

STATE OF WISCONSIN,

Plaintiff,

Case No.: 02-CF-2451

v.

CHARLES CHVALA,

Defendant.

**DEFENDANT’S PROPOSED JURY INSTRUCTIONS**

Defendant, Charles Chvala, by his attorneys, Lawton & Cates, S.C. by James A. Olson and Bruce M. Davey hereby request that the following jury instructions be utilized at the trial of the above matter:

- WIS JI – CRIMINAL 55: NOTE TAKING PERMITTED
- WIS JI – CRIMINAL 100: OPENING INSTRUCTIONS
- WIS JI – CRIMINAL 101: OPENING STATEMENTS
- WIS JI—CRIMINAL 140 BURDEN OF PROOF AND PRESUMPTION OF INNOCENCE
- WIS JI – CRIMINAL 145: INFORMATION NOT EVIDENCE
- WIS JI – CRIMINAL 103: EVIDENCE DEFINED
- WIS JI – CRIMINAL 170: CIRCUMSTANTIAL EVIDENCE
- WIS JI – CRIMINAL 275: CAUTIONARY INSTRUCTION: EVIDENCE OF OTHER CONDUCT (POTENTIAL)
- WIS JI – CRIMINAL 147: IMPROPER QUESTIONS
- WIS JI – CRIMINAL 148: OBJECTION OF COUNSEL; EVIDENCE RECEIVED OVER OBJECTION

WIS JI – CRIMINAL 150:	STRICKEN TESTIMONY
WIS JI – CRIMINAL 155:	EXHIBITS
WIS JI – CRIMINAL 157:	REMARKS OF COUNSEL
WIS JI – CRIMINAL 160:	CLOSING ARGUMENTS OF COUNSEL
WIS JI – CRIMINAL 190:	WEIGHT OF EVIDENCE
WIS JI – CRIMINAL 195:	JUROR'S KNOWLEDGE
WIS JI – CRIMINAL 200:	EXPERT OPINION TESTIMONY: GENERAL
WIS JI – CRIMINAL 201:	OPINION OF A NON-EXPERT WITNESS
WIS JI – CRIMINAL 205:	EXPERT TESTIMONY; HYPOTHETICAL QUESTIONS
WIS JI – CRIMINAL 246:	TESTIMONY OF A WITNESS GRANTED IMMUNITY OR OTHER EXCEPTIONS (EACH WITNESS)
WIS JI – CRIMINAL 300:	CREDIBILITY OF WITNESSES
WIS JI – CRIMINAL 305:	FALSUS IN UNO
WIS JI – CRIMINAL 315:	DEFENDANT ELECTS NOT TO TESTIFY  (POTENTIAL)
WIS JI – CRIMINAL 317:	WITNESS EXERCISING PRIVILEGE AGAINST SELF INCRIMINATION (POTENTIAL)
WIS JI – CRIMINAL 330:	IMPEACHMENT OF WITNESSES: CHARACTER FOR TRUTHFULNESS (POTENTIAL)
WIS JI – CRIMINAL 345:	MISSING WITNESSES (POTENTIAL)
WIS JI – CRIMINAL 400:	PARTY TO A CRIME: AIDING AND ABETTING: DEFENDANT EITHER DIRECTLY COMMITTED OR INTENTIONALLY AIDED THE CRIME CHARGED
WIS JI – CRIMINAL 460:	CLOSING INSTRUCTION

WIS JI – CRIMINAL 484:	VERDICTS SUBMITTED FOR ONE DEFENDANT: TWO COUNTS: SEPARATE VERDICTS ON EACH COUNT REQUIRED (TO BE MODIFIED DEPENDING ON THE NUMBER OF CHARGES THAT ARE SUBMITTED)
WIS JI – CRIMINAL 515:	UNANIMOUS VERDICT AND SELECTION OF PRESIDING JUROR
WIS JI – CRIMINAL 517:	JURY AGREEMENT: EVIDENCE OF MORE THAN ONE ACT INTRODUCED TO PROVE ONE CHARGE
WIS JI – CRIMINAL 770:	MISTAKE
WIS JI – CRIMINAL 901:	CAUSE
WIS JI – CRIMINAL 923A:	“INTENTIONALLY” AND “WITH INTENT TO”: MENTAL PURPOSE
WIS JI – CRIMINAL 1473B:	EXTORTION: INJURE OF THREATEN TO INJURE
WIS JI – CRIMINAL 1732	MISCONDUCT IN PUBLIC OFFICE (COUNTS 2,4,6)
SPECIAL INSTRUCTION	COUNTS 7 – 10 (ATTACHED)
SPECIAL INSTRUCTION	ELECTION LAW COUNTS (ATTACHED)
SPECIAL INSTRUCTION	LESSER INCLUDED OFFENSE (ATTACHED)

Dated this 3<sup>rd</sup> day of October 2005.

**BY: LAWTON & CATES, S.C.**

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**DEFENDANT’S PROPOSED JURY INSTRUCTION – COUNTS 7 – 10 – PROPOSED INSTRUCTION IS MODELED UPON WI JI-CRIMINAL 1732**

Count 7 alleges that in June 1999, while acting as a public officer, the Defendant exercised a discretionary power in a manner inconsistent with the duties of his office and with the intent to obtain a dishonest advantage by hiring Wendy Kloiber as a state employee for the purpose of conducting campaign activities.

Count 8 alleges that in October 1999, while acting as a public officer, the Defendant exercised a discretionary power in manner inconsistent with the duties of his office and with the intent to obtain a dishonest advantage by offering state employment to Heather Colburn for the purpose of having her conduct fund raising activities for State Senate Democratic candidates.

Counts 9 and 10 allege that the Defendant did not exercise a discretionary power in a manner consistent with the duties of his office “by directing employees of the Senate Democratic Caucus to participate in and manage the political campaigns on State of Wisconsin time and using State of Wisconsin resources.”

Misconduct in public office, as defined in Wis. Stats. § 946.12(3) of the Criminal Code of Wisconsin is committed by one who is a public officer or public employee and who, in his capacity as such an officer or employee, exercises a discretionary power in a manner that is inconsistent with the duties of his office or employment and with the intent to obtain a dishonest advantage for himself or another.

Before you may find the Defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

The first element requires that at the time of the alleged offense, the Defendant was a public officer or a public employee.

The second element requires that the Defendant, in his capacity as such an officer, exercised a discretionary power in his office. The Defendant may exercise discretionary power either by doing something or by failing to do something. Before you may find the Defendant guilty of misconduct in office, the State must prove beyond a reasonable doubt that it was a discretionary duty of the Defendant's office to hire and supervise the SDC employees for the purpose of working an average 40 hour week while performing work with a conceivable legislative purpose without performing any additionally services that had no conceivable legislative purpose

[The second element requires that the Defendant, in his capacity as such an officer, exercised a discretionary power in his office. The Defendant may exercise discretionary power either by doing something or by failing to do something. The Director of the Senate Democratic caucus is the supervising authority of the Senate Democratic Caucus. The Senate Policy Manual states that the caucus director administers and directs the caucus staff. Before you may find the Defendant guilty of misconduct in office, the State must prove beyond a reasonable doubt that it was a discretionary duty of the Defendant's office to supervise the Director of the Senate Democratic Caucus to insure that SDC employees worked an average 40 hour week while performing work

with a conceivable legislative purpose without performing any additionally services that had no conceivable legislative purpose]

The third element requires that the Defendant exercised a discretionary power in a manner inconsistent with the duties of his office. The State must prove beyond a reasonable doubt that the Defendant intentionally exercised a discretionary power in a manner inconsistent with the duties of his office by intentionally directing, authorizing and or approving SDC employees to perform services that had no conceivable legislative purpose during periods of time when they were paid by the state without working a minimum average 40 hour work week performing work with a conceivable legislative purpose. If you find that the state did not prove beyond a reasonable doubt that the defendant knew that caucus employees were not using vacation, compensatory time, or leave of absence to perform work that had no conceivable legislative purpose you must find the defendant not guilty.

[The third element requires that the Defendant exercised a discretionary power in a manner inconsistent with the duties of his office. The State must prove beyond a reasonable doubt that the Defendant intentionally exercised a discretionary power in a manner inconsistent with the duties of his office by intentionally failing to supervise the Director of the SDC to insure that SDC employees did not perform services that had no conceivable legislative purpose during periods of time when they were working a minimum average 40 hour work week. If you find that the state did not prove beyond a reasonable doubt that the defendant intended that the Senate Democratic Caucus Director permit caucus employees to perform work that had no conceivable legislative purpose during an average 40 hour work week you must find the defendant not guilty.]

The fourth element requires that the Defendant exercised such discretionary power with the intent to obtain a dishonest advantage for himself. The phrase “with intent to” means that the Defendant must have acted corruptly with an intention on his part to knowingly do an unlawful act to obtain a dishonest advantage for himself by causing caucus employees to perform work that had no conceivable legislative purpose during hours when they were receiving pay from the State of Wisconsin. You cannot look into a person’s mind to find corrupt intent. While the corrupt intent to obtain a dishonest advantage must be found beyond a reasonable doubt as a fact before you can find the Defendant guilty, it must be found, if found at all, from his acts, words, and statements, if any, bearing upon his corrupt intent.

If you are satisfied beyond a reasonable doubt that the Defendant was a public officer and in his capacity as such an officer, the Defendant exercised a discretionary power in a manner inconsistent with the duties of his office, and with the intent to obtain a dishonest advantage for himself, you should find the Defendant guilty.

If you are not satisfied of the above beyond a reasonable doubt, then you must find the Defendant not guilty.

Employees of the Senate Democratic Caucus were unclassified legislative employees. The caucus staff positions were partisan political positions. The caucus staff did not work an established schedule or shift. The caucus staff was expected to work “a minimum average of forty hour work week.” They were not paid overtime and, instead, received compensatory time for any hours worked beyond forty hours in a work week. The caucus staff could use compensatory time, personal leave or vacation time

for any purpose they wanted, including participating in or managing the campaigns of candidates for the Wisconsin State Senate.

It is lawful for caucus staff to participate in and manage the campaigns of Democratic candidates as long as the caucus employee performs caucus-related work for a “minimum average forty hour work week during the employee’s employment” or the campaign activities are conducted during periods of compensatory time, personal leave, vacation, or during the employee’s own time. It is also lawful for a caucus employee to engage in campaign activity during normal work hours or while at their normal work location as long as the employee works a minimum average forty hour work week during their employment performing caucus-related work.

It is the State’s burden to prove beyond a reasonable doubt that any work done by a SDC employee that did not have a conceivable legislative purpose was done by an SDC employee who did not average a forty hour work week and that the Defendant was aware that such employee was performing activities that had no conceivable legislative purpose and was not working a minimum average 40 hour work week.

In order for the Defendant to have exercised his discretionary power in a manner inconsistent with the duties of his office with regard to the hiring of Wendy Kloiber, the State must prove by evidence which satisfies you beyond a reasonable doubt that

1. The Defendant hired Wendy Kloiber for the purpose of engaging in work with no conceivable legislative purpose rather than working a minimum average forty hour work week performing caucus related work; that

2. Wendy Kloiber engaged in work with no conceivable legislative purpose as part of her minimum average forty hour work week and did so at the direction of or with the specific knowledge, approval, and authorization of the Defendant. It is not unlawful for Wendy Kloiber to engage in activity with no conceivable legislative purpose during normal work hours or while at her normal work location as long as she worked a minimum average forty hour work week during her employment performing caucus-related work, and that
3. The Defendant personally caused such activities with a corrupt motive and intended to gain a dishonest advantage regarding the hiring of Wendy Kloiber for himself or others.

In order for the Defendant to have exercised his discretionary power with regard to the Senate Democratic Caucus employees performing campaign work on State time in manner inconsistent with the duties of his office with regard to the offer of employment to Heather Colburn, the State must prove by evidence which satisfies you beyond a reasonable doubt that

1. The Defendant was responsible for the offer of employment to Heather Colburn; that
2. The job offered to Heather Colburn and the duties associated with it would be considered work with no conceivable legislative purpose and that these activities would be paid for by the State and that she would not be required to perform caucus-related work, and that

3. The Defendant personally made such offer of employment with a corrupt motive and intended to gain a dishonest advantage regarding the offer of employment to Heather Colburn for himself or others.

In order for the Defendant to have exercised his discretionary power with regard to the Senate Democratic Caucus employees performing work with no conceivable legislative purpose on State time in a manner inconsistent with the duties of his office you must find that the State proved beyond a reasonable doubt that:

1. A caucus employee engaged in work with no conceivable legislative purpose as part of the employee's "minimum average forty hour work week" rather than during periods of compensatory time, personal leave, vacation, or the employee's own time outside of work. It is lawful for a caucus employee to engage in work with no conceivable legislative purpose normal work hours or while at their normal work location as long as the employee works a minimum average forty hour work week during their employment performing caucus-related work, that
2. Any employee who engaged in work with no conceivable legislative purpose as part of his/her minimum average forty hour work week did so at the direction of, or with the specific knowledge, approval, and authorization of the Defendant, and that
3. The Defendant personally caused such activities with a corrupt motive and with intent to gain a dishonest advantage regarding such activities for himself or others.

In order for the Defendant to have exercised his discretionary power with regard to the use of State of Wisconsin resources by caucus employees in a manner inconsistent with the duties of his office, the State must prove beyond a reasonable doubt that:

1. A caucus employee improperly used State of Wisconsin resources to engage in work with no conceivable legislative purpose; that
2. Any caucus employee who used State of Wisconsin resources to engage in work with no conceivable legislative purpose did so at the direction of, or with the specific knowledge, approval and authorization of the Defendant, and that.
3. The Defendant personally caused such activities with a corrupt motive and intended to gain a dishonest advantage regarding the use of above State resources for himself or others.

## MEMORANDUM IN SUPPORT OF INSTRUCTIONS REGARDING CAUCUS COUNTS

This instruction is modeled after WI JI-Criminal 1732.

The second element of Wis. Stats. § 946.12(3) describes the conduct that constitutes the discretionary duty. State v. Schwarze, 120 Wis. 2d 453, 456, 355 N.W.2d 842 (Ct. App. 1984) holds that the question of legal duty presents an issue of law. The Defendant respectfully disagrees.

In U.S. v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310 (1995), the Supreme Court held that in a criminal case a defendant has “the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime for which he is charged.” Id., 515 U.S. at 522, 115 S.Ct. at 2320. The Schwarze case was decided eleven years before Gaudin and was not based upon an analysis of criminal law. Rather, Schwarze was based upon an analysis of civil law where the Fifth Amendment would not apply.

The State seems to allege that the Defendant had a discretionary duty of some sort to insure that caucus employees did not perform work with no legislative purpose while engaged in their average forty hours of work week. However, that duty is not set forth in statutes. Rather, it is found, if at all, in inferences taken from testimony relating to past practices, Senate Guidelines, and statutes. In the end, the Defendant is entitled to have a jury of his peers determine what duty he might have.

The jury must be instructed that only work that has no conceivable legislative purpose can be considered in determining whether there has been a violation. The court of appeals held that any work that conceivably furthered the legislative process could be performed by caucus employees while they were being paid by the state was appropriate for:

It is conceivable that monitoring press clippings, monitoring a Senator's committee and monitoring a Senator's votes may be construed as furthering the legislative process. We therefore conclude these facts do not allege a violation of Wis. Stat. § 946.12(3) that is justiciable. State v. Chvala, 271 Wis.2d 115, 156, 678 N.W.2d 880 (Ct. App. 2004)

Merely using the word campaign activities is error because some campaign activities could include activities could be conceivably construed as furthering the legislative process.

The next concept that is important is the meaning of state time. The only requirement according to the Senate Policy Manual is that the SDC employee work “a minimum average of forty hour work week.” The Senate Policy Manual, itself, establishes that legislative staff had no duty to meet their employment obligations during any particular hours or any particular days. Indeed, in establishing a requirement of an “average” forty hour week and in specifying that scheduling of work was discretionary, the Senate Policy Manual makes it clear that legislative staff can engage in official work on an irregular schedule and at any time of the day and on any day of the week. For example, during the budget and at other times during the session caucus employees might work almost around the clock. If the SDC employee was on compensatory time, vacation leave, or leave there would be no violation regardless of whether the activity performed had no conceivable legislative purpose.

It is the State's burden that activities of SDC employees performed work that had no conceivable legislative purpose with the required average 40 hour work week. The jury must be so instructed.

Finally, the state must prove a “corrupt” motive. The leading case involving Wis. Stats. § 946.12(3) is State v. Tronca, 84 Wis. 2d 68, 267 N.W.2d 216 (1978). Tronca

referred to the notes of Judiciary Committee on the Criminal Code that considered the statute in 1953 to conclude that a corrupt intent was required:

"Subsection (3) states in effect that an officer or employe must act honestly in performing duties or exercising powers which involve discretion. If any officer or employe has discretion as to the time or manner in which to perform a duty or discretion as to whether or not to perform a function of his office or employment, he is guilty of misconduct only if he acts in a manner inconsistent with the duties of his office or employment or the rights of others and with intent to obtain a dishonest advantage for himself or another, that is, 'corruptly'. *Id* at 77

In State v. Alfonsi, 33 Wis.2d 469,485, 147 N.W.2d 550 (1967) the trial court refused to give the following instruction.

Fifth that the defendant accepted the property pursuant to a corrupt understanding and with an intention on his part that he would do an act in violation of his lawful duty as an assemblyman. Before the Defendant may be found guilty of bribery, however, he must have intended that his official conduct be influenced or accepted property with the purpose and an intention on his part that his official conduct be influenced.'

The requested instruction also included, 'The defendant must have accepted the property with a corrupt intent.'

The Defendant's counsel made a timely demand for an instruction to the jury that a requirement of conviction was a guilty mind. The trial court refused. The Supreme Court found this refusal to be prejudicial error and ordered a new trial. Id. at 478.