

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2006 AP 2095 CR

v.

Trial Court Case No. 02-CF-2453
(Dane County Circuit Court)

SCOTT R. JENSEN,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. **Did the jury instruction on the Misconduct In Public Office felony contain an impermissible presumption in violation of § 903.03, Wis. Stats., and the Wisconsin and United States Constitutions?**

The trial court ruled that the jury instruction was proper.

2. **Did the jury instruction on the Misconduct In Public Office felony alter the specific intent requirement set forth by the legislature?**

The trial court ruled that the jury instruction was proper.

3. **Did the jury instruction on the Misconduct in Public Office felony misstate the law and render application of the statute unconstitutional?**

The trial court ruled that the jury instruction was proper.

4. **Did the trial court commit constitutional error by precluding the accused from presenting evidence relevant to the issue of specific intent?**

The trial court ruled such evidence was inadmissible as a matter of law.

5. **Was application of the Misconduct in Public Office statute to the conduct at issue unconstitutional on grounds of vagueness, fair notice, and due process?**

On interlocutory review, this Court rejected constitutional challenges to the statute as applied. The Wisconsin Supreme Court split 2-2 on whether the statute as applied was unconstitutional on grounds of vagueness, fair notice and due process. The issue was preserved below, and the jury instruction tendered by the Court further established the unconstitutionality of the statute as applied. The trial court ruled that application of the statute to the charged conduct was not unconstitutional.

**STATEMENT ON ORAL ARGUMENT AND
PUBLICATION**

This case presents important issues regarding the constitutional rights of the accused and presents questions of substantial state-wide importance, interest, and application. Oral argument should be granted and the decision of the Court should be published.

INTRODUCTION

This case presents fundamental errors of law on three issues at the core of criminal jurisprudence: (1) the right to trial by jury; (2) the requirement for strict adherence to the statutory *mens rea* element in crimes for which the legislature has mandated a specific intent; and (3) the right to present evidence in one's defense. By virtue of a novel and erroneous jury instruction, combined with the preclusion of defense evidence directly relevant to the central issue of Mr. Jensen's specific intent, the trial below was irreparably flawed and the felony convictions cannot stand.

The trial court, at the urging of the State, tendered to the jury an unprecedented instruction directing jurors to presume that "[t]he use of a state resource to promote a candidate in a political campaign or to raise money for the candidate, provides to that candidate a dishonest advantage." That presumption directly violates § 903.03, Wis. Stats., and settled federal and state constitutional precedent prohibiting the use of mandatory presumptions in criminal cases. The presumption not only deprived Jensen of his rights to due process of law and trial by jury, it also diluted the State's burden of proof, fundamentally altered the specific intent element required for the crime with which Jensen was charged, and misstated the law.

Based upon this erroneous instruction, the trial court also precluded Jensen from presenting the testimony of numerous witnesses corroborating the fact that he did not act with the specific intent to obtain any "dishonest advantage." This exclusion of evidence, squarely relevant to the intent of the accused, was plain constitutional error.

These errors deprived Jensen of a fair and constitutional trial and rendered the real controversy not fully tried. Reversal is thus required.

STATEMENT OF THE CASE

I. Nature of the Case

Jensen was convicted on three counts of felony Misconduct in Public Office in violation of § 946.12(3), Wis. Stats., and one count of misdemeanor Intentional Misuse of Public Positions for Private Benefit in violation of § 19.45(2), Wis. Stats.

The Honorable Steven D. Ebert sentenced Jensen on the felony convictions to concurrent sentences of 5 years imprisonment (15 months confinement and 45 months extended supervision), a \$500 fine and costs on each count, restitution, and an order that he not enter the Capitol grounds for 5 years. (R.186.)

II. Procedural Status and Disposition in the Trial Court

On October 18, 2002, Jensen was named, along with Steven M. Foti and Sherry L. Schultz, in a five count criminal complaint. (R.1.) Jensen was charged in four counts – three felonies in violation of §§ 939.05 and 946.12(3), Wis. Stats., and one misdemeanor in violation of §§ 939.05, 19.45(2) and 19.58(1), Wis. Stats. (R.1.)

Count One asserted Jensen violated § 946.12(3) in relation to “hiring, retaining and supervising a state employee, namely Sherry Schultz, to solicit, account for, distribute and to publicly report money for political campaigns, and to assist others in these same tasks, during times when Schultz was compensated as a state employee or using state resources or both.” (R.223:43-44.)

Count Three asserted Jensen violated § 946.12(3) in relation to “hiring, retaining and supervising Ray Carey and Jason Kratochwill, state employees, to recruit and otherwise directly assist candidates for political office as candidates, and cause others to do the same, during times when Carey and Kratochwill were compensated as state employees or using state resources or both.” (R.223:44.)

Count Four asserted Jensen violated § 946.12(3) in relation to “retaining and supervising state employees to work on Taxpayers for Jensen during times when the employees were compensated as state employees or using state resources or both.” (R.223:45.)

Count Five asserted Jensen violated § 19.45(2) by using “his public position at times when he was a state public official to obtain financial gain for the private benefit of an organization with which he was associated, namely the Republican Assembly Campaign Committee.” [“RACC”]. (R.223:45.)

The complaint was the subject of interlocutory review, and further details of the complaint are set forth in *State v. Jensen*, 2004 WI App 89, 272 Wis. 2d 707, 681 N.W.2d 230. This Court rejected challenges based on vagueness, overbreadth, separation of powers and sufficiency grounds. The Wisconsin Supreme Court granted review and, with only four justices sitting, split 2-2 on the issue of whether the Misconduct in Public Office statute violated due process, fair notice and vagueness as applied. *State v. Jensen*, 2005 WI 31, ¶ 2, 279 Wis. 2d 220, 694 N.W.2d 56.

Trial commenced February 21, 2006. (R.199.) The verdict was returned March 11, 2006. (R.226.)

Sentencing was rendered May 16, 2006. (R.227.) Jensen was granted bond pending appeal. (R.192.) This appeal is timely.

III. Statement of Relevant Facts

General background regarding the allegations, the history of the Assembly Caucuses and Legislative Campaign Committees, and Jensen’s role as Speaker of the Assembly and Chair of the Assembly Republican Caucus (“ARC”) have previously been addressed by this Court in *Jensen*, 272 Wis. 2d at 707, ¶¶ 3-8.

The basic allegations, and the evidence offered by the State, addressed use of state resources and facilities – *i.e.*, staff, office space, and equipment – for “political” or “campaign” activities. (*E.g.*, R.199:185; R.224:12-13.) Most evidence relating to state personnel being involved with, and state resources being used in connection with “political” or “campaign” activities was not in dispute. (*E.g.*, R.221:35-39,84-85.)

The focal issue in this trial was not whether State facilities, equipment, or personnel had been involved with “political” or “campaign” activities, but rather whether Jensen acted with the specific intent to “obtain a dishonest advantage” as required under the misconduct statute. As noted in pretrial filings, whether Jensen acted with this requisite intent was “at the heart” of his defense and formed the core of the “exculpatory evidence” he intended to offer at trial. (R.138:2,7.)

Jensen sought to offer evidence demonstrating that he did not understand or intend for the conduct at issue to constitute a “dishonest advantage” for two principal reasons: (1) the activities at issue had been long-standing practices in the legislature and his actions were consistent with those practices; and (2) the activities were undertaken by both parties in contested elections, on behalf of both incumbents and challengers. (R.138; R.143; R.168.)

Two pretrial rulings are central to this appeal. First, over Jensen’s objection, the trial court adopted a jury instruction proposed by the State defining the intent element of the Misconduct in Public Office offense. The State defined the intent element as follows:

The fourth element requires that the defendant exercised [] discretionary power with intent to obtain a dishonest advantage for himself or herself or another. ***The 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.*** The phrase “with intent to” means that the defendant must have had the purpose to obtain a dishonest advantage or have been aware that his conduct was practically certain to cause that result. You cannot look into a person’s mind to find intent. While this intent to obtain a dishonest advantage must be found as a fact before you can find the defendant guilty, it must be found, if found at all, from his acts and words and statements, if any, bearing upon his intent.

(App. 4) (emphasis added); (R.112:8).

Jensen objected to the State’s instruction and proposed that the intent element track WI JI-CRIMINAL 1732, with, *inter alia*, an additional modification applying the language of *State v. Tronca*, 84 Wis. 2d 68, 76-77, 267 N.W.2d 216 (1978), that: “To act with the intent to obtain a dishonest advantage is to act ‘corruptly.’ The term ‘corruptly’ is normally associated with wrongful, immoral, depraved or evil. It is to act knowingly and dishonestly.” (R.109:3.)

Second, the State moved *in limine* to preclude Jensen from introducing evidence demonstrating that the conduct alleged was

consistent with the long-standing practices of legislators and staff from both parties “over the decades” and that Assembly Democrats were engaged in the same conduct “during the time period at issue.” (App. 45.) The State asserted that Jensen should be precluded from arguing that he did not have an intent to obtain a dishonest advantage “due to the defendants’ alleged beliefs that state resources had been or would be used by others to operate competing political campaigns.” (App. 47-48.) On the basis of the State’s own tendered jury instruction – asserting that “by definition” “[t]he use of a state resource to promote a candidate in a political campaign or to raise money for the candidate, provides to that candidate a dishonest advantage” – the State argued, “[n]or is an attempt to prove similar law violations by other persons or entities relevant to the issue of intent of . . . Jensen” (App. 49.)

According to the State, the issue before the jury was not whether the defendant intended to obtain a “dishonest advantage” when engaging in the alleged conduct involving the use of state resources, but rather only whether “the defendant[] intentionally engaged in such conduct.” (App. 50.)

Jensen’s response emphasized that the “State chose to charge the accused with misconduct in public office pursuant to § 946.12(3)” and was required to prove the specific statutory elements of that offense. (R.138:1.) Jensen argued that by “its proposed jury instruction and Motion in Limine, the State asks the circuit court to enable evasion of its self-imposed duty to prove those elements.” (R.138:2.) Pointedly, the response asserted that “the State seeks to avoid meeting its burden to prove intent,” and that “[t]he State’s motion seeks to exclude evidence that directly supports the accused’s defense and sits at the heart of the right to present exculpatory evidence.” (R.138:2,7.) The response contained proffers describing the substance of the testimony at issue, all of which supported Jensen’s understanding that the conduct involved was a historical practice in the Assembly engaged in similarly by both parties. (R.138.)

In reply, the State reiterated its position that evidence regarding historical practices or the contemporaneous practices of legislators and staff from both parties that was being offered to explain why Jensen did not view the conduct at issue to be seeking a “dishonest advantage” was “irrelevant.” (App. 55.) According to the State, Jensen could not, as a matter of law under the State’s proposed jury instruction, assert that the use of a state resource was not intended by him to obtain a dishonest advantage; rather Jensen would be permitted *only* to “attempt to show that [he] did not

intend to use state employees or resources to engage in the campaign activity defined by the Court of Appeals.” (App. 61.)

Hearings were held February 3, 2006. (R.198.) Both parties, as well as the trial court, recognized that the jury instruction issue and the *in limine* motion were intertwined. (R.198:37-38,40.) As stated by Jensen’s counsel: “[T]he State’s motion *in limine* in this category combined with their proposed jury instruction . . . strikes at the heart of 200 years of American jurisprudence, that an accused is allowed to present a defense, that an accused is allowed to challenge the prosecution, the most important one is that the State, before a citizen’s life and liberty is taken away from him, is required to prove each element of an offense beyond a reasonable doubt.” (R.198:40.) Counsel emphasized that this evidence went directly to the question of specific intent and that “[t]he facts and circumstances which directly address my client’s formulation of his belief should be allowed to be presented to the jury.” (R.198:40-42,45.)

The trial court ruled, “it’s my belief, my view of the law that the State has presented the correct jury instruction with regard to misconduct in public office.” (App. 12-13.)

Following the hearing, the State acknowledged that “the court’s rulings precluded the ability of the defense to call a large percentage of those named on the defendants’ initial witness list” and specifically requested a revised list. (R.144:1.)

Trial proceeded consistent with the pretrial rulings. Evidence was presented through various witnesses regarding graphic artists’ involvement with campaign work (*e.g.*, R.201:251, R.204:30,108-113); staff involvement with candidate recruitment, (*e.g.*, R.204:129, R.206:9-10, R.206:232-246, R.208:48-82); campaign-related discussions at the ARC, (*e.g.* R.206:232-46, R.209:86-103); stuffing envelopes for mailings, (R.206:21-22, R.211:151-53, R.214:81,115-16; R.216:159); data entry, (R.210:67, R.215:296); and assistance with fundraising and finance reports, (R.211:31-35; R.214:79,148,233; R.215:62,187-89; R.222:23, 24.)

As to the presentation by Jensen of defense evidence, the court reiterated its pretrial rulings and held Jensen would not be “allow[ed] . . . to introduce evidence of what was going on in the Assembly Democratic Caucus at the same time.” (App. 26.) Counsel for Jensen submitted two offers of proof regarding evidence “the accused had intended to introduce at trial on the

issue of the intent of the accused to obtain a dishonest advantage.” (R.168; R.143.)

As stated in one offer, Jensen intended to present testimony regarding both his knowledge and the knowledge of the ARC staff and Assembly Republican leadership of similar activities conducted by the “Assembly Democratic Leadership and the staff of the Assembly Democratic Caucus” (hereafter “ADC”) during the relevant period. (R.168:1.) The offer provided State investigative reports demonstrating that during the relevant period, the ADC designated staff to address fundraising, (*id.* at A2-3, A10-24); created campaign lists, (*id.* at A45-46); held campaign and fundraising meetings in state offices, (*id.* at A2, A18-19, A29); paid ADC staff to work on contested political races in the field, (*id.* at A5, A25-31); directed ADC graphic artists to prepare campaign and fundraising materials, (*id.* at A2, A28); recruited candidates, (*id.* at A6); and prepared finance reports (*id.* at A50, A54.)

Those records also demonstrated that Jensen expressed frustration to Democratic leadership regarding ADC staffers working on campaigns without taking leave time. (*Id.* at A5.) Separate and apart from precluding this corroborating evidence, the trial court precluded Jensen himself from testifying regarding the concerns that he and his staff had with respect to the Democratic leadership’s failure to require staff to take leave for field campaign work. (R.220:109-110.) Other witnesses were also precluded from introducing statements by Jensen, or describing historical practices and the practices of Assembly Democrats in order to demonstrate and corroborate Jensen’s state of mind. (R.213:129-133.)

A second offer of proof addressed historical practices relevant to “the intent of the accused.” (R.143.) That filing identified various matters to which the Hon. David T. Prosser, Jr., former Democratic State Senate Majority Leader Joseph Strohl, and former Democratic Speaker Tom Loftus would testify. Justice Prosser, who served as a Republican Speaker of the Assembly, was prepared to testify to his specific knowledge of two important aspects of the intent issue: (1) the practices that existed long before Jensen was Speaker and of which Jensen was aware when working under then-Speaker Prosser’s leadership; and (2) the knowledge of the practices engaged in by Democrats. In particular, Justice Prosser was prepared to testify that during his term as a legislator and Speaker:

[T]here were caucus members and caucus directors who participated in activities including but not limited to the following:

- (a) Campaign and political meetings in the capitol office;
- (b) Assisting the speaker and the elected leadership by recruiting candidates;
- (c) Gathering voting lists and target lists;
- (d) Setting up, attending and staffing fundraisers; and
- (e) Assisting legislators in creating and implementing office plans.

(R.143.) Justice Prosser was prepared to testify that he and other legislators understood that these long-standing practices were allowed and that it was known that “Democratic leadership, members, and their respective caucuses were engaged in the same or similar conduct during my time in the legislature.” (*Id.*) Mr. Strohl was prepared to testify that both during the period that he was in the legislature, and subsequently as a lobbyist, Caucus staffs were instrumental in assisting their respective legislative leadership in fulfilling the objectives of “raising money, recruiting candidates, targeting key races, and developing issues.” (*Id.*) Tom Loftus, who had written a book on the issue, would also testify regarding the historical practices of the respective legislative leadership and caucuses with regard to campaign-related issues. (*Id.*)

All such evidence was precluded. Without the support of this corroborating evidence and context for his actions and beliefs, Jensen attempted to testify regarding his understanding of the practices governing appropriate conduct with respect to campaign-related work. Jensen testified that when he was first working for the ARC, he was taught that “if you were going to be out in the field . . . you had to either take vacation days, comp time, or take a partial leave If you were back at the office and you were doing state work and putting in your 37 ½ hours a week, then you didn’t have to do that.” (R.220:34.) He indicated that his job as Majority Leader necessarily crossed a broad spectrum of responsibilities: “I spent a lot of time as Majority Leader working with members to solve problems, either in their offices, personal problems, campaign problems back in their district.” (R.220:60.) Jensen testified that each individual legislator was responsible for authorizing the absences and leaves of his or her staff, that staff are paid to work an average of 37 ½ hours for the State and that most then volunteer time to assist their legislator with campaigning

because they want to help the legislator (or like-minded legislators) get re-elected. (R.220:74,84.)¹ The rules in the Jensen office were that no direct solicitations could be made from the office, no more than 50 pieces of mail could be sent after June 1 of an election year, and that if individuals went out into the field to work on a campaign they should take leave. (R.220:92.) As to graphic artists, Jensen testified that it was his understanding, from when he first worked for ARC nearly two decades ago, that:

it was appropriate for the graphic artists to do the design work for brochures because it didn't consume any – there's no additional bill being sent to state government for it. When you went to the printing, well then you had to contract it out and go to the printer and write a check from the campaign committee for that. But if the state equipment was available, state work had already been done, people could use that as long as they didn't create additional bills for the taxpayers.

(R.220:99.)²

Given the preclusion of evidence, Jensen was left to have various individuals, including Democratic Representative Marlin Schneider, Justice David Prosser and Judge J. Mac Davis, testify as to his character for honesty. (R.221:103-14.)

Despite prohibiting evidence showing that State resources were made available to opposing candidates by the ADC, the trial court ruled on the motion to dismiss at the close of the State's case that "[t]he element of dishonest advantage is established by the testimony of the use of State resources *that were not available to other candidates.*" (R.218:13) (emphasis added.) No such testimony regarding the resources actually "available to other candidates" was offered by the State. Defense evidence regarding

¹ The Chief Clerk testified that Assembly staff were not required to maintain time sheets and that they used a practice known as "comp" time, whereby staff was free to allocate time for other activities if they had averaged more than 37 ½ hours per week of Assembly work. (R.201:181-84.)

² Jensen and a State Investigator gave conflicting accounts of an interview of Jensen that occurred in 2001 and that was understood by Jensen to discuss in part various aspects of the reform measures then in place. (R.217:32-58; R.220:118-123.)

the fact that “mirror image” resources were available to opposing candidates was precluded by the Court.

At the instruction conference, all objections to the State’s intent instruction were restated. (R.222:69-70.) The Court rejected the defense arguments and reiterated its pre-trial ruling. (R.222:67,77-80.)

During closing argument, the prosecutor relied extensively on the form of instruction accepted by the Court. (R.224:20.) To this end, the prosecutor argued that “[i]f you find that Mr. Jensen used a state resource to promote a candidate in a political campaign or to raise money for a candidate, *that provides the candidate under this instruction with a dishonest advantage*” (R.224:20 (emphasis added); *see also* R.224:154), and that “it doesn’t matter if anyone other than Scott Jensen or Sherry Schultz may have violated the law in the way these two did. The judge has given you an instruction on point” (R.224:79.) Despite having precluded Jensen from introducing any evidence regarding the analogous activities of the ADC in contested races during the same time period, the prosecutor nonetheless held up the campaign finance reports of the opposing candidates in Mr. Jensen’s elections and argued (without supporting evidence) that those candidates did not have the advantage of any state resources. (R.224:52-53,78-79.)

ARGUMENT

Two fundamental errors require reversal. First, the trial court’s jury instruction on the specific intent element of Misconduct in Public Office violated well-settled statutory and constitutional requirements. Second, the trial court’s exclusion of evidence relevant to Jensen’s intent was improper and undermined Jensen’s constitutional right to present his defense. These errors deprived Jensen of a fair trial and rendered the real controversy not fully tried.

I. The Trial Court’s Jury Instruction Was Fundamentally Flawed And Deprived Jensen of A Fair Trial.

The jury instruction submitted by the State, and accepted by the trial court, had not previously been given in any court. The instruction was erroneous in two respects. First, the instruction contained an impermissible presumption in violation of § 903.03, Wis. Stats., and established constitutional precedent. As set forth below, this presumption deprived Jensen of basic constitutional

rights of due process and trial by jury, diluted the State's burden of proof, and altered the specific intent requirement mandated by § 946.12(3). Second, the instruction misstated the law and its use of the ambiguous and unauthorized term "promote" rendered application of the statute unconstitutional.

A. Misconduct In Public Office Is a Specific Intent Crime; The State Must Prove That The Defendant Acted With The Purpose To Obtain A Dishonest Advantage For Himself or Another.

Section 946.12(3) is a specific intent crime. *See State v. Stoehr*, 134 Wis. 2d 66, 78, 396 N.W.2d 177, 181 (1986). "[T]he phrase[] 'with intent to' . . . show[s] that specific criminal intent is an element of the crime." *State v. Voss*, 205 Wis. 2d 586, 593, 556 N.W.2d 433 (Ct. App. 1996).

Section 939.23(4), Wis. Stats., defines "with intent to" to mean "that the actor either has a purpose to do the thing or cause the result specified or is aware that his or her conduct is practically certain to cause that result." In the context of the misconduct statute, "with intent to" means that the defendant has "a purpose to cause . . . the result specified"; namely, "to obtain a dishonest advantage." § 946.12(3), Wis. Stats.

Section 946.12(3) contains four distinct elements: (1) the defendant must be a public official; (2) the defendant must commit an act of commission or omission within the official's discretionary powers; (3) that act of discretionary power must be inconsistent with the duties of office; and (4) the act must be performed with the specific "intent to obtain a dishonest advantage." The Judiciary Committee on the Criminal Code emphasized the importance of the specific intent *mens rea* required under § 946.12(3): "[One] 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'.*" *Tronca*, 84 Wis. 2d at 76-77 (quoting Judiciary Committee Report) (emphasis added).

This specific intent requirement is significantly different from crimes which require merely an intent to do a proscribed act. *See State v. Lasky*, 2002 WI App 126, ¶¶ 24-25, 254 Wis. 2d 789, 802-03, 646 N.W.2d 53 (distinguishing between general and specific intent crimes); *see generally* 1 W. LaFave, *Substantive Criminal Law* § 5.2(e), at 354 (2d ed. 2003) ("[T]he most common

usage of ‘specific intent’ is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime.”). The intent to “obtain a dishonest advantage” is not simply an intent to commit an act inconsistent with one’s official duties. Rather, it is a further mental state involving the purpose or reason for which that act is undertaken. The specific mental state mandated by § 946.12(3) is properly described in the words of § 939.23(4), as an act undertaken with the specific mental “purpose” to obtain a “dishonest advantage.” There are other analogues in the criminal law: *e.g.*, the crime of tampering with public records, § 946.72(1), Wis. Stats., is not committed by merely destroying public records; the defendant must have acted with a specific purpose to injure or defraud.

So too, the mere act of exercising a discretionary power to commit an act inconsistent with the duties of the office is not itself a violation of § 946.12(3). Rather, the act must have been undertaken with the specific intent, *i.e.*, the specific mental purpose, “to obtain a dishonest advantage.”

As set forth below, the rulings of the trial court failed to give proper effect to this specific intent requirement mandated by § 946.12(3).

B. The Issue of Specific Intent Was Of Critical Importance In This Case.

The United States Supreme Court has specified that the issue of criminal intent lies at the core of the right to trial by jury in our constitutional framework: “[M]atters of intent are for the jury to consider.” *McCormick v. United States*, 500 U.S. 257, 270 (1991); *see also Cheek v. United States*, 498 U.S. 192 (1991). Accordingly, courts consistently find reversible error when the “critical question of the intent of the accused” is compromised by the form of instruction tendered to the jury. *Francis v. Franklin*, 471 U.S. 307, 326 (1985) (“[T]he Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in *Winship on the critical question of intent in a criminal prosecution.*” (emphasis added)); *see also Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005) (reversing conviction because intent instruction failed to “convey the requisite consciousness of wrongdoing”); *Sandstrom v. Montana*, 442 U.S. 510, 520 (1979); *Morissette v. United States*, 342 U.S. 246, 274 (1952); *United States v. Quattrone*, 441 F.3d

153, 179 (2d Cir. 2006) (noting “glaring deficiency” of obstruction instruction because “all that need be proven was that an investigation had called for certain documents and that the defendant had ordered the destruction of those documents”).

Intent takes on heightened constitutional importance when, as here, a criminal statute sweeps broadly and is potentially susceptible to otherwise vague application. *See Colautti v. Franklin*, 439 U.S. 379, 395 (1979). The United States Supreme Court “has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*.” *Id.* at 395. Thus, “the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. . . .” *Id.* at 395 n.13 (quoting *Screws v. United States*, 325 U.S. 91, 101-02 (1945)). Here, the Wisconsin Supreme Court evenly divided as to whether the application of this statute to the charged conduct failed, as a threshold matter, on grounds of unconstitutional vagueness.

Jensen made clear that his lack of specific intent was the central dispute and the principal issue he intended to present to the jury. (*E.g.*, R.138:1, R.198:40-42.) As the Court recognized in *State v. Dyess*, 124 Wis. 2d 525, 370 N.W.2d 222 (1985): “[t]o err in that particular – in respect to the defense upon which [the Defendant] based his case – is almost *ipso facto* prejudicial.” *Id.* at 546-47.

C. The Intent Instruction Contained An Impermissible Mandatory Presumption In Violation of § 903.03, Wis. Stats., and Constitutional Requirements.

The United States Supreme Court has repeatedly held that “mandatory directions” which “foreclose[] independent jury consideration of whether the facts established certain elements of the offense[]” are an unconstitutional deprivation of criminal due process. *See, e.g., Carella v. California*, 491 U.S. 263, 266 (1989) (citing cases). Similarly, the Wisconsin Supreme Court has repeatedly instructed that presumptions in criminal cases deprive the accused of both the Fifth Amendment right to “proof beyond a reasonable doubt of every fact necessary to constitute a crime with which he is charged” and the Sixth Amendment right to “have the jury, rather than the judge, reach the requisite finding of ‘guilty.’” *State v. Harvey*, 2002 WI 93, ¶¶ 19-20, 254 Wis. 2d

442, 450-51, 647 N.W.2d 189 (citations omitted); *State v. Kuntz*, 160 Wis. 2d 722, 736-37, 467 N.W.2d 531 (1991).

Addressing the significance of errors arising from the use of presumptions in criminal cases, the United States Supreme Court has spoken in unequivocal terms:

“Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause 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.”

Sandstrom, 442 U.S. at 520 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)) (emphasis in original); *see also Francis*, 471 U.S. at 313 (emphasizing that “[t]his ‘bedrock, axiomatic and elementary [constitutional] principle’ . . . prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime” (citations omitted)). Wisconsin has codified the prohibition on the use of presumptions in criminal cases. *See* § 903.03, Wis. Stats.

The instruction given to the jury on the intent element directed that “[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.” This directive constitutes an impermissible presumption in violation of § 903.03 and violates constitutional strictures prohibiting such mandatory presumptions in criminal cases.

1. The instruction violated the express requirements of § 903.03.

Section 903.03 governs “[p]resumptions in criminal cases” and is applicable to all “presumptions against an accused,” whether “recognized at common law or created by statute.” § 903.03(1), Wis. Stats. Section 903.03 provides that “[t]he judge is not authorized to direct the jury to find a presumed fact against the accused.” § 903.03(2), Wis. Stats. The statute requires, without qualification, that “[w]henver the existence of a presumed fact against the accused is submitted to the jury, the judge *shall give* an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact *but does not*

require it to do so.” § 903.03(3), Wis. Stats. (emphasis added); *see also* WI JI-CRIMINAL 225.

No such limiting instruction was given in connection with this “dishonest advantage” presumption. Rather, the instruction unequivocally directed jurors that if they determined that a “state resource” was used to “promote a candidate in a political campaign or to raise money for a candidate,” then the candidate obtained a “dishonest advantage.” This was fundamental error. *See, e.g., Dyess*, 124 Wis. 2d at 534-40; *Harvey*, 254 Wis. 2d at 457-59, ¶¶ 31-34.

The Court made clear in *Dyess* that “[t]he strictures of sec. 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 the Wisconsin law.” 124 Wis. 2d at 535. Thus, in *Dyess*, the Court reversed a conviction for negligent homicide based on an erroneous instruction directing that driving in excess of the posted speed limit constitutes a “negligent speed.” *Id.* at 531.

Dyess emphasized the importance of strict adherence to the requirements of § 903.03 in order to preserve the trial rights of the accused:

It is apparent that a reviewing court cannot say that the loss of a jury right on a crucial issue guaranteed by the rules is of so little consequence as to be insubstantial. Section 903.03(3) guarantees to criminal defendants that all presumptions used will have a permissive effect only – that only the jury can find the presumed fact upon the inferences from basic facts which themselves must be proved to the jury beyond a reasonable doubt. This court cannot ignore its own rules and conclude that the deprivation of a substantial procedural and statutory right caused by faulty jury instructions did not, to a degree of reasonable possibility, contribute to the verdict of guilty.

Id. at 548.

The Court also clarified the broad scope intended by § 903.03 in two important respects. First, *Dyess* rejected the State’s attempts to restrict the reach of the statute to strictly “factual conclusions.” The Court instead held that “the restrictions

in that rule apply to all presumptions sought to be used in criminal cases. No exceptions to the rule have been sanctioned on the basis that the matter to be presumed is legal rather than factual in nature.” *Id.* at 537.³

Second, *Dyess* rejected arguments that the statutory requirements of § 903.03 are limited only to “the presumptive determination of the ‘elements’ of a crime and not upon other facts.” *Id.* at 538. The Court held that “903.03(3), Stats., makes no distinction between presumptions . . . as to facts with a ‘lesser effect’ with respect to the requirement that the jury be instructed only as to the permissive inference that may be drawn from basic facts believed beyond a reasonable doubt.” *Id.* at 539. Accordingly, the fact that “dishonest advantage” is a component of the intent element does not alter the prohibition against a mandatory presumption directing that specified factual conduct constitutes a “dishonest advantage.”

To comply with § 903.03, the instruction was required to inform the jury that if it found that state resources were used to promote a candidate in a political campaign or to raise money for a candidate, it *could* regard that fact as sufficient to establish a dishonest advantage “but it was not required to do so.” *Id.*; *see also* WI JI-CRIMINAL 225. This was not done. Instead, the instruction “required the jury to find the presumed fact [a dishonest advantage] on the evidence of the basic facts [use of state resources to promote a candidate or raise money for a candidate]. This was in violation of the rule . . .” *Dyess*, 124 Wis. 2d at 540.

2. The mandatory presumption was unconstitutional.

Where an instruction is found to violate § 903.03, the Court need not reach the constitutional errors presented by the presumption. *See Dyess*, 124 Wis. 2d at 533. However, it bears emphasis that this presumption also violated Jensen’s constitutional rights. *See, e.g., Carella*, 491 U.S. at 266 (citing

³ The “dishonest advantage” presumption requires factual, rather than legal inference – whether use of state resources was intended to create a “dishonest advantage” is inherently context-specific. At most, as with questions of “materiality,” the issue is one involving a mixed question of law and fact required to be submitted to the jury. *See, e.g., United States v. Gaudin*, 515 U.S. 506, 512 (1995); *State v. Smith*, 2005 WI 104, ¶ 11, 283 Wis. 2d 57, 65-66, 699 N.W.2d 508.

cases); *Francis*, 471 U.S. at 314; *Sandstrom*, 442 U.S. at 520; *Harvey*, 254 Wis. 2d at 450-51, ¶¶ 19-20; *Kuntz*, 160 Wis. 2d at 736-37.

Wisconsin courts have been especially vigilant in adhering to the constitutional prohibition against presumptions in criminal cases. See *Harvey*, 254 Wis. 2d at 456-57, ¶ 29 (instruction that “Penn Park” was a “city park” was erroneous mandatory presumption); *Kuntz*, 160 Wis. 2d at 737-38 (instruction that “[a] mobile home is a building” was erroneous mandatory presumption); *State v. Draughon*, 2005 WI App 162, ¶¶ 13-21, 285 Wis. 2d 633, 641-45, 702 N.W.2d 412 (instruction that member of clergy was a “therapist” held unconstitutional); *State v. Tomlinson*, 2002 WI 91, ¶ 62, 254 Wis. 2d 502, 536, 648 N.W.2d 367 (instruction that “[a] dangerous weapon is a baseball bat” was erroneous mandatory presumption); *State v. Leist*, 141 Wis. 2d 34, 37-40, 414 N.W.2d 45 (Ct. App. 1987) (instruction that “Declaration of Land Patent” document was “frivolous” was erroneous mandatory presumption), *overruled on other grounds by Harvey*, 254 Wis. 2d at 459, ¶ 35 n.10.

Here, the instruction did not merely attempt to *define* the term “dishonest advantage,” it instead directed *as a matter of law* that certain factual conduct constitutes a “dishonest advantage.” That violates basic rights to trial by jury and due process. While “it is within the province of a trial court to *define* an element for the jury’s enlightenment. . . . It is not within the province of the trial court . . . to determine as a matter of law that certain facts before the jury fit within the given definition. In that situation, the trial court is applying the facts to the law, thus invading the province of the jury.” *Leist*, 141 Wis. 2d at 37-38. To be proper, the instruction should have defined the meaning of “dishonest advantage,” but not directed conclusions regarding whether specified conduct constituted a “dishonest advantage.” See *Kuntz*, 160 Wis. 2d at 738 (“The analogous situation in this case would have been for the circuit court to define ‘building,’ but not make its own conclusions as to what types of structures are buildings. Whether a certain structure is a ‘building’ is a question of fact that the jury alone must decide.”).

The State asserted that the “dishonest advantage” presumption was compelled by the rulings in *Chvala* and *Jensen*. (App. 49-50.) That was error in two respects. First, as discussed more fully *infra*, the statement “[t]he use of a state resource to promote a candidate in a political campaign . . . provides to that candidate a dishonest advantage” does not appear in either

appellate decision and misstates the law. Second, and more fundamentally, even if the statement had appeared, it would not authorize this instruction. The *Chvala* and *Jensen* opinions addressed whether the statute was unconstitutionally vague as applied, using the objective “reasonable person” standard that governs such determinations – the Court was in no manner directing or authorizing jury instructions or otherwise resolving the issue of Jensen’s specific intent.

By analogy, there is little doubt that if a threshold vagueness challenge had been advanced with respect to criminal statutes at issue in *Harvey*, *Kuntz*, *Tomlinson* and *Leist*, the Court would have rejected the challenges on grounds that a reasonable person would be on fair warning that “Penn Park was a city park,” that “[a] mobile home is a building,” that a “dangerous weapon is a baseball bat” when intentionally swung at the head, and that a “Land Patent” may be a “frivolous document.” Nonetheless, all such statements constitute erroneous mandatory presumptions when included in a jury instruction. So too, nothing in the prior decisions in this or the *Chvala* case authorize mandating to the jury in a criminal prosecution that “the 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.” The inclusion of the mandatory presumption was constitutional error.

D. The Presumption Impermissibly Altered The Statutory Specific Intent Requirement.

The “dishonest advantage” presumption altered the statutory *mens rea* standard and diluted the State’s burden on the “critical question of [the defendant’s] state of mind.” *Sandstrom*, 442 U.S. at 521; *see also Francis*, 471 U.S. at 326.

The effect of the State’s requested instruction is straightforward: the jury was required only to find that Jensen intended the use of a “state resource to promote a candidate in a political campaign or to raise money for a candidate” without requiring that the State prove beyond a reasonable doubt that such actions were undertaken by him with the specific purpose 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.”).

The State well-understood that this was the impact of the presumption. Indeed, the State *specifically argued* before the trial court that, in accordance with the presumption, the defendants could *only* “attempt to show that they did not intend to use state employees or resources to engage in the campaign activity defined by the Court of Appeals.” (App. 61.) In this manner, the form of instruction accepted by the court impermissibly converted the *specific intent* statutory requirement that the defendant act with the purpose to “obtain a dishonest advantage” into a *general intent* crime requiring only that the defendant intend “the *actus reus*” that state resources be used to “promote a candidate” or “to raise money for a candidate.” LaFave, *supra*, at 354.

Section 946.12(3) does not create a crime for public officials who knowingly use state resources to “promote a candidate.” Rather, as set forth above, the statute explicitly requires both the exercise of a discretionary power in a manner inconsistent with the duties of office *and* that the defendant subjectively intend to “obtain a dishonest advantage” thereby. Under this instruction, jurors were precluded from independently determining that even if Jensen may have knowingly directed the use of state resources to “promote a candidate,” he did not specifically intend to obtain a “dishonest advantage.” In essence, the instruction collapsed the third and fourth elements of the offense – directing that the jury find that the defendant acted with the intent to obtain a dishonest advantage if he knowingly committed an act inconsistent with his duties of office. *See generally Francis*, 471 U.S. at 316 (“The portion of the jury charge challenged in this case directs the jury to presume an essential element of the offense – intent to kill – upon proof of other elements of the offense – the act of slaying another. In this way the instructions ‘undermine the factfinder’s responsibility at trial, based on evidence adduced by the State, to *find* the ultimate facts beyond a reasonable doubt.’” (citations omitted)). Indeed, the misconduct instruction given to the jurors here contained impermissible presumptions with respect to *each* element of the crime. (R.223:46-48.) The net effect of these improper presumptions was that a guilty verdict was directed if the jury found only that Jensen used state resources to “promote” a candidate.

In this respect, the instruction “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*, 544 U.S. at 706. In *Arthur Andersen*, the instruction undermined the statutory *mens rea* such

that “the ‘corruptly’ instructions did no limiting work whatsoever.” *Id.* Here too, the mandatory presumption eviscerated the “limiting work” that the “dishonest advantage” *mens rea* would otherwise perform in this specific intent crime. This is inconsistent with the express requirements of the criminal statute and constitutes fundamental error.

The Supreme Court has long instructed that the judiciary is not free to alter statutory *mens rea* requirements by engrafting its own construction of “the incriminating components contemplated by the words used in the statute.” *Morissette*, 342 U.S. at 263. Similarly, the fact that *the Court* may view it as incontrovertible that the evidence demonstrates an intent to obtain a “dishonest advantage” does not matter. *Id.* at 274. “[H]owever incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury.” *Id.* (citation omitted). The Constitution unequivocally vests such determinations in criminal cases with the jury. “[J]uries are not bound by what seems inescapable logic to judges.” *Id.* at 276.

Where, as here, the effect of the jury instruction alters the fundamental nature of the elements of the crime, reversible constitutional error occurs. *See, e.g., Draughon*, 285 Wis. 2d at 642, ¶ 14. The fact that Jensen did not intend to obtain a “dishonest advantage” from his conduct was a cornerstone of the defense. Regardless of one’s views regarding the impropriety of the use of state resources for political activity of any kind, the State was required to prove each factual element of the crime ***with which Jensen was charged***. Given the “dishonest advantage” specific intent element of § 946.12(3), Jensen was thus entitled to have the State prove beyond a reasonable doubt, and the jury assess independently, whether ***he intended*** not only the *actus reus* that state resources be used to “promote a candidate,” but that he did so with the specific mental purpose of thereby obtaining a “dishonest advantage.” The instruction deprived Jensen of this fundamental right.

This alteration of the statutory *mens rea* requirement by the trial court also violates the fundamental precept that “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.” *United States v. Bass*, 404 U.S. 336, 348 (1971).

E. The Jury Instruction Misstated the Law And Rendered Application of the Statute Unconstitutional.

In addition to containing an impermissible presumption that altered the required findings of the jury, the intent element also misstated the law.

The presumption in the instruction was in the disjunctive form: “The use of a state resource to promote a candidate in a political campaign *or* to raise money for the candidate, provides to that candidate a dishonest advantage.” Given this disjunctive form, the jury was entitled to convict Jensen of misconduct in public office if it found that he intended by his actions to “use a state resource to promote a candidate in a political campaign.” That, however, is a proposition unsupported by Wisconsin law and unconstitutional in application.

The State repeatedly invoked *Jensen* and *Chvala* in support of the “dishonest advantage” presumption. (*E.g.*, App. 49-50, 59-60; R.222:72.) Significantly, however, the statement “use of a state resource to promote a candidate in a political campaign . . . provides to that candidate a dishonest advantage” appears nowhere in either decision.⁴ Nor does any other decision in Wisconsin jurisprudence support the statement.

This is for good reason. Neither *Jensen* nor *Chvala* supports the notion that merely “promoting” a candidate using state resources, *ipso facto*, constitutes a “dishonest advantage.” Those decisions did not consider the “dishonest advantage” presumption accepted by the trial court. Rather, those decisions focused their analysis on the issue of whether the complaints as applied to the criminal statute “adequately delineate[] the duty . . . allegedly violated” and whether there was a constitutionally adequate distinction between “‘legislative activity’ and ‘political activity.’” *E.g.*, *Jensen*, 272 Wis. 2d at 720-21, 732, ¶¶ 11, 36. The Court carefully narrowed the reach of the statute to avoid those constitutional challenges.

⁴ A computer search confirms that the word “promote” was used only once in each opinion and neither usage remotely supports this instruction. *See Jensen*, 272 Wis. 2d at 730, ¶ 32; *State v. Chvala*, 2004 WI App 53, ¶ 63, 271 Wis. 2d 115, 678 N.W.2d 880

In this respect, the Court specifically agreed with the reasoning of then Circuit Court Judge (now Justice) Ginsberg in *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995):

[T]he life of a congressman – as incumbent legislator and perpetual candidate for office, whose official day ends only after a round of nominally “social” events at which he is obligated to appear, and whose weekends and holidays are only an opportunity to reconnect with his constituents – makes the line between “official work” and “personal services” particularly difficult to draw.

This observation applies with equal force to Jensen as Speaker of the Assembly.

In accordance with this analysis, the Court in *Chvala* differentiated between those activities that were wholly “political” and could not be construed to constitute legitimate “legislative” activities and those activities that could be both “legislative” and “political.” Conduct that could potentially constitute “legislative” activity was deemed to be beyond the reach of § 946.12(3). For instance, the Court held that “opposition research” conducted by staff members “does not allege a justiciable violation of Wis. Stat. § 946.12(3).” *Chvala*, 271 Wis. 2d at 153, ¶ 58. The Court also held that caucus staff monitoring a targeted senator’s activities would not violate this statute. *Id.* at 156, ¶ 64.

Thus, although the Court held a reasonable person would be aware that using discretionary powers to “wag[e] partisan political campaigns” or “engage in political campaign activity” could violate the statute (*Jensen*, 272 Wis. 2d at 728-29, ¶ 29; *Chvala*, 271 Wis. 2d at 136, ¶ 19), the Court also differentiated between those activities which were without doubt “political” and those activities that could be both “legislative” and “political.” Nothing in *Jensen* or *Chvala* states, or suggests, that the mere use of state resources to “promote” a candidate violates the statute or conclusively establishes a “dishonest advantage.”

Moreover, the term “promote” as used in the instruction is hopelessly ambiguous. By loosely employing the word “promote” without any narrowing definition, the instruction allowed jurors to find that otherwise authorized and proper legislative activities constitute a “dishonest advantage.” Candidates can be “promoted” through any number of legitimate uses of state resources. Indeed, the Director of the Assembly Republican Caucus testified about a

number of state-authorized activities enumerated in the official Caucus guide manual, (R.175:Exh. 101), that served the goal of “promoting the individual candidate to get re-elected.” (R.209:128-135.) These activities included, *inter alia*, “develop custom constituent databases,” “assist in all list management activities,” “coordinate the collection and formatting of poll list databases,” “provide targeted mailing lists, example hunters, farmers,” “coordinate state wide press activities,” and “feeding taped quotes and shows to radio stations,” and “redistricting.” *Id.* Jensen also testified regarding “legislative” activities that similarly “promoted” candidates in political campaigns. For instance, Jensen testified that legislative staffs:

design[ed] a plan to make sure that at their legislative offices they were doing things they need to do in order to get themselves re-elected; getting their newsletters out, getting themselves on the news in the local papers, getting a column in their weeklies.

(R.220:42-43.) There are further examples throughout the record. Numerous witnesses attested to the unexceptional reality that official legislative work and the “promotion” of candidates are often inextricably intertwined. (R.201:228-29; R.209:128-134; R.218:45, R.220:58,78.)

In this light, use of the ambiguous phrase “promote a candidate in a political campaign” is not only unsupported by the *Jensen* and *Chvala* decisions, but is also inconsistent with the stated purpose of those decisions to ensure that otherwise authorized legislative activities did not fall within the ambit of § 946.12(3).

The unsupported use of the ambiguous term “promote” in the jury instruction rendered application of the statute unconstitutional. Protecting the rights and duties of the legislature, a coequal coordinate branch of government, from incursions by the other branches, requires, at a minimum, narrow as opposed to broad standards of prohibited conduct. The definition of “dishonest advantage” must therefore be narrowly defined to prevent reaching activities that may be legislative. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 41-44 (1976); *Elections Bd. v. WMC*, 227 Wis. 2d 650, 676-80, ¶¶ 30-32, 597 N.W.2d 721 (1999). *Chvala* and *Jensen* attempted to specifically limit the reach of the statute by differentiating between those activities which were exclusively “political” and those which could be both “legislative”

and “political.” The broad and undefined use of the ambiguous term “promote” undid those limitations and thereby rendered application of the statute violative of the principles of vagueness, fair notice, due process, and separation of powers previously advanced.⁵

Finally, even if the *Jensen* and *Chvala* decisions contained the “dishonest advantage” statement incorporated in the instruction (they do not), or were somehow construed to endorse the statement, 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 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 536-37.

F. The Court Erred In Failing To Define “Dishonest Advantage” To Require Corrupt Intent.

The trial court further misstated the law when it refused to instruct the jury that “[t]o act with the intent to obtain a dishonest advantage is to act ‘corruptly.’” (R.109:3.)

The sole reason offered by the trial court for rejecting this clarification was that, “I don’t believe that corrupt, the language corrupt is found anywhere in the statute or the jury instruction and I’m not going to include the language of corrupt.” (R.198:66.)

However, in *Tronca*, the Wisconsin Supreme Court explicitly stated that a defendant is guilty of misconduct under the statute only if he is found to have acted “with intent to obtain a dishonest advantage for himself or another, *that is, “corruptly”*.” 84 Wis. 2d at 76-77 (quoting Judiciary Committee Report) (emphasis added).

There was no valid basis in law for denying the request for this clarification. “Where . . . the guilt or innocence of the defendant depends upon the question of intent, and instructions are

⁵ Accordingly, *Jensen* also expressly preserves all arguments regarding the unconstitutionality of the statute as applied, including those on which the Supreme Court was evenly divided.

properly requested upon that subject, they should be given, and it is error to refuse them.” *State v. Essex*, 170 Wis. 512, 514, 175 N.W. 795 (1920).

Failure to give a “corrupt intent” instruction – instructing the jury “that the accused had engaged in this transaction with a guilty mind” – constitutes “prejudicial error and necessitates a new trial.” *State v. Alfonsi*, 33 Wis. 2d 469, 478, 147 N.W.2d 550 (1967).

II. Jensen Was Deprived Of A Meaningful Opportunity To Present A Complete Defense.

The instructional error on “dishonest advantage” was compounded by the Court’s preclusion of evidence directly relevant to Jensen’s specific intent. *See generally State v. St. George*, 2002 WI 50, ¶ 14 n.8, 252 Wis. 2d 499, 513, 643 N.W.2d 777 (“[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.” (citations omitted)).

Whether a defendant has been denied the constitutional right to present evidence in his or her defense “is a question of ‘constitutional fact’” subject to *de novo* review. *St. George*, 252 Wis. 2d at 514, ¶ 16.

“The confrontation and compulsory process clauses of the Sixth Amendment of the U.S. Constitution and Article I, Section 7 of the Wisconsin Constitution ‘grant defendants a constitutional right to present evidence.’” *Id.* ¶ 14; *see also Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *State v. Stutesman*, 221 Wis. 2d 178, 182, 585 N.W.2d 181 (Ct. App. 1998); *State v. Pulizzano*, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990).

“The opportunity to be heard includes the right to ‘present a complete defense.’ The right to present a complete defense, in turn, includes the right to offer the testimony of witnesses.” *Brown County v. Shannon R.*, 2005 WI 160, ¶ 65, 286 Wis. 2d 278, 311, 706 N.W.2d 269. Although the right to present a defense is “subject to reasonable restrictions,” the preclusion of such evidence is unconstitutional where it “significantly undermine[s] fundamental elements of the defendant’s defense.” *State v. Shomberg*, 2006 WI 9, ¶ 35, 288 Wis. 2d 1, 29, 709 N.W.2d 370 (citations omitted).

This “right to ‘present a complete’ defense” rests at the very core of constitutional criminal process. As recently summarized by Justice Butler:

At a minimum, criminal defendants have ‘the right to put before the [trier of fact] evidence that might influence the determination of guilt.’ Few rights are more fundamental. This right is an essential attribute of the adversary system itself.

Shomberg, 288 Wis. 2d at 57, ¶ 75 (Butler, J. dissenting) (citations omitted); *see also Taylor v. Illinois*, 484 U.S. 400, 408 (1988); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Pulizzano*, 155 Wis. 2d at 645 (noting that the right is “fundamental and essential to achieving the constitutional objective of a fair trial”).

The right to present evidence on the issue of “intent,” and to provide the corroborating circumstances that explain one’s understandings and beliefs is a fundamental precept of a constitutional and fundamentally fair criminal trial. In short, “defendants in criminal cases are permitted to offer evidence as to what their intent was in the doing of a particular act.” *Essex*, 170 Wis. at 514. The Supreme Court has made clear that criminal intent is to be determined by the jury based upon “all of the surrounding circumstances.” *Morissette*, 342 U.S. at 276; *see also Cheek*, 498 U.S. at 203 (noting constitutional error in “forbidding the jury to consider evidence that might negate willfulness” because “[k]nowledge and belief” are for the jury).

Thus, a criminal defendant is entitled to present evidence of custom and practice to place “in context” his “state of mind” when engaging in the conduct in question and “to complete the story of the crime on trial.” *United States v. Sheffield*, 992 F.2d 1164, 1170 (11th Cir. 1993) (finding reversible error where defendant accused of embezzlement for ordering subordinates to manufacture personal fishing equipment on government time was precluded from introducing evidence of “base practice of making authorized retirement gifts”).

When a defendant is deprived of the right to present evidence relevant to disproving specific intent, reversible constitutional error occurs. *See, e.g., id.; Brown v. Israel*, 449 F. Supp. 1029, 1031-32 (E.D. Wis. 1978); *Brown County*, 286 Wis. 2d at 314, ¶ 72.

The central issue in this trial was whether Jensen acted with the specific intent to obtain a “dishonest advantage.” As set forth above, the cornerstone of Jensen’s belief that the activities did not constitute a “dishonest advantage” were two-fold: (1) the activities were consistent with long-standing practices within the Assembly; and (2) the activities were not intended to create an “advantage” because it was well-known and understood that “mirror image” activities were undertaken by the ADC. (R.138; R.143; R.168.) Not only was Jensen barred from presenting several witnesses to establish and corroborate both of these propositions, but the trial court precluded Jensen himself from discussing his understanding of the activities of Democrats regarding contested campaigns. (R.220:109-10.)

The State never contested that the offers of proof demonstrated that both propositions were accurate and could be established by Jensen. Instead, the State asserted that the evidence was not “relevant to the issue of intent” based on the State’s erroneous instruction and its assertion that “by definition” “[t]he use of a state resource to promote a candidate in a political campaign or to raise money for the candidate, provides to that candidate a dishonest advantage.” (App. 49.)

To show Jensen’s belief that the activities were not intended to obtain a “dishonest advantage,” *the* most salient facts were his understanding that the practices were long-standing and his understanding that the practices were engaged in by *both* caucuses. Irrespective of one’s views on the impropriety of the use of state resources for any form of “promot[ing] a candidate in a campaign,” there can be no legitimate dispute that such evidence was squarely relevant to the issue of whether Jensen could hold the belief that the use of state resources for the activities at issue was neither “dishonest” nor conferred an “advantage.” A jury could reasonably conclude that although the use of state resources for the political activities in question might be “inconsistent with the duties of office,” Jensen nonetheless did not have the requisite mental purpose to obtain a “dishonest advantage.” The jury could have concluded that Jensen (whether rightly or wrongly) intended to simply maintain a level playing field and to not compromise the position of his party given his understanding of the past and current practices of both caucuses.

The jury, however, was not allowed to hear this relevant evidence, nor, by virtue of the erroneous jury instruction, permitted to consider that Jensen could have knowingly directed the use of state resources but not have intended to obtain a “dishonest

advantage” by doing so. Indeed, the prejudice in excluding such evidence was exacerbated by the closing argument of the prosecutor. Despite having successfully precluded Jensen from introducing evidence regarding his accurate understanding that opposing candidates had similar resources available to them by virtue of the activities of the ADC, the prosecutor (without having introduced evidence supporting the proposition) argued to the jury that the opposing candidates in Jensen’s elections did not have state resources available to them. (R.224:52-53, 78-79.)

Denying Jensen the right to present the “surrounding circumstances” that informed his mental state so that jurors could fairly evaluate his “intent” was a fundamental error that deprived him of basic constitutional rights.

III. Due To The Errors In The Instruction and The Preclusion of Evidence Relevant To Specific Intent, Jensen Was Deprived Of A Fair Trial And The Real Controversy Was Not Fully Tried.

Individually, each of these errors requires reversal and remand for a new trial; considered collectively, as required by law, the confluence of errors rendered the trial fundamentally unfair and the real controversy in this case – namely, Jensen’s specific intent – not fully tried. Accordingly, reversal is mandated.

A. Each Error Individually Requires Reversal.

1. The mandatory presumption error requires a new trial.

Errors which compromise the “critical question of intent in a criminal prosecution” infringe upon core constitutional precepts of the criminal process and thus are of special concern. *Francis*, 471 U.S. at 326; *see also Arthur Andersen*, 544 U.S. 696; *Sandstrom*, 442 U.S. at 520; *McCormick*, 500 U.S. at 270; *Morissette*, 342 U.S. at 274. As stated by Justice Blackmun in *Connecticut v. Johnson*, 460 U.S. 73 (1983): “To allow a reviewing court to perform the jury’s function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society’s interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made.” *Id.* at 85-86 (Blackmun J., plurality).

So too, the Wisconsin Supreme Court emphasized in *Dyess* that an erroneous presumption regarding a contested issue central to the defense is necessarily prejudicial and mandates reversal. 124 Wis. 2d at 546-47 (“To err in that particular – in respect to the defense upon which [the Defendant] based his case – is almost *ipso facto* prejudicial.”) See also *Draughon*, 285 Wis. 2d at 643, ¶ 18 (noting that the “improper instruction . . . particularly affected [the defendant’s] ability to present his defense”); *Kuntz*, 160 Wis. 2d at 730 (noting that it is a “rare situation” in which a conclusive presumption in a criminal case could be construed as “harmless error”).

Accordingly, the erroneous mandatory presumption regarding the “dishonest advantage” component of the intent instruction requires reversal.

2. The misstatements of law in the instruction require a new trial.

Where there are alternate theories of guilt, “the Court consistently has followed the rule that the jury’s verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching its verdict.” *Mills v. Maryland*, 486 U.S. 367, 376 (1988); *Stromberg v. California*, 283 U.S. 359, 367-68 (1931).

Although the *Stromberg* principle does not apply to challenges based on sufficiency of the evidence, it remains applicable where, as here, there is a general verdict involving alternate theories of guilt, there exists an error of law in one of those theories, and it is impossible to tell on which theory the jury rendered its verdict. *Griffin v. United States*, 502 U.S. 46, 59 (1991).

Wisconsin follows this principle. *State v. Frey*, 178 Wis. 2d 729, 746, 505 N.W.2d 786 (Ct. App. 1993) (“Because the general guilty verdict is supportable on one ground, but not on the other . . . we must set the verdict aside and remand the matter for a new trial.”).

The “dishonest advantage” instruction was presented in the disjunctive and the “promote” prong is both an error of law and a constitutional violation. There is no valid basis to determine upon which prong the verdict rested. Accordingly, reversal is required.

3. The preclusion of evidence relevant to the defense requires a new trial.

“Where the exclusion of evidence deprives a criminal defendant of the constitutional right to present a defense, the harmless error rule is inapplicable.” *Pulizzano*, 155 Wis. 2d at 655-56; *Stutesman*, 221 Wis. 2d at 187-88; *Shomberg*, 288 Wis. 2d at 61, ¶ 83 (Butler, J., dissenting). Thus, where, as here, “[t]he ruling prevented the defendant from producing relevant evidence that would tend to negate an inference of guilt” the “function on appeal is not to determine whether the jury ultimately will accept the veracity of such evidence.” *State v. Mordica*, 168 Wis. 2d 593, 608-09, 484 N.W.2d 352 (Ct. App. 1992) (citations omitted).

Accordingly, the erroneous exclusion of evidence relevant to Jensen’s defense requires a new trial.

B. The Combination of Errors Deprived Jensen of a Fair Trial and Prevented The Real Controversy From Being Tried.

The errors committed by the trial court, at the State’s urging, on the intent instruction and in excluding evidence relevant to Jensen’s intent combined to deprive Jensen of the right to defend himself against the specific felony with which he was charged. The real controversy in this case was whether Jensen acted with the specific intent required to be convicted of the felony offense of Misconduct in Office. Due to the errors below, “the real controversy has not been fully tried.” *Shomberg*, 288 Wis. 2d at 30, ¶ 38. Accordingly, reversal is also warranted on this independent ground. *Id.*; see also *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

CONCLUSION

Wherefore, Scott Jensen respectfully requests that his conviction be reversed and the case be remanded for retrial.

Respectfully submitted this _____ day of November, 2006.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), Wis. Stats., for a brief produced with a proportional serif font. The length of the brief is 10,781 words.

Dated at Milwaukee, Wisconsin this 8th day of November, 2006.

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CERTIFICATION OF MAILING

I hereby certify that on this 8th day of November, 2006, pursuant to § 809.80(3)(b) and (4), Wis. Stats., the original and nine (9) copies of the Brief and Appendix of Defendant-Appellant were served upon the Wisconsin Court of Appeals via first-class mail. Three (3) copies of the same were served upon counsel of record via first-class mail.

Dated at Milwaukee, Wisconsin this 8th day of November, 2006.

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