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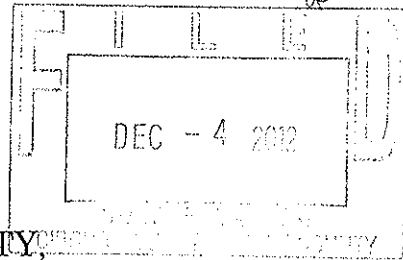
STATE OF WISCONSIN,

Plaintiff,

v.

JASON M. HUBERTY,

Defendant.



Case No. 12-FO-2437

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### STATE'S MOTION IN LIMINE

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The State of Wisconsin, by its attorney, hereby moves the Court for the following pretrial orders prior to the trial in the above case:

1. **Constitutional Challenge:** An order prohibiting the defendant from arguing to a jury that his or her conduct constitutes protected First Amendment speech. The Department of Administration ("DOA") has the authority to impose reasonable time, place, and manner restrictions on activities within the Capitol as long as they are content neutral.<sup>1</sup> The defendant has the obligation to provide proper notice when alleging the unconstitutionality of a statute or administrative code.<sup>2</sup> Whether DOA's permit requirements and other rules

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1. See *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) ("the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired"), see also *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002) ("[T]o allow unregulated access to all comers could easily reduce rather than enlarge the park's utility as a forum for speech") (quoting *Thomas v. Chicago Park Dist.*, 227 F.3d 921, 924 [7th Cir. 2000]).
  2. See Wis. Stat. § 806.04(11).

unconstitutionally limit the free speech rights of those who intentionally do not apply for a permit is a legal question appropriately addressed by the Court, not a jury.<sup>3</sup>

2. **Jury Nullification:** An order prohibiting the defendant from engaging in jury nullification arguments in the presence of the jury and specifically during jury selection, opening statements, closing arguments, and any examination of the witnesses. A jury's verdict must be based on the law, not its personal whim.<sup>4</sup> A defendant cannot argue to the jury that "fairness" dictates an acquittal.<sup>5</sup> The Wisconsin jury instructions specifically state that a juror should not "be swayed by sympathy, prejudice, or passion."<sup>6</sup>

3. **Disclosure of Exhibit:** An order prohibiting the defendant from introducing any video or audio recordings without disclosing the complete, unedited version to the State prior to trial. The Wisconsin Statutes provide courts with authority to control the order and manner for interrogating witnesses and presenting evidence.<sup>7</sup> Disclosure of

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3. See *DeChant v. Monarch Life Ins. Co.*, 204 Wis. 2d 137, 145, 554 N.W.2d 225 (Ct. App. 1996) (explaining that legal issues are decided by the court and factual issues are decided by the jury), see *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 731 (1999) (explaining that judges determine whether the speech that motivated a termination was constitutionally protected speech, while juries find whether the termination was caused by that speech).
  4. See *State v. Olexa*, 136 Wis. 2d 475, 485 (Ct. App. 1987) ("If the jury ignores the instructions as to the applicable legal rules the jury becomes in effect the legislature and its decision depends entirely on uncontrolled, arbitrary discretion, not legal principle.").
  5. See *State v. Bjerkaas*, 163 Wis. 2d 949, 959 (Ct. App. 1991), see *id.* at 960-61 ("[A] defendant has no right to have the jury defy the law or ignore the undisputed evidence." and "A defendant has no entitlement to the luck of a lawless decisionmaker, even if the lawless decision cannot be reviewed.") (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984), *People v. Rollins*, 438 N.E.2d 1322, 1327 (Ill. App. Ct. 1982)).
  6. Wis. JI-Crim. 460 (Closing Instruction).
  7. Wis. Stat. § 906.11(1), see *State v. McClaren*, 2009 WI 69, ¶ 3, 318 Wis. 2d 739 ("Wis. Stat. § 906.11 authorizes a judge to exercise control over the presentation of evidence so that the truth can be effectively ascertained and so that time will not be needlessly wasted. To hold otherwise could frustrate a circuit court's efforts to try to be certain that a jury is presented with admissible, reliable evidence and to make pretrial rulings so that the trial runs smoothly. . . . Foreseeing potential obstacles to a smoothly run trial

evidence prior to trial is consistent with Wisconsin's longstanding policy of avoiding trial by ambush.<sup>8</sup> Under the rule of completeness, "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."<sup>9</sup> Requiring disclosure of an unedited recording to opposing counsel before trial permits this Court to more efficiently manage this action.

4. **Panorama and Other Acts:** An order permitting the state to introduce evidence of other similar sing along events held at the Capitol and at which the defendant was a participant. The *Capital Times* recently reported "the Solidarity Singers . . . which gathers every weekday, conducted its 500th sing-along."<sup>10</sup> The activity of the defendant and additional individuals known collectively as the "Solidarity Singers" and "Solidarity Sing Along" is part of the panorama of evidence surrounding the specific activity that occurred on the date of the violation in this citation.<sup>11</sup> Additionally, the other similar events provide necessary evidence to show the intent, preparation, plan, knowledge, identity, and absence of mistake or accident by the defendant.<sup>12</sup> The introduction of similar acts assists the jury to understand the context of the case.<sup>13</sup> The admission of such

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and taking the necessary steps to avoid them is manifestly within the inherent power of a circuit court.")

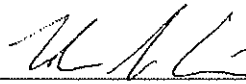
8. *State v. Guzman*, 2001 WI App 54, ¶ 22, 241 Wis. 2d 310 ("Wisconsin has abandoned the concept of 'trial by ambush' where neither side of the lawsuit knows until the actual day of trial what the other side will reveal in the way of witnesses or facts.") (quoting *Carlson Heating, Inc. v. Onchuck*, 104 Wis. 2d 175, 180 (Ct.App.1981)).
9. Wis. Stat. § 901.07; see also *State v. Eugenio*, 219 Wis. 2d 391, ¶¶ 30-33 (1998) (recognizing that Wis. Stat. § 901.07 references only written or recorded statements, while Wis. Stat. § 906.11 governs the rule of completeness for oral statements).
10. Steven Elbow, *Capitol Crackdown Fades; Police Say Only Four Citations Issued so far this Month*, The Capital Times, Nov. 27, 2012, available at [http://host.madison.com/news/local/crime\\_and\\_courts/blog/capitol-crackdown-fades-police-say-only-four-citations-issued-so/article\\_89f0e0da-37fe-11e2-b547-001a4bcf887a.html?comment\\_form=true](http://host.madison.com/news/local/crime_and_courts/blog/capitol-crackdown-fades-police-say-only-four-citations-issued-so/article_89f0e0da-37fe-11e2-b547-001a4bcf887a.html?comment_form=true).
11. See *State v. Jensen*, 2011 WI App 3, ¶ 81, 331 Wis.2d 440.
12. See Wis. Stat. § 904.04(2)(a).
13. See *State v. Shillcutt*, 116 Wis. 2d 227, 236-37 (Ct. App. 1983).

evidence does not permit the defendant to present or argue to the jury about the absence of any prior bad act or conviction.<sup>14</sup>

Dated this 4th day of December 2012,

Respectfully Submitted,

J.B. VAN HOLLEN  
Attorney General



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Winn S. Collins,  
Assistant Attorney General  
State Bar # 1037828

cc: Patricia K. Hammel, Attorney for Defendant

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14. *See State v. Bedker*, 149 Wis. 2d 257, 268-69 (Ct. App. 1989) (rejecting a defendant's argument that evidence that the defendant had never been convicted for a crime was admissible).