

STATE OF WISCONSIN  
COURT OF APPEALS - DISTRICT IV

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STATE OF WISCONSIN

Plaintiff-Respondent,

v.

Appeal No. 2006 AP 2121

SHERRY L. SCHULTZ,

Defendant-Appellant.

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APPEAL FROM A JUDGMENT OF CONVICTION ENTERED ON  
MAY 16, 2006, IN DANE COUNTY CIRCUIT COURT,  
CASE NO. 2002 CF 2455 THE HONORABLE STEVEN EBERT, PRESIDING

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BRIEF OF DEFENDANT-APPELLANT  
SHERRY L. SCHULTZ

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**STATEMENT OF THE ISSUES**

Issue #1: Did the trial court present a jury instruction relating to a "dishonest advantage" to the jury that violated Schultz' constitutional rights?

Trial Court's Determination: The trial court ruled that the jury instruction was proper.

Issue #2: Did the trial court present a jury instruction relating to Schultz' duties to the jury that violated Schultz' constitutional rights?

Trial Court's Determination: The trial court ruled that the jury instruction was proper.

Issue #3: Did the trial court present a jury instruction to the jury that violated Wis. Stat. § 903.03(3)?

Trial Court's Determination: The trial court ruled that the jury instruction was proper.

Issue #4: Did the trial court erroneously exercise its discretion when it determined Schultz' probation conditions?

Trial Court's Determination: The trial court determined that Schultz' probation conditions were proper.

**STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

This case presents novel issues regarding the constitutional rights of the accused in connection with jury instructions and presents questions of substantial statewide importance. Oral argument should be granted and the decision of the Court should be published.

**STATEMENT OF THE CASE**

On October 18, 2002, Sherry L. Schultz was named, along with Scott R. Jensen, Steven M. Foti and Bonnie L. Ladwig, in a 5 count criminal complaint. (R.1, p. 2-3). Schultz was charged with 1 count of Misconduct in Public Office in violation of Wis. Stat. § 946.12(3). *Id.*

The complaint was the subject of a pre-trial interlocutory review. *See State v. Jensen*, 2004 WI App. 89, 272 Wis. 2d 707, 681 N.W.2d 230. This Court rejected various constitutional challenges to the complaint based on vagueness, overbreadth, separation of powers and sufficiency grounds. *Id.*

The Wisconsin Supreme Court granted review and, with only 4 justices sitting, split 2-2 on the issue of whether the Misconduct statute violated due process, fair notice and vagueness as applied. *State v. Jensen*, 2005 WI 31, ¶ 2, 279 Wis. 2d 220, 221, 694 N.W.2d 56. Thus, this

Court's previous decision stood and the case proceeded to trial.

The focal issue for trial was whether Schultz acted inconsistent with the duties of her employment and with the requisite specific intent to "obtain a dishonest advantage" as required by Wis. Stat. § 946.12(3). (R. 170; pp. 45-53; A-App. 109-117).

Before trial, the trial court adopted jury instructions proposed by the State defining the elements of the Misconduct charge. (R. 170; pp. 62-69; A-App. 126-133). Schultz objected to the jury instructions on grounds that the instructions contained impermissible findings of fact that relieved the State of proving, beyond a reasonable doubt, each element of the charge. (R. 170; pp. 45-47; A-App. 109-111). Schultz also argued that an additional modification to the intent instruction was required to apply the language of *State v. Tronca*, 84 Wis. 2d 68, 76-77, 267 N.W.2d 216, 220 (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. 170; p. 41; A-App. 105; R. 190, pp. 71-72; A-App. 161-162).

On February 3, 2006, the Court allowed the State's proposed jury instructions without the Tronca language. (R. 170; p. 62; A-App. 126) ("It's my belief, my view of the law that the State has presented the correct jury instruction with regard to the Misconduct in public office.").

On February 21, 2006, the trial commenced and proceeded consistent with the pretrial rulings. (R. 186, p. 2).

At the close of the State's case, Schultz made a motion to dismiss the charge. The trial court ruled 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. 187, p. 13). However, no testimony regarding the resources actually "available to other candidates" was offered by the State. Defense evidence regarding the fact that the same resources were available to opposing candidates was precluded by the Court. (R. 170; pp. 57-62; A-App. 121-126).

At the instruction conference the day before closing arguments, the defendants restated their objections to the State's intent instruction. (R. 190, pp. 44-96; A-App. 134-186). In addition, the defense objected to new

language that the State proposed for the intent instruction, but the trial court incorporated the new language into the instruction. (R. 190, pp. 75-79; A-App. 165-169). The trial court rejected the defense arguments and reiterated its pre-trial rulings. *Id.*

On March 11, 2006, Schultz was found guilty of one count of felony Misconduct in Public Office in violation of Wis. Stat. § 946.12(3). (R. 194).

At the sentencing proceedings on May 16, 2006, the Honorable Steven D. Ebert withheld sentence, placed Schultz on probation with conditions that she be confined for 4 months with electronic monitoring, ordered that she not enter the Capitol grounds for 5 years and ordered payment of attorneys' fees previously paid by the State Assembly without specifying the amount. (R. 195, pp. 24-28; R. 154, p. 1; A-App. 101). In addition, the trial court ordered restitution in an amount to be determined at a later date. *Id.*

On August 29, 2006, Schultz filed the present appeal challenging her conviction. Other facts will be incorporated as necessary with the arguments.

### STANDARD OF REVIEW

The Court will employ a de novo review in determining whether a jury instruction deprived a defendant of his or her constitutional right to due process. *State v. Tomlinson*, 2002 WI 91, ¶ 53, 254 Wis. 2d 502, 533, 648 N.W.2d 367, 382.

A de novo standard of review is also applied to questions concerning the interpretation and application of a statute. *Anderson v. MSI Preferred Ins. Co.*, 2005 WI 62, ¶ 18, 281 Wis. 2d 66, 79, 697 N.W.2d 73, 80; *Chernetski v. American Family Mut. Ins. Co.*, 183 Wis. 2d 68, 72, 515 N.W.2d 283, 285 (Ct. App. 1994).

The Court will examine whether the trial court erroneously exercised its discretion imposing probation conditions. *State v. Oakley*, 2001 WI 103, ¶ 13, 245 Wis. 2d 447, 461, 629 N.W.2d 200, 206.

### ARGUMENT

#### **I. THE JURY INSTRUCTIONS VIOLATED SCHULTZ' CONSTITUTIONAL AND STATUTORY RIGHTS**

Wis. Stat. § 946.12(3) provides that any public officer or public employee who does the following is guilty of a Class I felony:

Whether by act of commission or omission, in the officer's or employee's capacity as such officer

or employee exercises a discretionary power in a manner inconsistent with the duties of the officer's or employee's office or employment or the rights of others and with intent to obtain a dishonest advantage for the officer or employee or another.

Wis. Stat. § 946.12(3). Thus, to prove "misconduct in public office," the State must prove: (1) Schultz was a public official; (2) Schultz committed an act of commission or omission within her 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." Wis. Stat. § 946.12(3) and Wis. JI - Criminal § 1732 (1990).

When instructing the jury on the Misconduct charge, the judge stated as follows:

Misconduct in public office, as defined in Sec. 946.12(3) of the Criminal Code of Wisconsin, is committed by one who is a public officer or public employee and who, in his or her capacity as such officer or employee, exercises a discretionary power in a manner inconsistent with the duties of his or her office or employment and with intent to obtain a dishonest advantage for himself or another. Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present for each offense charged.

The first element requires that at the time of the alleged offense, the defendant was a public officer or public employee. A Wisconsin state

representative is a public officer; an employee of a state representative is a public employee.

The second element requires that the defendant, in his capacity as such officer or employee, exercised the discretionary power of his or her office. The defendant may exercise discretionary power either by doing something or by failing to do something. The work performed by a state employee as part of his or her state employment is a state resource. State-owned facilities, office equipment and supplies are state resources. A public officer who directs the use of a state resource to assist in a political campaign exercises a discretionary power in his capacity as a public officer. A public employee who directs the use of or uses a state resource to assist in a political campaign exercises a discretionary power in his or her capacity as a state or as a public employee.

The third element requires that the defendant exercised a discretionary power in a manner inconsistent with the duties of his or her office of employment. It is a state representative's duty to refrain from directing state employees to manage political campaigns and to engage in political activity with state resources. It is a state employee's duty not to use, or direct the use of, state resources for political campaigns. A campaign for the Wisconsin State Assembly is a political campaign. Political activity includes any of the following: Campaign fundraising, the preparation and maintenance of campaign finance reports and candidate recruitment.

The fourth element requires that the defendant exercised such 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 words and acts and statements, if any, bearing upon his intent.

If you are satisfied beyond a reasonable doubt that the defendant was a state representative or state employee and in his or her capacity as such officer or employee the defendant exercised the discretionary power in a manner inconsistent with the duties of his or her office or employment and with the intent to obtain a dishonest advantage for himself or herself or another, you should find the defendant guilty. If you are not so satisfied, you must find the defendant not guilty.

(R. 191, pp. 46-48; A-App. 188-190). (emphasis added).

As explained below, the jury instruction relieved the State of its burden to prove 2 of the 4 elements of the Misconduct charge. The trial judge adopted almost verbatim each of the changes to the standard instruction as was submitted by the State. The jury instruction violated Schultz' constitutional and statutory rights and the conviction must be overturned.

**A. Discussion of Constitutional Law Regarding the Harm Caused by Presumptions in Jury Instructions**

A mandatory conclusive presumption occurs when a Court includes a finding of fact in the jury instructions and directs a jury to accept the finding. *Carella v.*

*California*, 491 U.S. 263, 267, 109 S. Ct. 2419, 2421, 105 L.Ed.2d 218 (1989). These presumptions are unconstitutional because the Fifth Amendment's due process guarantee, applied to the states by operation of the Fourteenth Amendment, protects the accused against conviction unless the State proves every element of the charge beyond a reasonable doubt. *State v. Harvey*, 2002 WI 93, ¶ 22, 254 Wis. 2d 442, 452, 647 N.W.2d 189, 194; *United States v. Gaudin*, 515 U.S. 506, 510-511, 115 S. Ct. 2310, 2313, 132 L.Ed.2d 444 (1995); *Carella*, supra.

Further, the Sixth Amendment right to trial by jury in criminal cases includes, "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Harvey*, 2002 WI 93 at ¶ 22, 254 Wis. 2d at 452, 647 N.W.2d at 194. This means that a judge "may not direct a verdict for the State, no matter how overwhelming the evidence." *Id.*

In *Gaudin*, the defendant was charged with violating 18 U.S.C. § 1001 by making false representations on HUD forms in connection with real estate transactions. *Gaudin*, 515 U.S. at 508, 115 S. Ct. at 2312. The government conceded that the statute was violated only when the false representations go to "material facts." *Id.* at 509, 115 S.

Ct. at 2313. The court determined that "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had the right to have the jury decide materiality." *Gaudin*, 515 U.S. at 511; 115 S. Ct. at 2314.

Similarly, Wisconsin courts have been strict in refusing to approve trial court actions that arguably remove an element from the jury's consideration, even where an element involves largely a "legal" conclusion. See *Harvey*, 2002 WI 93 at ¶ 29, 254 Wis. 2d at 456-457 (instruction that "Penn Park" was a "city park" was an erroneous mandatory presumption); *State v. Draughon*, 2005 WI App. 162, ¶ 13-21, 285 Wis. 2d 633, 641-645, 702 N.W.2d 412, 417-418 (instruction that a 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, 382, 383-384 (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, 46-48 (Ct. App. 1987) *overruled on other grounds by Harvey*, 2002 WI 93 at ¶ 35, n.10, 254 Wis. 2d at 459 (instruction that

"Declaration of Land Patent" document was "frivolous" was erroneous mandatory presumption).

The trial judge incorporated presumptions or findings in 2 elements of the instructions. Both of these findings were mandatory conclusive presumptions that violated Schultz' constitutional rights.

**B. The Judge Inserted Factual Conclusions To The Intent Element Of The Misconduct In Public Office Charge**

The statutory prohibition in Wis. Stat. § 946.12(3) and the standard jury instruction at § 1732, describe the fourth element of misconduct as an exercise of discretionary power "with intent to obtain a dishonest advantage for another." The State requested, and the trial court agreed, to add the following words that are not part of the standard jury instruction: "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." (R.190, pp. 70-72, 79-82; A-App. 160-162, 169-172).

The instruction does not state or suggest language such as: If you, the jury, find that a candidate did certain activities, then you can find that this constitutes

a dishonest advantage. Instead, the language to the jury is conclusory and mandatory.

Either this instruction constitutes the trial judge's finding of fact as to what constitutes a dishonest advantage, or the trial court is making a finding of law under circumstances where there is no authority to make this finding.

In addition, the trial court refused to give a jury instruction requested by the defense defining dishonest advantage as "corrupt." (R. 170, p. 41; A-App. 105; R.190, pp. 71-72; A-App. 161-162). There is no question that the nature of dishonest advantage being corrupt is discussed in the legislative history for § 946.12(3) and recognized in *Tronca*, 84 Wis. 2d at 76-77, 267 N.W.2d at 220.

This instruction, both alone and in the context of other conclusions inserted into the overall instruction, directed the jury to find that the State fulfilled the "corrupt intent" element of the charge if the State proved that Schultz assisted and promoted a candidate. But, the law is settled that this conclusion is for the jury to reach, not the judge. *Harvey*, 2002 WI at ¶ 22, 254 Wis. 2d at 452, 647 N.W.2d at 194; *Gaudin*, 515 U.S. at 510-511, 115 S. Ct. at 2313. This instruction relieved the State of its

burden to prove every element of the charge and foreclosed the jury's independent consideration of whether Schultz had the corrupt intent to commit Misconduct in public office. The instruction violated Schultz' constitutional rights and, consequently, her conviction cannot stand.

**C. The Judge Applied Factual Determinations To The Duty Element Of The Misconduct Charge**

Another element of the Misconduct charge requires the State to prove, beyond a reasonable doubt, that Schultz exercised "a discretionary power in a manner inconsistent with the duties" of her office of employment. Wis. Stat. § 946.12(3). However, the jury instruction included the following impermissible findings:

It is a state employee's duty not to use, or direct the use of, state resources for political campaigns. A campaign for the Wisconsin State Assembly is a political campaign. Political activity includes any of the following: Campaign fundraising, the preparation and maintenance of campaign finance reports and candidate recruitment.

(R. 191, p. 47; A-App. 189).

The erroneous instruction directed the jury to find that Schultz violated her duties of office if the State proved that she engaged in campaign fundraising, the preparation and maintenance of campaign finance reports or candidate recruitment. *Id.* The instruction effectively

eliminated all other evidence on the subject of Schultz' "duty" and removed any jury scrutiny from the equation of guilt.

**D. The Jury Instruction Violated Wis. Stat. § 903.03(3)**

Wis. Stat. § 903.03(3) provides as follows:

**Instructing the jury.** Whenever 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. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

Wis. Stat. § 903.03(3).

Pursuant to Wis. Stat. § 903.03(3), only the jury can infer presumed facts from the evidence. *State v. Dyess*, 124 Wis. 2d 525, 548, 370 N.W.2d 222, 234 (1985). Courts are prohibited from including mandatory conclusive presumptions in jury instructions. *Id.* If the trial court commands the jury to presume a fact, and thereby, relieves the State of its burden, the appellate court must conclude that this error contributed to the guilty verdict and reverse the conviction. *Id.*

The trial judge violated Wis. Stat. § 903.03(3) by submitting the presumed facts to the jury without telling the jury that they were not required to accept the presumed facts as true.

The trial judge instructed the jury that if they determined that a "state resource" was used to assist and promote a candidate, then the candidate obtained a "dishonest advantage". (R. 191, p. 47; A-App. 189). This command relieved the State of its burden to prove that Schultz had the "corrupt intent" to commit Misconduct in Public Office.

Further, the judge directed the jury to find that Schultz violated her duties of office if the State proved that she engaged in "campaign fundraising, the preparation and maintenance of campaign finance reports or candidate recruitment." (R. 191, p. 47; A-App. 189). Again, this action relieved the State of its burden to prove the duties of Schultz' office.

For these reasons, the jury instructions violated Wis. Stat. § 903.03(3) and the conviction against Schultz should be reversed. *Dyess*, 124 Wis. 2d at 534-540; *Harvey*, 2002 WI 93 at ¶¶ 31-34; 254 Wis. 2d at 457-459.

**E. The Constitutional And Statutory Violations  
Relating To The Jury Instructions Were Not  
Harmless Errors**

Despite the constitutional and statutory infirmities explained above, the appellate court undoubtedly will be told by the State to deem any error as "harmless" if it is clear, beyond a reasonable doubt, that a rational jury would have found the defendant guilty absent the error. *Harvey*, 254 Wis. 2d 442 at ¶ 33. In making its assessment of a harmless error, the court will consider the contestability of the challenged element. *Id.*

The stated issues relating to the jury instructions are not harmless errors. As explained in Section I(B) and (C), above, the State did not prove, beyond a reasonable doubt, that Schultz violated her duties or that she had the "corrupt intent" required to violate the Misconduct statute. Further, both of these issues were highly contested as evidenced by the record. It is not clear that a rational jury would have found Schultz guilty absent the erroneous jury instructions. Therefore, the error was not harmless and Schultz' conviction must be overturned.

## II. THE AUTHORITY FOR FINDING A "DUTY" AS A MATTER OF LAW IS ERODED AND SHOULD BE OVERTURNED

There is no question the trial judge believed he had the power and obligation to define duty as a matter of law. (R. 170, pp. 56-57; A-App. 120-131). The Wisconsin Jury Instructions - Criminal, in the most current release dated 1990, states in footnotes 4 and 5 that the question of a legal duty of a public employee is an issue of law and that "is proper for the trial court to instruct the jury that such a duty existed." (Wis. JI-Criminal 1732, fn. 4). The footnote relies on a 1984 decision, *State v. Schwarze*, 120 Wis. 2d 453, 355 N.W.2d 842 (Ct. App. 1984).

Despite requests by both defendants to require the jury to make a finding of fact on duty, the trial court denied the defense request. (R. 170, pp. 40-67; A-App. 104-131). The defense based its request on the 1995 decision of *United States v. Gaudin*, discussed in Section I(A), above. The *Gaudin* case prohibits judges from making findings that prevented a jury from considering each element of a crime. *Gaudin*, 515 U.S. at 511; 115 S. Ct. at 2314.

The State filed a request near the end of the trial to amend the jury instruction for Misconduct by adding the

following words to the end of the third element defining duty, and the trial court agreed:

Political activity includes any of the following:  
Campaign fundraising, the preparation and  
maintenance of campaign finance reports and  
candidate recruitment.

(R. 190, pp. 78-79; A-App. 168-169).

The *Gaudin* decision prohibits this instruction because it eliminates the jury's ability to determine whether Schultz is guilty on each and every element of the Misconduct charge. *Gaudin*, 515 U.S. at 511; 115 S. Ct. at 2314. By defining "political activity" the trial judge invaded the providence of the jury by making an impermissible factual finding related to Schutlz' duties. For the reasons expressed in *Gaudin*, the conviction must be overturned and sent back to the trial court for a new trial with jury instructions allowing the jury to make findings of fact on the duty element.

### **III. THE TRIAL COURTS RELIANCE ON THE JENSEN AND CHVALA DECISIONS WAS ERRONEOUS**

On several occasions during the trial, the trial judge determined that he was bound by the findings in the *Jensen* and *Chvala* decisions. As explained below, the trial judge's reliance on these cases was erroneous.

**A. The Jury Instruction Defining Duty Was Changed By  
The Trial Court At The Conclusion Of The Trial**

The jury instruction for "duty" adopted words and concepts from the *Jensen* and *Chvala* decisions. Yet, neither case defined the meaning of "duty" based on evidence from the trial. Instead, both cases acknowledged the obvious limitation that the true "facts" were simply those allegations in the lengthy complaints written by the prosecutors without any submissions, or analysis, or examination by the defense. *Jensen*, 2004 WI App. 89 at ¶ 95, 272 Wis. 2d at 756, 681 N.W.2d at 253; *Chvala*, 2004 WI App. 53 at ¶ 7, 271 Wis. 2d at 129, 678 N.W.2d at 886.

We are now at a much different stage after evidence has been submitted and challenged, and we do not have the requirement when reviewing the propriety of the jury instructions that the allegations in the complaints must be accepted as true. Substantial evidence was introduced at trial concerning the duty of the defendants, even though some additional evidence was precluded on the State's objections on relevance and for exceeding the strictures imposed by certain Motions in Limine. It is true that the *Jensen* decision found there was a prohibitory duty and cited to several sources including the Assembly Employee

Handbook to support its conclusion. *Jensen*, 2004 WI App. 89 at ¶ 18, 272 Wis. 2d at 724, 681 N.W.2d at 238.

The trial judge advised he was required to use language from *Jensen* to define the duty even though several key witnesses for the State as well as documents gave explanations to the contrary -- that there was a duty of employment requiring State employees to engage in political activities on State time. This duty ranged from specific to general testimony and is summarized as follows:

- The job classification for the director of the Assembly Republican Caucus ("ARC") specifically required the director to meet with officials of the Republican Party and with leadership in the Assembly "in planning statewide political strategy." (Ex. 176; A-App. 212-227).
- One of the caucus directors, Mr. Ray Carey, testified at length that he and other employees, at his direction, ran the Assembly election campaigns in 1998 and participated in the campaigns throughout the state for the election of Assembly members. (R. 175, pp. 296-306).
- Mr. Carey testified that it was an important part of his job as a state employee to obtain reports on

campaign fundraising and spending. (R. 175, pp. 300-301, 305-306). For this reason, he directed Schultz to obtain numbers and reports on campaign fundraising for him. (R. 175, pp. 305-306).

- The State introduced testimony and trial exhibit 176 detailing a study done in 2001 by then Assembly Chief Clerk John Scocos and Assistant Chief Clerk Patrick Fuller of the two assembly caucuses ("Study"). This Study described the very strong political nature of the Assembly and how the State employees who worked in the caucuses were expected to perform. Under the heading of "Mission and Assembly Caucus Organization," the Study identified several duties that were the "Mission" of the ARC as follows:

- o "The mission of the Wisconsin State Assembly Caucus is to assist legislators, staff and party caucuses develop and advance policies that are consistent with a common political agenda." (Exhibit 176; A-App. 214).

- o "Because legislatures are partisan political bodies, lawmakers have institutional responsibilities that are political in nature. Caucus staff, along with other

partisan staff, help lawmakers advance their views and push ideas within this partisan political environment." (Exhibit 176; A-App. 214).

o "In addition to administrative, research and policy analysis functions, caucus staff conduct political research and analysis and advise leaders and members on political strategies." (Exhibit 176; A-App. 214).

• When Mr. Fuller testified, he said: "Everything we do in the Assembly is political." (R. 172, p. 232).

• Mr. Fuller compared the mission statement and job descriptions with the prohibition on political activity in the Assembly Handbook, and admitted there was confusion. His testimony, as follows, runs contrary to the trial court's finding of the prohibitory duty:

"Q: What is the Caucus Director doing when the Caucus Director is administering and directing a partisan political Caucus, when the Caucus Director is meeting with legislative leadership and State party officials and planning statewide political strategy? Is he engaging in political activity that the manual says should not be done on State time?

A: When the Caucus Director - when I say - the way I understand political activity, we have two different parties here, and that's the political activity, working for, toward the end goal of what that Caucus wants to do or the leaders want to do.

Q: And that's political activity?

A: Everything we do in the Assembly is political.

Q: And that's permitted, correct?

A: I guess it is.

Q: And, therefore, the manual on political activity is confusing at best, is it not?

A: Well, I'm confused, yeah.

Q: Okay, thank you, sir.

(R. 172, p. 232).

- Chief Clerk Scocos agreed with Mr. Fuller and stated that there was confusion as to whether the caucus employees could engage in political activity. More importantly, he admitted that the purposes or missions of the caucuses were too political to work around so they decided to disband the caucuses. As Mr. Scocos said, "My intent on this basically, given a description of what the two caucuses' main missions were, we didn't find a way around it. Basically we recommended to eliminate it . . . ." (R. 187, p. 267).

The Assembly leaders and the employees had defined job functions and responsibilities, that is, duties that were defined for them to be highly political in nature. The political functions and duties obviously were ignored and omitted by the State when the prosecutors drafted the 47-page complaint against Schultz and the others. Thus, this appellate court did not have the benefit of these political duties when deciding the *Jensen* case.

Remarkably, Schultz is being held responsible for engaging in political activity even though the State's own witnesses and exhibits prove that political activity was included in the job descriptions. The jury was not allowed to consider these aspects of duty because the trial court's instruction, as a matter of law, eliminated any possible consideration of this testimony and evidence.

**B. The Trial Court Erroneously Relied On The Previous Decisions To Define "Dishonest Advantage" In The Jury Instruction**

The trial court judge determined that the "dishonest advantage" presumption in the jury instructions was compelled by the rulings in *Chvala* and *Jensen*. (R. 170, pp. 56-57, 65-66; A-App. 120-121, 129-130; R. 190, pp. 78-79; A-App. 168-169). However, the court's reliance was erroneous because: (i) the language does not appear in the

decisions; and, (ii) even if the language did appear, it is dicta and cannot overcome the constitutional and statutory infirmities.

1. The Language Does Not Appear In The Decisions

The judge maintained throughout the trial that he was bound by the *Chvala* and *Jensen* appellate decisions to find that "[t]he use of a state resource to promote a candidate in a political campaign. . . provides to that candidate a dishonest advantage." (R. 170, pp. 56-57, 65-66; R. 190, pp. 78-79; A-App. 168-169). However, the cases do not discuss the definition of "dishonest advantage" or the effect of promoting a candidate in a political campaign. The language does not appear in either decision and there was no requirement for the trial judge to include these impermissible findings in the jury instructions.

2. The Language Is Not Binding Even If It Appeared In The Decisions

The *Chvala* and *Jensen* opinions focused on whether the complaints, as applied to the criminal statute, "adequately delineated the duty. . . allegedly violated" and whether there was a constitutionally-adequate distinction between "legislative activity" and "political activity". *Jensen*, 2004 WI App. 89 at ¶¶ 11, 36, 272 Wis. 2d 707, 720-721, 681

N.W.2d 230, 236-242; *Chvala*, 2004 WI App. 53 at ¶¶ 58, 64, 271 Wis. 2d 115, 153, 156, 678 N.W.2d 880, 898-899. The decisions reorganized the obvious that the facts alleged and written by the State in its 47 page complaint must be accepted as true. *State v. Reed*, 2005 WI 53, ¶ 12, 280 Wis. 2d 68, 74, 695 N.W.2d 315, 318; *State v. Haugen*, 52 Wis. 2d 791, 793, 191 N.W.2d 12, 13 (1971). Conversely, a court does not search out facts that are not a part of a complaint. *Haugen*, 52 Wis. 2d at 793, 191 N.W.2d at 13.

The issue of "dishonest advantage" was not before the appellate court. If language relating to the definition of a dishonest advantage appears in the decision, this language is dicta and cannot overcome constitutional and statutory infirmities set forth in Section I, above. *State v. Sartin*, 200 Wis. 2d 47, 60, n. 7, 546 N.W.2d 449, 455 (1996); *American Family Mutual Insurance Company v. Shannon*, 120 Wis. 2d 560, 565, 356 N.W.2d 175, 178 (1984).

The judge's erroneous reliance on the *Jensen* and *Chvala* decisions violated Schultz' constitutional rights. The jury instructions relieved the State of its burden to prove, beyond a reasonable doubt, that Schultz' actions were undertaken with the "corrupt intent" to obtain a "dishonest advantage." Rather, the judge commanded the

jury to find "corrupt intent" if it believed that Schultz used a "state resource to promote a candidate in a political campaign or to raise money for a candidate". Thus, the conviction cannot stand.

**IV. THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT SET CERTAIN CONDITIONS FOR SCHULTZ' PROBATION**

The trial court erroneously exercised its discretion when it set two conditions of probation with one prohibiting Schultz from entering the State Capitol for 5 years and the other requiring her to pay the State Assembly for attorneys' fees stemming from a legal matter that was outside the time of her crime.

**A. Conditions Of Probation Cannot Be Used To Prevent Schultz From Exercising Her Constitutional Rights**

The First Amendment protects the rights of citizens to "petition the Government for a redress of grievances." U.S. Const. Amend. I. Wisconsin's State Constitution similarly guarantees the right "to petition the government." Wis. Const. Art. I, § 4. In conjunction with due process requirements, the right to petition for redress of grievances requires that people, including persons convicted of a crime, be given meaningful access to pursue their claims. *State ex rel. Thomas v. State*, 55 Wis. 2d 343, 352, 198 N.W.2d 675, 680 (1972). Imprisonment is not

totally a civil death. *Id.* A convicted person retains not only the freedom to have adequate access to the courts, but also the broader right to petition the government for redress of grievances. *Id.*

As a condition for Schultz' probation, the trial court banished Schultz from the State Capitol for 5 years. (R. 195, p. 25; R. 154, p. 1; A-App. 101). The trial court's probation condition preventing Schultz from entering the State Capitol grounds infringes on her constitutional right to petition the government and cannot be sustained. The State Capitol is a public building and its doors are open to the community at large. Citizens attend legislative and Wisconsin Supreme Court hearings in the State Capitol and discuss issues in the offices of their legislative representatives.

In addition, the restriction does not further the objectives of probation -- that is, to rehabilitate and protect society and potential victims from future wrongdoing. *Oakley*, 2001 WI 103 at ¶ 13, 245 Wis. 2d at 461, 629 N.W.2d at 206. Schultz is no longer a state employee and preventing her presence in the State Capitol does not serve to rehabilitate Schultz or protect anyone

from future wrongdoing, Her banishment from the State Capitol cannot be sustained.

**B. The Trial Court Cannot Issue Probation Conditions Based On Matters Unrelated To The Conviction**

Generally, Wisconsin courts are not allowed to require payment obligations stemming from unrelated issues as a condition of probation. *State v. Oakley*, 2000 WI 37, ¶ 3, 234 Wis. 2d 528, 531, 609 N.W.2d 786, 787; *State v. Torpen*, 2001 WI App. 273, ¶ 11, 248 Wis. 2d 951, 958, 637 N.W.2d 481, 485. This is especially so when the unrelated issues arise out of events occurring well after the crime charged and involve absolutely non-criminal activity.

In *Oakley*, the defendant was convicted of witness intimidation in violation of Wis. Stat. § 940.43(3). *Oakley*, 2000 WI 37 at ¶ 1, 234 Wis. 2d at 530, 609 N.W.2d at 786. The trial court withheld sentence and imposed probation for a period of 3 years. *Id.* One of the conditions of probation required the defendant to pay an old, unpaid fine previously imposed on the defendant in a prior conviction. *Id.*

The appellate court determined that the probation condition requiring the defendant to pay the fine was erroneous. *Id.* at ¶ 27, 234 Wis. 2d 542, 609 N.W.2d at

792. The maximum punishment for not paying the fine was 6 months in jail. *Id.* However, by requiring that the fine be paid as a condition of probation, the defendant faced 10 years in prison if he did not pay his fine as a condition of probation. *Id.*

The charges and conviction involve activity from January 27, 1998 through October 8, 2001 when Schultz left state employment. However, the condition of probation involves an alleged contractual obligation due to the State Assembly paying Schultz' legal fees for services from October 2001 until the criminal complaint was filed in October 2002.

The legal fees relate entirely to the effort to have Schultz testify at a John Doe proceeding. For the full description of events regarding her testimony, see *In re John Doe Proceeding*, 2003 WI 30, 260 Wis. 2d 653, 660 N.W.2d 260. Schultz did not testify and the State, just before oral arguments were held in the Wisconsin Supreme Court, withdrew the subpoena and sought to end the case before the Court. *John Doe*, 2003 WI 30, ¶ 13, 260 Wis. 2d 653, 665, 660 N.W.2d 260, 266.

During her sentencing on May 16, 2006, the trial court placed Schultz on probation and imposed the condition to

reimburse the State Assembly for the attorneys' fees, but the amount was left undetermined pending a future proceeding. (R. 195, p. 26; R. 154, p. 1; A-App. 101). This condition of probation is improper and not contemplated by any law or rules on probation.

The closest statute on this issue is Wis. Stat. § 973.09(1g) which allows the trial court to order defense fees "for legal representation to the county or the state for the defense of the case." (emphasis added) The attorneys' fees incurred by Schultz did not arise out of the defense of the case. Rather, the attorneys' fees stemmed from services unrelated to the Misconduct charge or any criminal activity. Thus, there is no statutory authority to impose repayment of fees unrelated to the defense of the case.

Further, Schultz may have faced civil liability if the State Assembly desired repayment of the monies it expended on her behalf. However, the trial court's imposition of the repayment as a condition of Schultz' probation, results in subjecting Schultz to potentially 5 years in prison should she fail to repay the funds.

The trial court had no authority, statutory or otherwise, to impose this repayment of attorneys' fees that

are not related to any crime as a condition of Schultz' probation.

**CONCLUSION**

For the reasons set forth above, Schultz requests that the Court overturn the conviction and order a new trial.

Dated this 22<sup>nd</sup> day of November, 2006.

**MURPHY DESMOND S.C.**

Attorneys for Defendant-  
Appellant Sherry L. Schultz

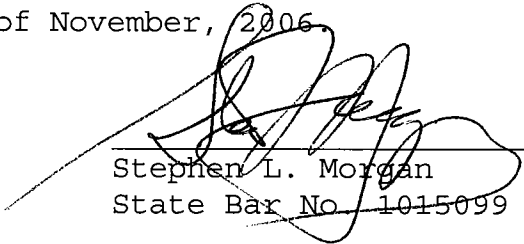
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**CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a brief produced with a monospaced font. The length of this brief is 33 pages (exclusive of signatures).

Dated this 22<sup>nd</sup> day of November, 2006.



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APPENDIX

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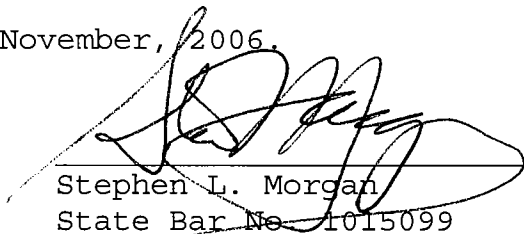
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**CERTIFICATION FOR APPENDIX**

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and, (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 22<sup>nd</sup> day of November, 2006.

  
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