STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2018AP19-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

MICHAEL WILLIAMS,
Defendant-Appellant-Petitioner.

ON APPEAL FROM THE MARCH 16, 2017, JUDGMENT OF CONVICTION, FILED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING.
MILWAUKEE COUNTY CASE NO. 2016CF991

PETITION FOR REVIEW

Respectfully submitted by:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

I. **Whether Williams' due process rights were violated when the prosecutor made improper arguments in closing that shifted the burden of proof?**

Williams objected and then asked for a mistrial following closing arguments. The circuit court did not admonish the jury to disregard the prosecutor's comments, later gave what it believed to be a curative instruction, and denied the motion for a mistrial.

The court of appeals affirmed, holding that Williams was not prejudiced by the improper closing.

II. **Whether the standard burden of proof jury instruction is unconstitutional and his conviction the result of a violation of his constitutional right to require the State prove his guilt beyond a reasonable doubt?**

The circuit court refused to modify the standard instruction to omit language that Williams argued lowered the State's burden of proof, and thus answered this question no.

The court of appeals stayed Williams' appeal pending this Court's decision in *State v. Trammell*, 2019 WI 59, 387 Wis. 2d 156, 928 N.W.2d 564, and then affirmed once this Court issued its decision in *Trammell*.

III. **Whether the circuit court erroneously admitted evidence that Michael Williams had been seen, at some unknown place and time, with the man who drove the getaway car in the murder of Fredrick Martin, a tenuous association on which the State relied to convince the jury of Williams' guilt?**

The circuit court admitted the evidence over Williams' objection. The court of appeals affirmed.

STATEMENT OF CRITERIA FOR REVIEW

Williams' case presents real and significant questions of constitutional law, thus making it appropriate for the Court's review. Wis. Stat. § (Rule) 809.62(1r)(a). Williams contends that the prosecutor's closing argument violated his constitutional right to a fair trial. *Id.* In deciding that constitutional claim, the court of appeals did not apply the harmless error test, but rather required Williams to prove that he was prejudiced by the error. This Court should grant review to clarify that the harmless error test for federal constitutional errors applies to due process claims arising from improper prosecutorial closing argument. Wis. Stat. §§ (Rules) 809.62(1r)(a) & (c)3.

Additionally, Williams argues that the jury instructions allowed the jurors to vote to convict even if they had reasonable doubt to his guilt. Wis. Stat. § (Rule) 809.62(1r)(a). This Court recently addressed a facial challenge to the reasonable doubt jury instruction, holding that it does not result in unconstitutional verdicts. *State v. Trammell*, 2019 WI 59, 387 Wis. 2d 156, 928 N.W.2d 564. Williams invites this Court to accept his facial challenge for review only to preserve his right to federal review. *See* 28 U.S.C. § 2254(b) (exhaustion is prerequisite to federal habeas review).

However, unlike the defendant in *Trammell*, Williams also argued below that the reasonable doubt instruction caused an unconstitutional result *in his specific case*—regardless of its facial constitutionality—given the manner of proof and the State's argument to the jury. That specific question—whether the reasonable doubt instruction can cause an unconstitutional result in a particular case—is novel and its resolution would have statewide impact insofar as the reasonable doubt instruction applies in every criminal case. Wis. Stat. § (Rule) 809.62(1r)(c)2. Review is thus appropriate.

STATEMENT OF THE CASE

In the summer of 2015, Michael Williams arrived at a Milwaukee hospital with a gunshot wound. (R.205:35-36.) He was met there by police officers who were responding to reports of a shooting. (*Id.*:34-36.) Williams told those officers that he had been robbed and shot by a couple of guys near North Teutonia and Villard in the city. (*Id.*) Audio surveillance equipment used by the Milwaukee Police Department to triangulate the location of gunshots had registered one in the area not long before Williams arrived at the hospital. (*Id.*:68.)

Williams was wearing a pair of camouflaged pants and no shirt when he got to the hospital. (*Id.*:39.) His pants would ultimately become a key piece of State's evidence at Williams' trial for the murder of Fredrick Martin. (*See* R.209:43.)

On the same day that Williams was shot, Martin was shot and killed at a Milwaukee gas station. He was a drug dealer. (*See* R.203:63, 65.) He came to the gas station on 9th and Center to sell drugs to Miguel Henderson. (*See id.*) Henderson, who admittedly had memory problems because of his weed habit and trouble seeing out of the corner of his eyes, would later become a witness for the State. (R.203:66, 94, 119-20, R.204:11) After a few attempts, he would identify Williams as Martin's shooter. (*Id.*)

On the day of the murder, Henderson waited for Martin at the gas station for about forty-five minutes. (R.203:66-67.) When Martin arrived and parked at pump, Henderson got into his car. (*Id.*:68.) Then, unexpectedly, Martin got out and went inside the station. (*Id.*:71.) Henderson waited in the car. (*Id.*) When Martin returned, he got into the driver's seat. Henderson was still in the front passenger's seat. (*See* R.203:72.) Immediately, a man Henderson had never seen before entered the car through the rear passenger's side door. (*Id.*, R.204:25.)

According to Henderson, the shooting took place moments after Martin reentered the car. (R.203:116.) A man climbed into the car and said something like, "'Do you know what time it is?'" (R.204:16.) Henderson looked back to his left. (*Id.*:14.) The first thing that he saw was a gun, and then he "glance[d]" the man's face. (*Id.*:14-15.) He "could barely turn around" and admitted that "[i]t wasn't a lot of time to stare and get details." (*Id.*:15.) The gun went off, Martin grabbed his chest and rolled out of the car. (*Id.*:16.) Henderson fled at about the same time. (*Id.*)

Henderson had never before seen the shooter. (*Id.*:25.) And thus, the only time that he had to look at the shooter was the couple of seconds in the car prior to the shooting. (*Id.*)

Martin ran into the gas station where he collapsed and later died. Henderson returned to the gas station a short time after the shooting. (R.203:78-79, R.204:16-17.) He heard the police coming but did not want to stick around because he still had the drugs and was prohibited from having police contact. (R.203:81, R.204:18.) So, Henderson drove off in Martin's car. (R.203:79.) Henderson's flight was short-lived, though, and he had to ditch the car because it shut off automatically; the key fob was still in Martin's pocket back at the gas station. (*See* R.203:82.)

Henderson's first chance to identify Williams came during a photo array approximately three weeks after the shooting. (R.207:94.) When showing Henderson a lineup that included Williams, police asked him to pick out anyone who was involved in Martin's shooting. But, Henderson did not identify Williams. (R.207:92, R.203:93, 101-02.) In fact, he did not identify anyone. (*Id.*:104.) Afterwards, Henderson was arrested and taken to jail. (*Id.*:104, 106.)

The next day, police showed Henderson a live lineup that did not include Williams. (R.203:105-06.) During that live lineup, Henderson identified someone other than Williams—a man named Tony Madison—as Martin's killer. (R.203:105-06.) He was released from custody after that identification. (*Id.*:106.)

But, Henderson found himself back in custody seven months later. (*Id.*:106.) Police were then still trying to solve Martin's murder, and Henderson was once more given an opportunity to identify Martin's killer. (*Id.*) Police presented Henderson with a live lineup that included Williams, and Henderson—nearly eight months removed from the incident—identified him as Martin's shooter. (*Id.*:94-95.)

An eyewitness identification expert, Prof. Lawrence White, testified at Williams' trial regarding Henderson's identification. (R.208:26-32.) As for witnessing conditions, Prof. White explained that the shooter was a stranger to Henderson; he was wearing sunglasses; Henderson saw the shooter for just a few seconds and was focused on the gun for at least some of that time; and Henderson was scared, which interferes with a person's ability to properly remember things. (*Id.*) Each of those factors has been shown by scientific study to contribute to a greater likelihood of misidentification. (*See id.*:9-10.)

Prof. White also discussed aspects of Henderson's identification procedure. (*Id.*:29-30.) He noted that Henderson did not identify Williams when first given the opportunity three weeks after the shooting. Instead, he picked out another person. (*Id.*:29.) Then, six months later and seven months after the shooting, Henderson saw another lineup with Williams and picked him out. (*Id.*:29-30.) Prof. White explained,

> So for me, that fact pattern is troubling. Seven months is a really long time to accurately remember

> the face of a stranger that was seen very briefly in an emotional situation. So that concerns me.
>
> And then secondly, we have this repeated lineup that we talked about before. That the witness had in fact seen Mr. Williams' face before in the photographic lineup and hadn't picked him out. So again, we have this ambiguity. We don't know how to interpret his response at the live lineup.
>
> It could be explained in this way. Like he really is the shooter. Or it could be explained in this other way, he looked familiar because he's seen his face before. . . .
>
> And then at the live lineup, when I looked at the photographs of the men who participated in the live lineup, in my judgment -- and people can look at photographs and judge for themselves -- but in my opinion, there were only two persons in the lineup who fully resembled the description of the shooter. Everyone else was either too heavy, they weighed too much, or their hair was too long, they didn't have a low haircut. So there were two men, the defendant and one other guy. So really what that suggests is that the lineup wasn't a lineup of six. It was a lineup of two. And lineups of two lead to fewer mistakes -- sorry, lead to more mistakes than larger lineups.

(*Id.*:30-31.)

The State also relied on events happening later at an entirely different location to argue that Williams was the man in the camouflaged pants. (*See id.*:27-28.)

About fifteen minutes after the gas station shooting, police received another shots-fired call on 54th and Hampton. (*See* R.132:1.) When police responded to the 54th Street shooting, they found twenty shell casings, eight bullet fragments, and several bullet strikes to nearby vehicles and a home. (R.205:76.) They also found a red SUV matching the description of the getaway vehicle used in the gas station shooting. (*See id.*:82-83.)

A canvas of the area found one man a few blocks away who was suffering from a gunshot wound. (*Id.*:56.) That was Tony Madison. (*Id.*) Police eventually discovered that the shirt that Madison was wearing after the 54th Street shooting matched the shirt worn by the driver of the getaway vehicle in the Martin shooting. (*Id.*:57; *compare* R.78 *with* R.104.) A church across the street from the gas station where Martin was shot also had operable video cameras, which captured images of the getaway driver. (*Id.*:57; *compare* R.78 *with* R.104.)

Police also obtained surveillance video from a pizza joint nearby the 54th Street shooting; it, too, had external security cameras. (R.206:95.) On review, police were able to see in that video a silver car that resembled the silver car seen in the gas station video. (R.207:11-12, R.86.) It was the State's theory that the silver car seen in the gas station video had chased the red SUV from the station to 54th Street where a shootout occurred between the occupants of the two vehicles. (R.209:45-46.) That shootout, reasoned the State, resulted in Madison being found nearby with a gunshot wound. (*Id.*) And, it explained Williams' gunshot wound. (*Id.*)

But Williams was not found anywhere near the 54th Street shooting. And no evidence—video, audio, fingerprints, DNA, or testimony—placed him at the scene of the 54th Street shooting.

Two men who lived near the 54th Street shooting testified that they were approached that day by a young man who appeared to have been shot. (R.204:101-02, 109-11.) Both men told police that the young man had been wearing camouflaged pants and that he had gotten close when they asked if he needed help. (*Id.*:102, 105, 110.) Importantly, neither of those two men identified Williams as the young man that they had seen. (*Id.*:105, 111.) In fact, that young man was never found near 54th Street, and he was never identified. Police found bloodstains that the young man had left on the pavement

and a nearby car, but they took no samples of that blood for DNA or other testing. (R.206:5, 12, R.128.)

The only witness connected with the 54th Street shooting who was even aware of Williams was the owner of the home outside which it occurred, Tiffany McAffee. (R.205:12, 25.) McAffee "kn[e]w of [Williams]. [She] d[id]n't know him." (*Id.*:25.) She knew so little about Williams that she "didn't know his name until this -- all this happened." (*Id.*:31.) She never saw him at her house on the day of the shooting. In fact, she did not see him at any time that day. (*Id.*:31-32.) She had "seen him like once or twice with [Madison]," but she could not recall "where or when that happened." (*Id.*:25, 31.)

On the other hand, McAffee knew Madison well; they had some sort of a relationship. (R.205:13-14.) She testified that Madison had been at her house about an hour and a half prior to the shooting. (*Id.*:22.) She identified his minivan in pictures that police had taken after the 54th Street shooting, but she had no knowledge of how the red SUV came to be at her house. (*Id.*:14-15, 23.)

Pretrial, Williams objected to McAffee's testimony that she had seen him with Madison on some unidentified date at some unidentified location. (R.202:13-14.) He argued that her inability to recall anything about when or where she had seen him with Madison rendered her testimony overly prejudicial. (*Id.*) The court allowed the evidence, reasoning: "She'll not have too much weight with the jury then, right? So it goes to the weight of the jury -- weight of that evidence. So whether or not somebody knows someone I don't think is -- is not – it goes to the weight of the evidence." (*Id.*:14.)

Linking the gas station shooting to the 54th Street shooting was key to the State's case. In closing, the prosecutor explained that the murder investigation "c[a]me into focus when the detectives realize they [had]

to put together two shooting scenes." (R.209:27-28, P-Ap 45-56.) To put Williams at the 54th Street shooting, the State repeatedly relied on McAffee's testimony that she had seen Williams with Madison a couple of times. (*Id.*:34, 37, 42; P-Ap 52, 55, 60.) However, in its closing argument, the State inflated McAffee's testimony to be that "Mike Williams [w]as an associate of Tony's," not merely someone who she had seen with him a couple of times. (*Id.*:37, 42; P-Ap 55, 60.)

At the end of his closing remarks, the prosecutor told the jury that either Williams was the shooter or "he has to be the unluckiest man in the world." (*Id.*:43; P-Ap 61.) But, it wasn't a "coincidence," argued the prosecutor, "it's the truth." (*Id.*:43, 45; P-Ap 61, 63.)

> And the truth is that the defendant is the man wearing the camouflaged pants in the homicide video. And Tony Madison is the man shown behind the wheel of the red Ford Expedition at the homicide. And Miguel Henderson correctly identified the defendant as the shooter when he saw him in the live lineup in March after the defendant was arrested.
>
> And the truth is that the defendant was shot by the occupants of that silver two-door in retribution for the murder of Fred Martin. Whoever those guys were, Fred got killed right in front of their eyes. And that car takes right off after the red Ford. And both those guys end up shot where the red Ford ends up parked.

(*Id.*:45-46; P-Ap 63-64.)

For his part, Williams' trial counsel argued that the State had presented nothing more than a theory that the evidence did not back up. (*Id.*:47; P-Ap 65.) Police had failed to adequately investigate the 54th Street shooting and the scene where Williams said that he'd been shot. Police

> didn't collect one blood sample. [They] didn't submit one casing, one bullet. Nothing to the state crime lab. Not a single thing.
>
> And if that's all that this courtroom requires at this point, ladies and gentlemen, we are abridging the constitutional rights that we are guaranteed as citizens of this country.

(*Id.*:51-52; P-Ap 69-70.) Trial counsel repeatedly highlighted that the State had the burden of proof: "And again, I want to be clear that it is their job to do the investigation. It is the police department's job to collect evidence. It's not Michael Williams' job to come up here and prove anything to you." (*Id.*:54; P-Ap 72.) As trial counsel saw it, Williams' constitutional rights were "the central theme of [his] case." He reiterated to the jury that Williams was "entitled to the presumption of innocence from the start and until the finish. And only if the state proves by evidence . . . beyond a reasonable doubt." (*Id.*:67; P-Ap 85.)

Before trial, Williams had asked the trial court to modify the standard jury instruction on reasonable doubt. (R.36:1; P-Ap 17.) Williams asked that the instruction be changed to read, "It is your duty to give the defendant the benefit of every reasonable doubt," thus striking language in the standard instruction telling the jury to "search for the truth." (*Id.*:12, 14; P-Ap 28, 30.) He argued that including the "search for the truth" would violate his right to avoid a conviction unless the jury is convinced beyond a reasonable doubt. (*Id.*:6-10; P-Ap 22-26.) The trial court refused to change the standard instruction. (R.202:3; P-Ap 31.) It did not address Williams' constitutional challenges.

The State started off its rebuttal by arguing that Williams hadn't put forth sufficient facts to sustain his defense: "The thrust of [trial counsel]'s remarks, that's a -- kind of a moldy, old ratty defense that we sometimes see when the defense has no good facts." (*Id.*:69, P-Ap

87.) Williams' attorney immediately objected and, at sidebar, asked for a mistrial on the ground that the State had shifted the burden of proof. (*Id.*:69, 77; P-Ap 87, 95.) The defense's objection "preserved its right for . . . a mistrial because of what was said during . . . the state's argument." (*Id.*:77; P-Ap 95.) Nonetheless, the State was allowed to continue its argument without any on-the-record admonishment from the court. (*Id.*:69; P-Ap 87.)

In what followed, the State repeatedly pointed out things that it believed Williams had "[n]o answer for:"

> - No answer for the red truck you see in the homicide video and the red truck that you see at McAffee's house on 54th Street.
> - No answer for the fact that Tiffany McAffee knows Tony Madison. And that Tony Madison's minivan is blocking the red truck with the Streff Auto Group plate and with the adhesive square on it in the driveway.
> - No answer for the fact that Tony Madison is found a few blocks from the 54th Street dressed in the tricolored hooded sweatshirt which you can see the driver wearing in the homicide scene video.
> - And no answer for the fact that Tiffany McAffee told the police that Tony Madison hangs out or has hung out with the defendant Mike Williams on prior occasions. And Mike Williams turns up shot wearing these camouflaged pants which you see the man wearing in the homicide video. No answer for any of that.

(*Id.*:69-70, P-Ap 87-88 (formatting altered).)

After closings, the trial court gave the jury its final instructions to the jury. It included the following language in an attempt to redress the State's burden shifting argument:

> Let me make something – there's another instruction. And that is that the burden of proof -- you should read the burden of proof. The Court's going to give that to you. The burden of proof is

> entirely on the State of Wisconsin. And the defense can just – do nothing. The elements have to be proved by the state beyond a reasonable doubt.

(*Id.*:72-73; P-Ap 90-91.)

Williams appealed (R.173), arguing the same issues he sets forth in this petition. The court of appeals affirmed in a per curiam decision. *State v. Williams*, No. 2018AP19-CR, ¶1 (Wis. Ct. App. Feb. 6, 2020); (P-Ap 1-2).

ARGUMENT

I. REVIEW OF WILLIAMS' IMPROPER CLOSING ARGUMENT CLAIM IS APPROPRIATE TO CLARIFY THAT SUCH ERRORS SHOULD BE REVIEWED FOR HARMLESS ERROR NOT PREJUDICE TO THE DEFENDANT.

The content of proper closing argument is limited to the evidence admitted at trial and reasonable inferences that can be made therefrom. *State v. Nemoir*, 62 Wis. 2d 206, 213, 214 N.W.2d 297, 300-301 (1974). "The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence." *State v. Neuser*, 191 Wis. 2d 131, 136, 528 N.W.2d 49, 51 (Ct. App. 1995). "The prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors." *State v. Draize*, 88 Wis. 2d 445, 454, 276 N.W.2d 784, 789 (1979). However, "'[a]rgument on matters not in evidence is improper.'" *Neuser*, 191 Wis. 2d at 142, 528 N.W.2d at 54 (quoting *State v. Albright*, 98 Wis. 2d 663, 676, 298 N.W.2d 196, 203 (Ct. App. 1980)).

In Williams' case, the prosecutor started his rebuttal argument by labeling "[trial counsel]'s remarks" as a "kind of a moldy, old ratty defense that [prosecutors]

sometimes see when the defense has no good facts." (R.209:69.) Those disparaging remarks were improper and had no business in the prosecutor's closing argument. *State v. Mayo*, 2007 WI 78, ¶ 43, 301 Wis. 2d 642, 734 N.W.2d 115; *see Darden v. Wainwright*, 477 U.S. 168, 180-81 (1986) (personal attacks in closing are "undoubtedly" improper and deserve "condemnation").

Furthermore, by opining as to the merits of Williams' defense and the character of his defense counsel, the prosecutor impermissibly shifted the burden of proof. The prosecutor also impermissibly shifted the burden of proof to Williams by repeatedly telling the jury that Williams had "no answer" for facts that he believed showed Williams' guilt. He told the jury that it was Williams' responsibility to provide facts to the jury to rebut the State's case. Simultaneously, the prosecutor told the jury his opinion that the defense could not meet that burden because there was no merit to defense's theory. That is entirely improper.

Criminal defendants bear no burden to provide an answer to anything. *State v. Sawyer*, 266 Wis. 494, 506, 63 N.W.2d 749 (1954). The burden to prove each element of the charged offenses beyond a reasonable doubt is on the State in criminal cases. *Gauthier v. State*, 28 Wis.2d 412, 415-416, 137 N.W.2d 101 (1965). The burden of proof may not be shifted to the defendant. *State v. Schulz*, 102 Wis. 2d 423, 427, 301 N.W.2d 151 (1981). This is one of the most fundamental principles of law, and the prosecutor knew or should have known it.

However, the prosecutor's argument in Williams' case surely left the jury with the impression that Williams was burdened with providing it answers to questions that not even the State had. Even after Williams objected at sidebar on burden shifting grounds, the prosecutor went on to tell the jury *six times* that Williams had no answer for what he perceived were bad facts:

> No answer for the red truck you see in the homicide video and the red truck that you see at McAffee's house on 54th Street. No answer for that.
>
> No answer for the fact that Tiffany McAffee knows Tony Madison. And that Tony Madison's minivan is blocking the red truck with the Streff Auto Group plate and with the adhesive square on it in the driveway. No answer for that.
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> No answer for the fact that Tony Madison is found a few blocks from the 54th Street dressed in the tricolored hooded sweatshirt which you can see the driver wearing in the homicide scene video.
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> And no answer for the fact that Tiffany McAffee told the police that Tony Madison hangs out or has hung out with the defendant Mike Williams on prior occasions. And Mike Williams turns up shot wearing these camouflaged pants which you see the man wearing in the homicide video. No answer for any of that.

(R.209:69-70.)

The State's argument told the jury that Williams should provide an answer to the perceived bad evidence. That argument was misleading, false, and could only have caused confusion. Furthermore, it bungled the law on reasonable doubt, shifted the State's burden to the defense, and commented on Mr. Williams' exercise of his right not to testify. The prosecutor's closing arguments were thus improper.

It has long been accepted that a prosecutor's improper remarks in closing can "rise to such a level that the defendant is denied his or her due process right to a fair trial." *State v. Wolff*, 171 Wis. 2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992) The relevant question is "whether those remarks 'so infected the trail with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (quoting *Darden*, 477 U.S. at 181 (1986)).

In Williams' case, the court of appeals applied the test for prejudicial error to discern whether the prosecutor's improper argument entitled Williams to a new trial. *Wiliams*, 2018AP19, ¶25; (P-Ap 12). Such tests necessitate the defendant to prove that the result of the proceeding would have been different but for the error. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 694 (1984).

However, the Supreme Court has before recognized that the harmless error test applies to constitutional errors in closing argument. *United States v. Hasting*, 461 U.S. 499, 509 (1983). The burden of proving any federal constitutional error harmless falls squarely on the State. *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988). The State must be able to show that the error "'did not contribute to the verdict.'" *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). And, its burden of proof is substantial. *Chapman*, 386 U.S. at 24. The "harmlessness standard" requires the reviewing court to "'be able to declare a belief that [the error] was harmless *beyond a reasonable doubt*.'" *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015) (quoting *Chapman*, 386 U.S. at 24) (emphasis and alteration added). Thus, to prove an error harmless, the State must prove beyond a reasonable doubt that it did not contribute to result. *Chapman*, 386 U.S. at 24.

However, when the court of appeals decided Williams' prosecutorial misconduct claim, it did not require the State to prove the error harmless beyond a reasonable doubt. *See Wiliams*, 2018AP19, ¶25; (P-Ap 12). Instead, the court of appeals required Williams to prove that he was not prejudiced. *See id.* If the prosecutor's closing argument violated Williams' constitutional rights, it should have been the State's responsibility to prove that error had no effect on the outcome of the case. *See Hasting*, 461 U.S. at 509, *Chapman*, 386 U.S. at 24..

This Court should grant review to decide whether the harmless error standard and not the standard for

prejudicial error is properly applied to questions of improper prosecutorial closing argument.

II. REVIEW IS APPROPRIATE TO DECIDE NOT WHETHER THE STANDARD REASONABLE DOUBT INSTRUCTION IS FACIALLY UNCONSTITUTIONAL, BUT RATHER WHETHER IT CAN CAUSE AN UNCONSTITUTIONAL RESULT AS APPLIED IN SPECIFIC CASES.

As a threshold matter, Williams recognizes that this Court recently concluded that the standard reasonable doubt instruction—Wis. JI-Criminal 140—is not facially unconstitutional, and thus it is unlikely that this Court will again review *that* question. *Trammell*, 2019 WI 59, ¶2.

However, Williams contends that the instruction caused an unconstitutional result in his case because, in tandem with the State's evidence, manner of proof, and improper closing argument, it confused the jury about the State's burden of proof and allowed it to convict even if reasonable doubt existed.

"The Fifth Amendment's due process guarantee, applied to the states by operation of the Fourteenth Amendment, 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.'" *State v. Harvey*, 2002 WI 93, ¶ 19, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)) (emphasis added).

"A jury instruction is tainted and in error if 'a reasonable juror could misinterpret the instructions to the detriment of a defendant's due process rights.'" *State v. Dodson*, 219 Wis. 2d 65, 86, 580 N.W.2d 181 (1998) (citation omitted). Given the evidence in Williams' case, the State's manner of proof, and the prosecutor's closing argument, the reasonable doubt instruction likely caused the jury to misinterpret the burden of proof and convict on less than a reasonable doubt.

Early in the instruction, the jurors were told that the State bore the burden of proving every element beyond a reasonable doubt. They were told to convict only if the evidence persuaded them beyond a reasonable doubt that every element was proven. They were also directed to use reasonable doubt as the measure of the State's ability to prove its case against Williams. In sum, the first part of the instruction told the jury to assess the State's proof based on reasonable doubt.

However, at the close of the instruction, the jury was told not to search for doubt, but instead to search for truth. Taken together with the earlier language in the instruction, the command not to search for doubt but instead the truth is confusing. After all, the first part of the instruction tells the jury to measure the State's case on a reasonable doubt standard. But, on the heels of that directive, the latter part of the instruction warns the jury not to search for doubt. It tells the jury not to explore the things about which it has doubts. Instead, the jury should ignore those doubts and pursue the truth.

Recent studies[1] have shown that the "search for the truth" language in Wis. JI-Criminal 140 has the potential to confuse jurors regarding the State's burden of proof "to the detriment of the defendant's due process rights." *Dodson*, 219 Wis.2d at 86. Those same studies also show that the instruction, as a whole, can misdirect the jury. The conflict between searching for doubt and searching for truth is front-and-center in Williams' case, given the way the case was presented and argued to the jury.

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[1] Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. Richmond L. Rev. 1139 (2016), Michael D. Cicchini & Lawrence T. White, *Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication*, 117 Colum. L. Rev. Online 22 (Mar. 1, 2017).

The State's case against Williams was built substantially out of circumstantial evidence. The State had to connect a variety of successive dots before it could establish that Williams was the man in camouflaged pants visible in the gas station video.

To do that, the prosecutor relied heavily on McAffee's weak evidence regarding a Madison-Williams connection. He also hammered his opinion of the "truth" in closing argument:

> And the truth is that the defendant is the man wearing the camouflaged pants in the homicide video. And Tony Madison is the man shown behind the wheel of the red Ford Expedition at the homicide. And Miguel Henderson correctly identified the defendant as the shooter when he saw him in the live lineup in March after the defendant was arrested.
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> And the truth is that the defendant was shot by the occupants of that silver two-door in retribution for the murder of Fred Martin. Whoever those guys were, Fred got killed right in front of their eyes. And that car takes right off after the red Ford. And both those guys end up shot where the red Ford ends up parked. . . .
>
> If you use logic and deductive reasoning, if you connect these dots, and you can ask yourselves how much coincidence is too much before it starts bleeding over into reality and fact, I believe the inescapable conclusions that you can draw based on the evidence that we have, the cars match up, the garments match up, the times match up, at that -- I don't have any DNA for you. I don't have a gun. I don't have any fingerprints, but what we've got is enough to demonstrate beyond any reasonable doubt that Mike Williams is the killer. And you should find him guilty of Count 1 and Count 2 as charged.

(R.209:45-46.) The prosecutor told the jury that if it was not true that Williams killed Martin, then he

> ha[d] to be the unluckiest son of a gun in the world because the only way it can be all a coincidence . . . is if you've got nearly an identical red Ford Expedition at the homicide scene and at the McAffee shooting scene. And that somehow the fact that Madison and his associate Mike Williams the defendant both get shot on the same date of the homicide, and it's unrelated somehow both to each other and to the murder scene. And somehow, some way Tony's wearing a tricolored hooded sweatshirt when he gets shot, and the defendant's wearing camouflaged pants when he gets shot, and it's all just a big coincidence.

(*Id.*:44-46.)

Additionally, as was explained above, the prosecutor chastised Williams for being unable to offer answers to questions that the State wanted the jury to resolve against him. Many of those questions involved holes in the State's case against Williams, such as the absence of proof regarding the Madison-Williams connection. The State did not want the jury to hold the absence of proof against it, but instead against Williams. And so, the State made its "unluckiest man in the world" argument.

But, under the burden of proof instruction as given to Williams' jury, the jury was not supposed to explore how Williams may have been the unluckiest man in the world. It was not supposed to explore the holes in the State's proof. If the jury wanted to explore the limits of McAffee's evidence and ascertain what doubt it contributed to the case, it could not. If the jury wanted to question the limits of Jackson's believability because he had a proffer agreement, it could not. The jury was not to question the State's inability to prove that Williams had not been shot at Tuetonia and Villard. All those things would constitute searching for doubt, and the instruction specifically forbade any such inquiry.

The internal conflict in the burden of proof instruction—defining reasonable doubt, but then instructing the jurors not to search for doubt and instead search for the truth—thus gave Williams' jurors an impossible task, undoubtedly confusing them. In short, the command to not search for doubt but to search for truth gave "a reasonable juror" in Williams' case grounds "misinterpret the instructions [on the State's burden of proof] to the detriment of [Williams'] due process rights." *Dodson*, 219 Wis. 2d at 86.

Thus, the burden of proof instruction caused an unconstitutional result in Williams' case specifically, given the manner of proof and the State's argument to the jury. Regardless of whether the instruction is universally unconstitutional, it certainly created that result in Williams' case.

Williams thus urges this Court to review his case to decide whether the reasonable doubt instruction can and did cause an unconstitutional result in his specific case.

III. WILLIAMS ALSO ASKS THIS COURT TO REVIEW THE CIRCUIT COURT'S ADMISSION OF EVIDENCE THAT HE CONTENDS WAS UNFAIRLY PREJUDICIAL.

Williams has argued that McAffee's testimony about having seen him with Madison at some unknown date and location should have been excluded because its probative value was substantially outweighed by unfair prejudice.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. Generally, "[a]ll relevant evidence is admissible." However, otherwise relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair

prejudice . . . or needless presentation of cumulative evidence," Wis. Stat. § 904.03.

Whether evidence is relevant and admissible is a matter of the circuit court's discretion. *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983). Deciding whether to omit otherwise relevant evidence requires a balancing test in which the challenged evidence's probative value is weighed against the possible countervailing factors. *State v. Walters*, 2004 WI 18, ¶32, 269 Wis. 2d 142, 675 N.W.2d 778. If the weight of those countervailing factors is more substantial than the probative value, then the trial court should not admit the evidence. *See State v. Mordica*, 168 Wis. 2d 593, 605, 484 N.W.2d 352, 357 (Ct. App. 1992).

Determining the probative value of evidence necessitates consideration of both its relevance and "of what [it] adds to the case." 7 Daniel D. Blinka, Wis. Practice: Wis. Evid. § 403.1 (4th ed. Sept. 2017 update). "The lower the probative value, the more likely it will be 'substantially outweighed' by unfair prejudice" or other countervailing concerns. *Id.; see State v. Richardson*, 210 Wis. 2d 694, 709, 563 N.W.2d 899, 903 (1997).

In Williams' case, the circuit court did not weigh the probative value of McAffee's testimony against any possible prejudice. (R.202:14.) Instead, the court simply determined that McAffee's testimony would "not have too much weight with the jury," and thus it was admissible. (*Id.*)

Decision-making is not identical with an exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶3, 270 Wis. 2d 535, 678 N.W.2d 197. "'[T]he term [discretion] contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.'" *Id.* (quoting *McCleary v. State*, 49 Wis. 2d 263,

277, 182 N.W.2d 512 (1971)). Thus, simply because a court makes a decision does not mean that it properly exercised its discretion. *Id.*

Furthermore, the proper exercise of discretion necessitates application of the correct legal standard. *State v. Black*, 2001 WI 31, ¶9, 242 Wis. 2d 126, 624 N.W.2d 363. If the circuit court applies the wrong standard or fails to consider relevant legal rules, it erroneously exercises its discretion. *State v. Wyss*, 124 Wis. 2d 681, 733-34, 370 N.W.2d 745, 770 (1985).

This Court's review of the decision to admit McAffee's evidence would reiterate the need for courts to apply the proper test when deciding whether to admit evidence that is claimed to be unfairly prejudicial. After all, ascertaining the weight of McAffee's testimony was not dispositive of its admission. *Walters*, 2004 WI 18, ¶32. Instead, extant law required the circuit court to measure the weight of the McAffee evidence against the prejudice that Williams would suffer from it. *Id.* Nothing in the record shows that the circuit court considered the prejudice that would result to Williams when deciding to admit the McAffee evidence. But, Williams' counsel had moments prior to the circuit court's decision explained that "his position [wa]s that the danger of unfair prejudice substantially outweighs the relevance." (R.202:13.)

The record is thus devoid of any reasoning by the circuit court demonstrating its application of the proper legal standard. Williams' case thus presents this Court with a good vehicle whereby it can reaffirm that circuit courts cannot rightly take shortcuts when making evidentiary decisions.

CONCLUSION

For all the reasons stated above, Williams asks this Court to grant his petition for review.

Dated this 4th day of March, 2020.

PINIX & SOUKUP, LLC
Attorneys for the Petitioner

By: Matthew S. Pinix, SBN 1064368

CERTIFICATION

I certify that this petition conforms to the rules contained in Section 809.19(8)(b) and (c) for a petition produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this petition is 6,628 words, as counted by the commercially available word processor Microsoft Word. I further certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of Section 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed as of this date. A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 4th day of March, 2020.

PINIX & SOUKUP, LLC
Attorneys for the Petitioner

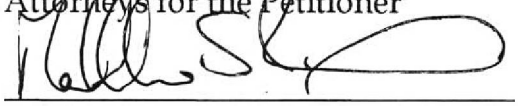
By: Matthew S. Pinix, SBN 1064368

CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, is an appendix that complies with Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. I further certify that this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using 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 4th day of March, 2020.

PINIX & SOUKUP, LLC
Attorneys for the Petitioner



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