

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

Branch 4

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 02 CF 2453

SCOTT R. JENSEN,

Defendant.

**DEFENDANT JENSEN'S REPLY IN SUPPORT OF HIS MOTION FOR BOND
PENDING APPEAL**

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Defendant Scott Jensen, by his appellate counsel, Skadden, Arps, Slate, Meagher & Flom, LLP, and Friebert, Finerty & St. John, S.C., respectfully submits this reply memorandum in support of his motion for continued release pending appeal.

The State's Response is marked by two features: (1) a failure to substantively address, by legal argument, significant issues presented in Defendant's Motion; and (2) a mischaracterization of the standards that govern the § 809.31, Wis. Stats., inquiry before this Court.

The State ignores, without explanation, core issues raised in Defendant's Motion:

- The State does not so much as mention, let alone distinguish, the controlling case of *State v. Dyess*, 124 Wis. 2d 525 (1985), or the requirements of § 903.03(3), Wis. Stats. This was the *lead* argument raised in Defendant's Motion regarding the substantial appellate issues presented. *Dyess* is squarely on point and establishes error. A copy of the *Dyess* opinion is attached for the Court's convenience.
- The State does not cite, let alone attempt to distinguish, *State v. Harvey*, 254 Wis. 2d 442 (2002); *State v. Kunz*, 160 Wis. 2d 722 (1991); *State v. Draughon*, 285 Wis. 2d 633 (2005); *State v. Tomlinson*, 254 Wis. 2d 502 (2002); or *State v. Leist*, 141 Wis. 2d 34 (Ct. App. 1987), all of which establish that the instruction given here contains an improper mandatory presumption. The *single* case cited by the State with respect to presumptions, *State v. Vick*, 104 Wis. 2d 678 (1981), only reinforces the error. See *State Response* at 4. In *Vick*, the form of presumption used in the instruction was proper only because it was expressly permissive. *Id.* at 694 ("the word 'may' was used which is clearly construed as permissive.").
- The State does not mention, let alone address, the misstatement of law arising from the improper use of the word "promote" in the instruction. Despite being called upon to do so, the State does not, and cannot, identify any paragraph in the Court of Appeals decisions in *Jensen* or *Chvala* that contains the statement, "the use of a state resource to promote a candidate in a political campaign . . . provides to that candidate a dishonest advantage." The statement does not appear. Even if it had, *Dyess* makes clear that its incorporation into a criminal jury instruction is error.

In a matter of this significance, both the Court and Mr. Jensen deserve the benefit of appropriate legal argument on the issues raised. If the State cannot legitimately distinguish *Dyess* or the litany of precedent concerning unconstitutional mandatory presumptions, and cannot locate the phrase "promote a candidate" in the Court of Appeals decisions, it should

acknowledge as much, rather than refuse to confront the issues. It is for this reason that Wisconsin Courts have consistently held that when the State fails to respond properly to arguments advanced by a criminal defendant, the “arguments not refuted are deemed admitted.” *State v. Alexander*, 2005 WI App 231, ¶ 15 (Ct. App. 2005); *State v. Bergquist*, 2002 WI App 39, ¶ 14, 250 Wis. 2d 792, 802; *State v. Peterson*, 222 Wis.2d 449, 459 (Ct. App. 1998).

The State also mischaracterizes the standard governing bond pending appeal under § 809.31. According to the State, the standard is, in essence, indistinguishable from that governing a motion for a new trial — suggesting that the Defendant must convince the trial court it committed error. *See Res.* at 3. That is not the standard under Wisconsin law. Section 809.31 **does not** require the federal showing “that the appeal is not for purpose of delay **and** raises a substantial question of law and fact.” *Compare* § 809.31(3)(d) *with* 18 U.S.C. § 3143(b)(1)(B). By statute, Wisconsin requires only that the appeal is not for purposes of delay. Regardless, even under the federal standard, courts recognize that:

requiring district judges to determine the likelihood of their own error is repugnant, for in such a case the proper remedy would be to rectify the error on post-trial motions. “Judges do not knowingly leave substantial errors uncorrected, or deliberately misconstrue applicable precedent. Thus it would have been capricious of Congress to have conditioned bail only on the willingness of a trial judge to certify his or her own error.”

United States v. Bilanzich, 771 F.2d 292, 299 (7th Cir. 1985) (citation omitted). In this light, the State overreads *State v. Salmon*, 163 Wis. 2d 369 (1991). The issue presented in *Salmon* was whether it was an abuse of discretion for the court to consider the merits of appeal on a § 809.31 motion. *Id.* at 372. *Salmon* held that the statute “implicitly approves consideration of the merits of the underlying appeal” and that courts “may consider” the merits with respect to the “factors relevant to pretrial release” and the risk of “irreparable injury.” *Id.* at 374-375. *Salmon* did not

fundamentally alter the statutory test to require that a defendant must convince a trial court to declare its own error in order to qualify for bond under § 809.31.

This is not a motion for a new trial. This Court need not find or concede error in order for Mr. Jensen to be accorded bond pending appeal. This Court need only find that Mr. Jensen raises significant, non-frivolous issues; that he satisfies the statutory criteria of § 809.31; and that he is entitled to the opportunity to have *meaningful* appellate review of his conviction.

The Commentary to the ABA Standard, upon which § 809.31 is expressly based, is clear: “When only short prison sentences have been imposed, the possibility of litigation becoming moot before an appeal can be decided suggests that such sentences *ought to be stayed so as not to foreclose appellate review.*” Commentary, Exhibit A to Motion (emphasis supplied); accord *State v. Firkus*, 119 Wis. 2d 154, 162 (1984) (emphasizing the importance of bond pending appeal to further Wisconsin’s “public policy of allowing a convicted person a timely opportunity to secure relief from an allegedly illegal conviction”).

Basic consideration of the balance of harms further directs that bond pending appeal be granted. There is no compelling reason that Mr. Jensen must be imprisoned on July 15, 2006, and the State identifies none. To the extent the State’s confidence in its verdict is well-founded, no State interest is compromised by awaiting completion of the appellate process before his sentence is served. If his conviction is affirmed, he will serve, and all interests of the State will then be fully vindicated. If, however, Mr. Jensen’s conviction is overturned, failure to grant bond pending appeal will be the cause of an irreparable injustice. Nothing can or will ever replace the damage done to Mr. Jensen and his young family.

I. The State Does Not Legitimately Challenge Mr. Jensen's Satisfaction Of The Express Requirements Enumerated In § 809.31, Wis. Stats.

The State suggests that the Court should be reluctant to grant Defendant's Motion because Mr. Jensen is a "convicted felon." *Res.* at 2. Section 809.31 *presumes* that one is a convicted felon and enumerates the express criteria under which bond is appropriately granted a convicted felon pending appeal. Notably absent from the State's Response is any meaningful challenge to whether Mr. Jensen meets those express statutory terms.

The State concedes that Mr. Jensen is not a flight risk. *Res.* at 7. The State does not challenge the fact that Mr. Jensen will promptly prosecute his appeal. And the State does not argue that Mr. Jensen is undertaking his appeal for purposes of delay.

The only factor under § 809.31(3) argued by the State is the alleged danger to the community from Mr. Jensen remaining on bond. The State's suggestion that Mr. Jensen poses a present danger to the community is, to say the least, overreaching. Mr. Jensen has no criminal history outside this case. He has comported with all requirements of his bond pre-trial, during trial, post-conviction, and post-sentencing. At the time of sentencing, this Court expressly noted that confinement was not necessary "to protect the public from further criminal activity." 5/16/06 Tr. at 28. Mr. Jensen was convicted of a felony crime upon which the Wisconsin Supreme Court split evenly as to whether application of the statute to the conduct at issue was unconstitutionally vague in the first instance. Indeed, a sitting Justice of the Wisconsin Supreme Court submitted an affidavit to the Court and stood prepared to testify that the conduct at issue was a historical practice of both parties and was not considered improper. *See* "Offer of Proof Re: Duty and Custom." Against this background, to suggest that this Court should deny bond to "protect the public from the possibility of his participation in any new crimes of fraud or corruption," *Res.* at 8-9, manifests an unfortunately skewed zealotry.

II. This Case Presents Significant Appellate Issues And Matters Of First Impression.

A. The State inexplicably fails to address *Dyess* and the litany of authority barring mandatory presumptions in criminal cases.

The jury instruction given in this case is novel and has never been approved by any appellate court. Its review will be a matter of first impression and Defendant Jensen has set forth in his Motion substantial defects in the instruction.

Defendant Jensen's Motion states in straightforward and direct terms that the Wisconsin Supreme Court decision in *State v. Dyess* is controlling and establishes that the "dishonest advantage" instruction violates § 903.03, Wis. Stats. *Motion* at 5-10. Unable to distinguish *Dyess*, the State chooses to hide from the case – refusing to mention, let alone confront, the decision or the statutory requirements of § 903.03(3). This tactic, in itself, underscores the significance of this appellate issue. *See generally Alexander*, 2005 WI App 231 at ¶ 15.

The State's superficial efforts to evade *Dyess* are demonstrably incorrect. First, the State suggests that "Jensen's motion sheds little light" on the question of whether the instruction contained an improper mandatory instruction. *Res.* at 3. To the contrary, Defendant Jensen's Motion identifies *the precise statement* that constitutes the erroneous mandatory presumption and addresses *in detail* the precedent establishing that the presumption is error. *Motion* at 5-14.

So too, the State's claim that "Jensen's Motion does not address why he believes the instruction here constituted an erroneous instruction on a fact, rather than a proper instruction on the law," *Res.* at 3-4, is inaccurate, and reflects a fundamental misunderstanding of Wisconsin law. The Motion *expressly* addresses why the "dishonest advantage" presumption requires factual inference and is, at most, a mixed question of fact and law that must be submitted to the jury. *See Mot.* at 8. Regardless, the Wisconsin Supreme Court in *Dyess* expressly addressed and rejected *the very same argument* now being advanced by the State. *See Dyess*, 124 Wis. 2d at

536-537 (“The state argues this directed finding is not a factual conclusion but a legal one. . . . No exceptions to the rule have been sanctioned on the basis that the matter to be presumed is legal rather than factual in nature.”).

Separate and apart from *Dyess*, Defendant’s Motion cites a litany of precedent from the United States Supreme Court and Wisconsin appellate courts dealing with improper mandatory presumptions. *See Motion* at 10-13. The State addresses none of this authority. Instead, the State cites one case regarding the generic obligation of the Court to instruct on the law, *Res.* at 3 (citing *State v. Schwarze*, 120 Wis. 2d 453 (Ct. App. 1984)). The obligation of the Court to instruct on the law is, of course, subject to constitutional and statutory constraints. To the point, the Wisconsin Supreme Court unequivocally held in *Dyess* that “the strictures of § 903.03(3), Stats., go to the authority of the judge. They deny the judge the prerogative in a criminal case to place certain limitations upon a criminal defendant’s right to a jury finding under Wisconsin law.” 124 Wis. 2d at 535; *accord Sandstrom v. Montana*, 442 U.S. 510, 522 (1979).

As to precedent dealing with the actual issue of presumptions in criminal jury instructions, the State cites to a *single* inapposite case addressing *permissive* rather than mandatory presumptions. *See Res.* at 4 (citing *State v. Vick*, 104 Wis. 2d 678 (1981)). In *Vick*, the instruction at issue involved “a permissive . . . presumption” because it used “the word ‘may,’ which is clearly construed as permissive.” 104 Wis. 2d at 694. The State does not attempt to argue, nor could it, that the instruction “[t]he use of a state resource to promote a candidate in a political campaign or to raise money for a candidate, provides to that candidate a dishonest advantage” is permissive. The State asserted just the opposite when advancing the proposed instruction. *See State’s Motions in Limine*, at 6 (“[E]ngaging in such activity creates a dishonest

advantage by definition.”). The instruction was mandatory, *see Sandstrom*, 442 U.S. at 519, and both *Dyess* and the constitutional precedent cited unequivocally direct that the instruction is error.

The State also offers no response or argument to rebut the fundamental alteration of the statutory *mens rea* that resulted from the inclusion of the “dishonest advantage” presumption. *See Motion* at 14-17. The effect of the State’s requested instruction was that the jury needed to find only that Mr. Jensen intended that “state resources” be used “to promote a candidate” without requiring that the government prove beyond a reasonable doubt that such actions were undertaken by him with the specific intent to thereby obtain a “dishonest advantage.” *See United States v. Sawyer*, 85 F.3d 713, 729 (1st Cir. 1996) (“Allowing the jury to find that Sawyer intended to defraud the public of its right to honest services based on proof of gift statute violations alone constituted reversible error.”).

“Matters of intent are for the jury to consider.” *McCormick v. United States*, 500 U.S. 257, 270 (1991); *Cheek v. United States*, 498 U.S. 192, 203 (1991) (“Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would [erroneously] prevent the jury from considering it.”). The instruction here “prejudge[d] a conclusion which the jury should reach of its own volition,” *Sandstrom*, 442 U.S. at 522, and failed to “convey the requisite consciousness of wrongdoing.” *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005).

B. The appellate decisions in *Chvala* and *Jensen* did not authorize the instruction and *could not*, as a matter of law, have authorized the instruction.

The State suggests in its Response that no error occurred because the “dishonest advantage” presumption was somehow authorized by the appellate decisions in *Chvala* and *Jensen*. *Res.* at 4 and 6. Again, the argument is wrong both as a matter of fact and law.

Defendant's Motion challenged the State to identify the statement "[t]he use of a state resource to promote a candidate in a political campaign . . . provides to that candidate a dishonest advantage" anywhere in either appellate decision. The Motion also noted that the use of the ambiguous term "promote" – which finds no support in the opinions – is inconsistent with the distinctions rendered by the *Chvala* Court. *See Motion* at 17-21. Again, the State simply ignores the argument. The State identifies no statement in the opinions supporting the use of the word "promote" or the specific form of the instruction.

More fundamentally, even if the Court of Appeals decisions contained the "dishonest advantage" statement (they do not), the opinions *could not*, as a matter of law, have authorized the instruction given. *Dyess* makes this clear. In *Dyess*, the Court instructed the jury that the defendant drove negligently if he exceeded the posted speed limit. 124 Wis. 2d at 539. This principle was well-settled in the law; indeed it was codified in the Civil Jury Instructions. *Id.* at 531. Nonetheless, incorporation of this settled principle into a criminal jury instruction was reversible error in direct violation of § 903.03. *Id.* at 536-537. The State offers no distinction between the presumption in *Dyess* and the presumption at issue. There is none.

C. The State misstates several legal principles in its Response.

The State's Response is replete with various additional misstatements of the law on other issues. For instance, the State attempts to cast aside Mr. Jensen's issues regarding the exclusion of evidence by suggesting the "appellate court will uphold a circuit court's exclusion of evidence under § 904.03 under a deferential standard of review." *Resp.* at 5. However, the law is settled that "[w]hether a trial court's ruling excluding evidence deprived a defendant of the constitutional right to present evidence is a question of 'constitutional fact' . . . review[ed] de novo." *State v. Stutesman*, 221 Wis. 2d 178, 182 (Ct. App. 1998). The evidentiary challenge in

this case is fundamental and of constitutional dimension. Mr. Jensen was precluded from fully explaining his intent and placing his actions within context to demonstrate to the jury that he held a justified and credible belief that the use of state resources for certain political activities was neither “dishonest” nor conveyed an “advantage.” See *Mot.* at 21-22; 3/7/06 Tr. at 40, 109, 116; see also *Cheek*, 498 U.S. at 203 (noting constitutional error in “forbidding the jury to consider evidence that might negate willfulness” because “knowledge and belief” are for the jury).

The State suggests, without citation, that “even assuming an error in the challenged instruction requiring a new trial, the defendant would be convicted again at a second trial.” *Res.* at 7. The lack of citation is understandable, as this form of argument has been expressly rejected by the Supreme Court. See *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (“The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered . . .”). It appears that the State is arguing as to the *impact* of existing error. If so, then Mr. Jensen has demonstrated significant, non-frivolous appellate issues.

The State’s unstated allusion to waiver, without citation, is also baseless. See *Res.* at 3. *Dyess* explicitly ruled that a general objection to the particular clause of the instruction at issue is sufficient to preserve the challenge. 124 Wis. 2d at 535. A more than adequate objection was made here. See “Brief and Memorandum of Law, Jury Instruction, § 946.12(3), Stats.” Moreover, *Dyess* directs that the issue should be reached in any event because “the strictures of § 903.03(3), Stats., go to the authority of the judge.” *Id.* at 535.

Finally, the State’s suggestion, without support, that the Defendant’s continued assertion of his innocence militates against bond pending appeal is meritless. *Res.* at 8. It would be ironic, indeed, if a Defendant must “acknowledge the wrongfulness of his conduct” in order to qualify for bond to challenge his conviction.

III. Mr. Jensen And His Young Family Face Irreparable Harm If The Court Erred; By Contrast, No Significant State Interest Is Compromised By Bond Pending Appeal.

The State's off-handed suggestion that "counsel for Jensen should be able to obtain reasonably prompt relief for any appellate arguments that could have merit," *Res.* at 9, is wrong. The matters that were addressed in the threshold interlocutory reviews are fundamentally different from those that will be raised based on a full consideration of the trial transcript and the rulings of this Court. Those decisions did not address jury instructions, *Dyess*, § 903.03(3), mandatory presumptions, the phrase "promote a candidate in a political campaign," or any issues relating to the exclusion of evidence relevant to the Defendant's intent. It is properly anticipated and expected that the appellate courts of this State will give this matter the full consideration and scrutiny that it deserves. If Mr. Jensen is incarcerated, his 15-month sentence will be served before the appellate process is completed. If the Court were to deny bond on the single substantive ground actually advanced by the State – that Mr. Jensen is allegedly "unable to identify a strong appellate argument" – and that assertion proves incorrect, the harm to Mr. Jensen, his wife, and his young children (ages 7, 5, and 2) can never be remedied.

Against that risk, the State presents *no* significant State interest that is compromised by the grant of bond pending appeal. To the extent the purported State interest in denying Mr. Jensen bond is to "send a message," that message has been adequately delivered by his conviction, the sentence imposed, and his preclusion from the Legislature, all of which were widely reported. There is no reason to also deny him the right to a meaningful appeal.

Mr. Jensen's request is basic, and the very reason § 809.31 exists. Mr. Jensen asks that he be afforded the opportunity for *meaningful* appellate review of this Court's rulings. Mr. Jensen meets each and every factor set forth in § 809.31. Irrespective of the Court's confidence in the propriety of this conviction, he should be afforded that opportunity.

Dated at Milwaukee, Wisconsin, this 9 day of June, 2006.

By: 

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