eighteenth Century Context" at 45-49. *Cf. Victor v Nebraska*, 511 U.S. 1, 10-12 (1994). The phrase may be American in origin, as one of its earliest uses was in the American colonies, at the Boston Massacre trial. Shapiro, "Eighteenth Century Context" at 23-24.

The U.S. Supreme Court has not directed that specific language be used to advise jurors about the beyond a reasonable doubt standard. *Victor*, 511 U.S. at 5. Nonetheless, the substance of the standard, as articulated in *Coffin*, *Winship*, and *Jackson* and as borne out by the standard's history, consists of three pieces: (1) a state of mind (2) of near certainty (3) resulting from the evidence. *Cf. Coffin*, 156 U.S. at 460 (reasonable doubt is "the condition of mind produced by the proof resulting from the evidence in

the cause. It is a result of the proof, not the proof itself…"). "Beyond a reasonable doubt" refers to—is shorthand for—the highest degree of certainty achievable for a reasonable person seeking to determine the facts of an historical event based on an examination of evidence. The crucial task of an instruction on the standard is conveying that requisite level of certainty to the jurors.

JI—140 fails on this score. While the instruction states twice that the defendant may not be found guilty unless the evidence satisfies the jury beyond a reasonable doubt (App. 101), nowhere does it explain that "beyond a reasonable doubt" means a subjective state of near certainty about the defendant's guilt. This explanation was found in past instructions, though those instructions employed the now-disfavored language of "moral certainty." *See, e.g., Butler v. State*, 102 Wis. 364, 367-68, 78 N.W. 590 (1899) ("a reasonable doubt is the state of the case which, after an entire comparison and consideration of all the evidence in the case, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the matter"); *Emery v. State*, 101 Wis. 627, 651, 654, 78 N.W. 145 (1899) (instruction referred to "moral certainty" and decision noted jurors need to be convinced of guilt "with such degree of certainty as to leave in their minds … no reasonable theory consistent with innocence"); *Manna v. State*, 179 Wis. 384, 400, 192 N.W. 160 (1923); Wis. JI—Criminal 140 at 3 (App. 103) (noting

discussion in *Victor v. Nebraska*, 511 U.S. at 12-15, of why "moral certainty" may be misunderstood today).

Instead of defining "*beyond* a reasonable doubt," JI—140 defines "reasonable doubt." (App. 101-02). But as one judge has explained, "reasonable doubt" is a term that can stand alone and signifies something quite distinct from the burden itself, which requires a juror to reach the state of mind of near certainty. Stephen Fortunato, "Instructing on Reasonable Doubt after *Victor v. Nebraska*: A Trial Judge's Certain Thoughts on Certainty," 41 *Villanova Law Review* 365, 416 (1996). As a subjective state of certitude of guilt based on reasoned conclusions about the evidence presented at trial, "beyond a reasonable doubt" is not just the sum total of reasonable doubts (or lack thereof) about particular pieces of evidence.

Yet JI—140 makes no link between its definition of "reasonable doubt" and the "beyond a reasonable doubt" standard and gives no explanation of how a "reasonable doubt," as defined, factors into the standard. Further, defining "reasonable doubt" as a doubt based on reason or common sense arising from an examination of the evidence, or that it cannot be based on speculation or guesswork, simply does not tell the jury that it must be convinced to a state of near certitude to convict. Thus, defining "reasonable doubt" and focusing the jurors attention on the assessment of evidence without telling them they must reach the required level of certitude permits the jury to convict based on a lesser, and therefore unconstitutional, intensity of belief, regardless of

whether the instruction also tells the jury that the state has the burden to prove guilt beyond a reasonable doubt or accurately defines what a specific "reasonable doubt" looks (or does not look) like. *See* Fortunato, "Instructing on Reasonable Doubt" at 409.

Having failed to apprise the jury of the level of certainty demanded by the "beyond a reasonable doubt" standard and decoupled that standard from "reasonable doubt" as defined in the instruction, JI—140 exacerbates the risk the jury will convict based on a lesser level of certainty because it concludes by telling jurors "not to search for doubt…." (App. 102). By defining "reasonable doubt" at length, the instruction focuses jurors' attention on that concept—which, again, is distinct from the "beyond a reasonable doubt" standard. Then the instruction tells them not to search for what it has taken the trouble to define.

While the instruction also says reasonable doubt arises from a fair and rational consideration of the evidence or lack of evidence (App. 101), concluding with a command not to search for doubt is not just confusing; it distracts the jury from its essential task of determining whether the evidence convinces them to the required level of certainty to overcome the presumption of innocence. That task requires jurors to scrutinize the evidence and test whether it is sufficiently convincing. Doing that demands an initial attitude of skepticism or doubt about the evidence.

Finally, having told jurors not to search for doubt, the instruction tells them to "search for the truth." (App. 102). This language of searching (rather than finding) initially appears innocuous. "Beyond a reasonable doubt" is, after all, a state of mind of *near* certitude, the closest a trial can get to the truth, search as jurors might. And this court has said "the aim of the jury should be to ascertain the truth." *Manna*, 179 Wis. at 400.

It is more accurate, however, to say the search for truth is achieved through the implementation of the adversary system as a whole. *Stivarius v. DiVall*, 121 Wis. 2d 145, 157, 358 N.W.2d 530 (1984). By contrast, as this court recognizes, a trial in a particular case "is not a formless jumble of evidence dumped in the factfinder's lap," but "an exhibition of evidence presented [by the parties] within an intentionally-ordered construct designed to produce an intelligible and persuasive account of the matter *sub judice*." *State v. C.L.K.*, 2019 WI 14, ¶26, ___ Wis. 2d ___, 922 N.W.2d 807. And those exhibitions of evidence are hemmed in by multiple constitutional and evidentiary rules that often exclude relevant, probative evidence in the service of other important societal goals. *See, e.g., Whitty v. State*, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967) (Rule 904.04 excludes propensity evidence "'not because it has no appreciable probative value, but because it has too much'" and may tend to lead jury to convict on bases other than the evidence (quoted source omitted)); *Oregon v. Hass*, 420 U.S. 714, 722 (1975) ("We are, after all, always engaged in a search for truth in a

criminal case so long as the search is surrounded with the safeguards provided by our Constitution."). To the extent a trial is a search for "a" truth, it is not necessarily—and sometimes not possibly—a search for "the" truth, for verdicts ultimately reflect only the evidence presented at trial. Therefore, telling jurors they are to search for the truth is misleading.

It is also distracting. The jurors' task at trial is to assess the evidence presented in the courtroom and determine whether that evidence convinces them to a state of near certainty that the defendant is guilty. Telling jurors to search for the truth implies the search may go beyond the evidence (unless the court adds the additional text in footnote 5 that refers again to the evidence in the case (App. 105)). In an era of ubiquitous digital devices that make information readily available to jurors, telling them to search for the truth is an invitation to go beyond the evidence. And it endorses the normal human desire to keep looking for the rest of the story, to fill in the absences and silences, and thus may encourage jurors to keep searching despite—and contrary to—their reasonable doubts. The exhortation to search for truth would be constrained if the instruction told jurors about the level of certainty needed to overcome the presumption of innocence, but JI—140 lacks just that kind of statement.

In sum, JI—140 fails to clearly state the level of certainty jurors need to reach before they can conclude the presumption of innocence has been overcome and the defendant is guilty. It instead

focuses on defining a separate and distinct concept called "reasonable doubt" and then directs the jury not to search for doubt, but for the truth. In combination these directives take jurors from their duty to assess whether the evidence leaves them in "a subjective state of near certitude" that the defendant is guilty. *Jackson*, 443 U.S. at 315.

The question remains whether there is a reasonable likelihood that jurors reading JI—140 would understand the instruction to allow a finding of guilt based on a degree of proof less than "beyond a reasonable doubt." *Victor*, 511 U.S. at 6. In applying this test, the language being objected to must be examined within the context of the entire instruction given in the case. *Id.* at 12-17, 19-22; *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). This court applied that standard to a previous challenge to JI—140's "search for truth, not for doubt" formulation and concluded the language did not dilute the state's burden of proving guilty beyond a reasonable doubt. *State v. Avila*, 192 Wis. 2d 870, 888-90, 532 N.W.2d 423 (1995). The court reached the same conclusion in *Manna*, 179 Wis. at 399-400.

Avila's holding is undermined by the fact there was no argument in that case about how the "search for truth, not for doubt" formulation was affected by the absence in JI—140 of any explanation that "beyond a reasonable doubt" requires the jurors to have a near certainty of the defendant's guilt to convict. While the court noted the instruction states the burden of proof and defines "reasonable doubt," it

said nothing about the lacunae the instruction leaves between those two concepts. Thus, *Avila* did not address how the "search for truth, not for doubt" directive interacted with the lack of an explanation of the quantum of certainty. In this way it is unlike *Manna*, where the directive appeared in an instruction that *did* address the required level of certainty. 179 Wis. at 400.

Emmanuel Trammell and amicus Wisconsin Association of Criminal Defense Lawyers argue that logic, as well as recent empirical studies, show *Avila*'s holding is untenable. In addition to those reasons, the missing statement of what "beyond a reasonable doubt" means is crucial to determining whether JI—140 dilutes the state's burden of proof because alleged defects in instruction must be read in context of the entire instruction. For the reasons given above, along with the reasons cited by Trammell and WACDL, this court should conclude that JI—140 as currently written fails to fully advise jurors of the content of the state's burden of proof and must be revised to include a statement of the level of certainty needed for conviction and to remove the directive that the jurors search for truth, not doubt.

Because the effect of a flawed instruction is based on the instructions as a whole viewed in the context of the entire case, the effect of the use of JI—140 in any particular case will have to be addressed on a case-by-case basis under that standard, starting with this case.

CONCLUSION

This court should hold that Wisconsin JI—Criminal 140 (2017) is flawed because it fails to articulate the level of certainty needed for jurors to convict and directs jurors to search for the truth, not for doubt.

Dated this 8th day of March, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,997 words.

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 8th day of March, 2019.

Signed:

JEFREN E. OLSEN
Assistant State Public Defender

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; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation 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 8th day of March, 2019.

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APPENDIX

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