To: Wisconsin criminal defense lawyers
From: Michael D. Cicchini
Re: Brief in support of modified pattern jury instruction 140

The brief: Starting on the following page is a brief in support of a request for a modified instruction on the burden of proof. It requests modification as set forth in Exhibit A of the brief.

The motion: Given that the jury instruction on the burden of proof may be read to the jury in preliminary instructions before the trial begins, it is probably wise to raise this issue in a motion in limine (along with a supporting brief) rather than waiting for the jury instruction conference after the close of evidence.

Copyright: Wisconsin criminal defense lawyers have my permission to use part, or all, of this brief *without attribution*. (However, citations *within the brief*, including footnotes, should be preserved to acknowledge the sources cited.) This brief is already written in the third-person with regard to the published studies and articles; therefore, it does not need to be modified in that regard.

Modifications: Please contact me at mdc@CicchiniLaw.com to suggest improvements or other modifications.

DISCLAIMER: I am making this brief available with the understanding that it is not legal advice. Each person who uses this brief or any portion thereof is responsible for ensuring the case law and other information in the brief is accurate, up-to-date, and appropriate for the particular case in which it is being used. Anyone using this material must always research, read, and verify the original sources. Similarly, each person is responsible for ensuring that the brief satisfies local court rules and other requirements with regard to length and format. I am not liable for damages of any kind, including direct, indirect, and consequential damages, resulting from the use of this material.

Rebutting prosecutor arguments:

This brief preempts two prosecutor arguments. Only one prosecutor argument has ever suggested that Wisconsin's doubt-truth language is useful or helpful, so I have addressed this argument. I have also addressed the most popular prosecutor argument: that verdict means "to say the truth," and that trials are about truth, etc. I have posted a second brief that preempts arguments commonly made by Kenosha prosecutors. See the JI 140 resource page for a copy. For additional sources that can be used to anticipate or respond to prosecutor arguments, see the articles page. The same **DISCLAIMER** (above) also applies to the use of that material.

STATE OF WISCONSIN CIRCUIT COURT _____ COUNTY

STATE OF WISCONSIN,
Plaintiff

-vs- Case No. _____

_____, Hon. _____
Defendant

DEFENDANT'S BRIEF IN SUPPORT OF MODIFIED JURY INSTRUCTION 140 ON THE BURDEN OF PROOF

I. THE BURDEN OF PROOF

In 1970, the United States Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt . . ." *In Re Winship*, 397 U.S. 358, 364 (1970). Strangely, however, after defining reasonable doubt, Wisconsin's pattern instruction concludes by telling the jury "you are *not* to search for doubt. You are to search for the *truth*." WIS. J.I. CRIM. 140 (emphasis added).

This brief demonstrates, both logically and empirically, that Wisconsin's pattern jury instruction lowers the burden of proof below the constitutionally-guaranteed standard. To correct this serious problem, the defendant proposes a jury instruction that is identical to Wisconsin's pattern instruction, except that it deletes the offending language and simply concludes: "It is your duty to give the defendant the benefit of every reasonable doubt." (Exhibit A.)

Modifying the last sentence of the pattern instruction is well within the Court's authority: "a trial judge may exercise wide discretion in issuing jury instructions . . . This discretion extends to both choice of language and emphasis." *State v. Vick*, 104 Wis. 2d 678, 690 (1981). In fact, not only *may* a trial judge independently evaluate pattern jury instructions, but he or she is *obligated* to do so. "A circuit court must . . . exercise its discretion in order to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." *State v. Neumann*, 32 N.W.2d 560, 584 (Wis. 2013).

II. LOWERING THE BURDEN OF PROOF

A. Language and Logic

First, telling a jury "not to search for doubt" is to instruct it *not* to perform its constitutionally-mandated duty. That is, the jury's duty *is* to search for doubt. More specifically, "The question for any jury is whether the burden of proof has been carried

by the party who bears it. In a criminal case . . . [t]he jury cannot discern whether that has occurred *without examining the evidence for reasonable doubt.*" *State v. Berube*, 286 P.3d 402, 411 (Wash. Ct. App. 2012) (emphasis added).

Second, telling the jury "to search for the truth" lowers the burden of proof. As stated above, the jury's duty is to examine the evidence for reasonable doubt, not to speculate or search for the truth of what it thinks happened. That is, "'seeking the truth' suggests determining whose version of events is more likely true, the government's or the defendant's, and thereby intimates a *preponderance of evidence standard*. Such an instruction *would be error* if used in the explanation of the concept of proof beyond a reasonable doubt." *U.S. v. Gonzalez-Balderas*, 11 F.3d 1218, 1223 (5th Cir. 1994) (emphasis added).

Third, the problem with Wisconsin's unconstitutional mandate is illustrated with a simple question. When the jury is instructed "not to search for doubt" but "to search for the truth," what should it do if it finds the allegation is *probably* true? In a "search for the truth" it would, of course, be obligated to convict. But this is blatantly unconstitutional. "The jury's task is not simply to determine the truth or falsity of the charge, to convict if it is true, acquit if it is false. *The jury must acquit even when it thinks the charge is probably true*." *State v. Giroux*, 531 A.2d 403, 406 (Vt. 1989) (emphasis added).

Fourth, worse than merely lowering the burden of proof, instructing the jury to search for or speculate about the truth poses even greater risks. To "search for truth and not for reasonable doubt both misstates the jury's duty and *sweeps aside the State's burden*." *Berube*, 286 P.3d at 411 (emphasis added). Other courts have recognized that, worse than merely lowering or even sweeping aside the state's burden, "Jury instructions on reasonable doubt which charge the jury to seek the truth are disfavored because they run the risk of unconstitutionally *shifting the burden of proof* to a defendant." *State v. Aleksey*, 343 S.C. 20, 27 (2000) (emphasis added).

B. Empirical Evidence

This problem—lowering, sweeping aside, or even shifting the government's burden of proof to the defendant—is obvious from the plain language of Wisconsin's pattern jury instruction. However, Wisconsin prosecutors have long argued that there was no actual *evidence* to support this claim. Therefore, attorney Michael D. Cicchini and Dr. Lawrence T. White—Professor and Chair of Psychology at Beloit College—designed, conducted, and published a controlled study to empirically test the impact of Wisconsin's pattern instruction on juror decision-making. *See* Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. RICHMOND L. REV. 1139 (2016).[1]

In this controlled study, 298 participants served as mock jurors. These mock jurors all read the *identical* case summary of a hypothetical criminal trial, including the elements of the crime, a synopsis of the trial testimony, and the lawyers' closing arguments. Participants were then randomly assigned to one of three groups, each of which received a *different* burden of proof jury instruction: Group A was instructed to render a verdict based only on a "search for the truth"; Group B was properly instructed on reasonable doubt, i.e., they were given Wisconsin's pattern jury instruction without the truth-related mandate; and Group C was given Wisconsin's pattern jury instruction.

[1] http://lawreview.richmond.edu/2016/06/24/truth-or-doubt-an-empirical-test-of-criminal-jury-instructions/.

Group A convicted at a rate of 29.6 percent. Group B, which received a legally proper reasonable doubt instruction, convicted at a rate of only 16 percent. Finally, Group C, which received Wisconsin's pattern instruction, convicted at a rate of 29 percent. This conviction rate was nearly *double* that of the group that received a legally proper reasonable doubt instruction, and was *statistically identical* to the group that received no reasonable doubt instruction whatsoever.

The statistical significance of the findings is fully explained in the article. But in summary, with the large sample size and the large difference in conviction rates, the authors were able to conclude with more than 97 percent certainty—with a *p*-value of 0.028—that they did not commit a "Type I error." That is, they are more than 97 percent certain (1-*p*) that they did not obtain a "false positive" when testing their hypothesis.

After the publication of this article, the authors conducted a follow-up study in order to test the reliability of the findings and expand the original work. *See* Michael D. Cicchini & Lawrence T. White, *Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication*, 117 COLUMBIA L. REV. ONLINE 22 (2017).[2] In this conceptual replication, they again found a statistically significant difference in conviction rates between mock jurors who were properly instructed on reasonable doubt and those who were instructed "not to search for doubt" but instead "to search for the truth" (p=0.033). Further, they included additional post-verdict questions and, in the process, identified a cognitive link between Wisconsin's truth-related language and jurors' higher conviction rate.

Jurors assigned to the group that received Wisconsin's truth-related language were nearly *twice* as likely ($p = 0.01$) to indicate, in their response to a post-verdict question, that "[e]ven if I have a reasonable doubt about the defendant's guilt, I may still convict the defendant[.]" Further, jurors who held this mistaken belief, regardless of the group to which they were randomly assigned, actually voted to convict the defendant at a rate *2-1/2 times higher* ($p < .001$) than jurors who correctly understood the burden of proof. In other words, the authors empirically demonstrated that Wisconsin's truth-related language creates in jurors a mistaken belief about the constitutionally-mandated burden of proof; the jurors, in turn, base their verdicts on this mistaken belief, which results in a significantly higher conviction rate.

The constitutional defects in Wisconsin's pattern instruction have long been obvious from a logical and textual analysis. Now, statistically significant empirical evidence proves that telling a jury to disregard doubt in favor of a search for the truth lowers the state's burden of proof below the constitutionally-guaranteed reasonable doubt standard.

III. DEBUNKING PROSECUTOR ARGUMENTS

Prosecutors have raised several arguments to preserve the pattern instruction. Nearly all such arguments take the form of a "harmless error" type of argument. Only *one* of their arguments even hints or suggests that the don't-search-for-doubt-search-for-truth mandate serves some sort of legitimate purpose. This argument is addressed below in part III.A. Additionally, prosecutors have developed several truth-themed arguments, which are addressed collectively in part III.B.

[2] http://columbialawreview.org/content/testing-the-impact-of-criminal-jury-instructions-on-verdicts-a-conceptual-replication/.

A. "Reasonable" versus "Any"

Many prosecutors argue that jurors must be told "not to search for doubt" and instead "to search for the truth," otherwise they will replace the words "reasonable doubt" with the words "any doubt." This prosecutorial argument is not just pure speculation, but is contrary to the plain language of the jury instruction.

First, Wisconsin's jury instruction 140 discusses *reasonable* doubt. Courts have held that this term "is self-defining, that there is no equivalent phrase more easily understood . . . that the better practice is not to attempt the definition, and that any effort at further elucidation tends to misleading refinements." *U.S. v. Lawson*, 507 F.2d 433, 443 (7th Cir. 1974). It is simply irrational to claim that jurors would substitute "any doubt" for "reasonable doubt."

Second, even if jurors were somehow inclined to change the words of the instruction in order to set guilty defendants free, "the proper solution is not to instruct them to disregard doubt altogether in favor of a search for the truth. This would be the equivalent of a doctor refusing to prescribe insulin to a diabetic out of fear that the patient might take too much of it. Rather, the proper solution would be to explain what type of doubt is a reasonable one and what type of doubt is not." Michael. D. Cicchini, *The Battle over the Burden of Proof: A Report from the Trenches*, 79 U. Pitt. L. Rev. __ (forthcoming, 2017).

Third, Wisconsin's instruction does just that. After explaining what a reasonable doubt *is*, it explains what it is *not*: "A reasonable doubt is *not* a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is *not* a reasonable doubt. A reasonable doubt is *not* a doubt such as may be used to escape the responsibility of a decision." WIS. J.I. CRIM. 140 (emphasis added).

Jury instruction 140 already goes to great lengths to protect the government from the amazingly remote possibility that a jury would intentionally set a guilty defendant free based on the "any doubt" standard. It is unconstitutional to tell the jury to disregard its constitutional duty to evaluate the state's case for doubts that are reasonable.

B. Trials are a "Search for the Truth"

1. *Verdict means "to say the truth"*

Prosecutors often argue that "verdict" is Medieval Latin for "to say the truth." These prosecutors then leap to the conclusion that jury instruction 140 should instruct jurors "not to search for doubt" but instead "to search for the truth." But the meaning of this medieval word has no bearing on the burden of proof jury instruction. Not only does the word "verdict" *predate* our modern burden of proof by several *centuries*, but the medieval jury played a dramatically different role than today's jury.

> [T]he medieval English jury *differed fundamentally* from the modern jury. Its members . . . came to trial already informed about the facts. Jurors based their verdicts on information they actively gathered in anticipation of trial or which they learned by living in small, tight-knit communities

> where rumor, gossip, and local courts kept everyone informed about their neighbors' affairs. Interested parties might also approach jurors out of court to relate their side of the case. *Witness testimony in court was thus unnecessary. The jurors themselves were considered the witnesses*—not necessarily eyewitnesses, but witnesses in the sense that *they reported facts to the judges*. They were self-informing; *they came to court more to speak than to listen*. Daniel Klerman, J.D., Ph.D., *Was the Jury Ever Self-Informing?*, 77 SO. CAL. L. REV. 123, 123 (2016) (internal quotations and citations omitted; emphasis added).

Consequently, even though the term "verdict" has survived, its definition does not describe our modern burden of proof or the role of the modern jury—which is to evaluate the state's case for reasonable doubt—and therefore should not influence the jury instruction on the burden of proof.

2. *Trials are about finding the truth*

Prosecutors often argue that, even though the literal definition of "verdict" is of no value, the purpose of the jury trial is still to find the truth. But in reality, "If one were asked to start from scratch and devise a system best suited to ascertaining the truth . . . [i]t is inconceivable that one would create a system bearing much resemblance to the criminal justice process we now have[.]" Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. SCH. L. REV. 912, 912 (2011).

In fact, the modern jury trial goes to great lengths to *hide* the truth from the jury—particularly when it comes to the defendant's evidence. For example, modern accuser-advocate privileges and rape-shield statutes intentionally and specifically exclude *relevant* evidence of innocence because a competing interest—the accuser's privacy—is elevated *above* the trial's truth-seeking function. *See also* Wis. Stats. sec. 906.11(1) (allowing the control of evidence to "protect witnesses from . . . embarrassment").

Similarly, under *State v. Denny*, a defendant is precluded from presenting evidence of his innocence—including eyewitness testimony and physical evidence linking a third party to the crime—unless the defendant can prove the true perpetrator's *motive*. But at the same time, the jury is specifically instructed that "the State is *not* required to prove *motive* on the part of a defendant in order to convict." WIS. J.I. CRIM. 175 (emphasis added).

Such an arbitrary double standard that excludes evidence of innocence, while allowing evidence of guilt, greatly obstructs the truth-seeking function, yet is justified due to its efficiency. As one court stated in denying a defendant the right to present a third-party defense, "One can only imagine how much longer this six-week trial would have lasted had the court granted [the defendant's] request to introduce third-party liability evidence[.]" *State v. Avery*, 337 Wis. 2d 351, 385 (Ct. App. Wis. 2011). In fact, any amount of time savings, no matter how small, trumps the truth-seeking function:

> that evidence of third-party guilt is excludable because it is a waste of time is breathtaking in its disregard for a criminal defendant's due process rights. Reviewing the cases in which this idea has been applied, one never sees a serious indication about the actual time involved in presenting the

> evidence. In some cases, it seems as though the offered evidence comes from a single witness whose testimony, we might estimate, is likely to take an hour or less. David Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 WIS. L. REV. 337, 378 (2016).

These three examples demonstrate that the modern trial "may *in some ways* be a search for the truth"; however, "*truth is not the jury's job*." *Berube*, 286 P.3d at 411 (emphasis added). That is why the Constitution demands that, even if the jury concludes that a charge is "probably true," it is obligated to find the defendant not guilty. *Giroux*, 531 A.2d at 406.

3. *Case law says trials are about truth*

Prosecutors often argue that, even though the medieval word "verdict" is of no importance when instructing the jury, and even though modern trial rules often elevate competing interests above the truth-seeking function, case law still says that trials are about the truth. It is true that case law does discuss "truth" in several contexts, but none of these cases support this prosecutorial argument.

For example, prosecutors frequently cite *Tehan v. United States*, 328 U.S. 406 (1966), but this case holds that competing interests may *override* the truth-seeking function in order to "preserv[e] the integrity of a judicial system in which *even the guilty are not to be convicted* unless the prosecution 'shoulder the entire load.'" *Id*. at 415 (emphasis added).

Prosecutors also cite *Wardius v. Oregon*, 412 U.S. 470 (1973),[3] but this case discusses pretrial discovery obligations. "The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses." *Id*. at 475.

Most frequently, prosecutors cite *Manna v. State*, 192 N.W. 160 (1923). But not only was this case decided many decades before the development of our truth-suppressing trial rules discussed above, but it deals with the jury's fact-finding function, not the burden of proof:

> It is undoubtedly true that the aim of the jury should be to ascertain the truth. When the court said that the jury was not to search for doubt, he plainly intended, and the jury must have so understood, that the purpose of a trial is to *ascertain the facts* and not the ascertainment of doubt, which is the negation of a fact. *Id*. at 166.

Other Wisconsin cases that address "the truth" in the context of resolving such credibility and factual conflicts include *State v. Scott*, 608 N.W.2d 753 (Wis. 2000) (cross-examining a witness about his motive to lie is part of the truth-seeking function) and *State v. Reid*, 479 N.W.2d 572 (Wis. Ct. App. 1991) (evidence of a witness's perjury is relevant to the truth-seeking function). And Wisconsin jurors are already instructed on how to carry out this part of their role. For example, "You, the jury, are the sole judges

[3] The Wisconsin case discussing *Wardius* is *State v. McClaren*, 767 N.W.2d 550 (Wis. 2009).

of the facts." WIS. J.I. CRIM. 100. And, "You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony." WIS. J.I CRIM. 300.

It is true that many courts have *tolerated* "search for the truth" language in jury instructions regarding credibility conflicts. *See Aleksey*, 538 S.E.2d at 251 (upholding conviction because mandate "to seek the truth" appeared in the court's "concluding remarks on determining the credibility of witnesses" and not in the burden of proof instruction); *Commonwealth v. Allard*, 711 N.E.2d 156, 160 (Mass. 1999) (upholding conviction because description of trial as "a search for the truth" was made in the instruction regarding the jury's "fact finding function" and not in the burden of proof instruction).

But the jury's role "involves more than resolving the credibility conflicts." *Id*. And telling the jury to "search for the truth" is "error if used in the explanation of the concept of proof beyond a reasonable doubt." *Gonzales-Balderaz*, 11 F.3d at 1223. That is, "The jury's task is not simply to determine the truth or falsity" of various pieces of testimony or even "of the charge" itself; rather "[t]he jury must acquit even when it thinks the charge is probably true." *Giroux*, 531 A.2d at 406.

4. *The definitive case on the purpose of jury trials*

Prosecutors do not really believe that trials are searches for the truth. To know this, we need only flip the script and see how they respond when defendants make such an argument. When a defendant is acquitted of a criminal charge, and the prosecutor later tries to use the facts underlying that acquittal as "other acts" evidence in a subsequent trial, defendants argue that the jury found them "not guilty" and, therefore, they are *not guilty*. Consequently, the defendant's argument goes, the prosecutor should not be able to use the other-acts evidence (that resulted in an acquittal) at the new trial.

To this, prosecutors respond, and Wisconsin courts have held, that "an acquittal *only establishes that there was a reasonable doubt* in the jury's mind as to whether the defendant committed the prior crime, not that the defendant is innocent." *State v. Landrum*, 528 N.W.2d 36, 41 (Ct. App. Wis. 1995) (emphasis added).

"The prosecutor is correct to argue that a prior acquittal only established reasonable doubt about the defendant's guilt. But this claim is a general truth; it is not rhetoric for the prosecutor to selectively invoke only when it suits the government's needs." Michael. D. Cicchini, *The Battle over the Burden of Proof: A Report from the Trenches*, 79 U. Pitt. L. Rev. __ (forthcoming, 2017).

In other words, "it is always the jury's role to evaluate the evidence presented to it for reasonable doubt. Trial courts must not dilute this constitutionally-imposed standard with contradictory, nonsensical, burden-lowering, truth-based jury instructions." *Id*.

IV. SERVING NO PURPOSE

The only reason a prosecutor would oppose the defendant's jury instruction (Exhibit A) is that, quite obviously, it is much easier to convict when the court instructs the jurors not to evaluate the evidence for reasonable doubt, but instead to search for the truth of what they think happened. There is simply no reasonable objection to a burden of proof instruction

that concludes, as the defendant's proposed instruction does, "It is your duty to give the defendant the benefit of every reasonable doubt."

Further, no court has held that the search for the truth language in the pattern instruction is *required*, or *preferable*, or serves *any purpose* whatsoever. Rather, when affirming convictions after the fact, the best thing that courts have been able to say about such truth-related language is that it probably didn't affect the jury's verdict—a claim that has always been highly suspect and now empirically debunked in two studies. And even more importantly, these courts are only addressing the "search for truth" language, not the far more damaging "you are not to search for doubt" language.

For example, after considering "the context of the entire instruction," Wisconsin courts have merely concluded that "it is not reasonably likely that the jury understood" the truth mandate "to allow conviction based on proof below the *Winship* reasonable doubt standard." *State v. Avila*, 192 Wis. 2d 870, 889 (Wis. 1995).

Similarly, in South Carolina, the court "strongly urge[d] trial courts to avoid any 'seek' language," including the trial judge's instruction that jury should be "in search of the truth." *State v. Needs*, 333 S.C. 134, 154 (1999). Nonetheless, the court tolerated such truth-related language, and affirmed the conviction, because the truth mandate was not combined with "any other offending terms." *Id*.

Likewise, in Washington, the court held that instructing the jurors to determine "the truth" probably doesn't diminish the beyond a reasonable doubt standard, "but neither does it add anything of substance" to the burden of proof jury instruction. *State v. Pirtle*, 904 P.2d 245, 262 (Wash. 1995).

When the *best* thing that can be said of truth-related language is that it adds nothing of value, but probably does no harm, logic and prudence require that it be deleted from the burden of proof instruction. And now that empirical evidence debunks this already weak and irrational justification—that the language probably causes no harm—continuing to instruct the jury "not to search for doubt," but instead "to search for the truth," would, without any doubt, be unconstitutional.

V. CONCLUSION

The defendant's proposed jury instruction (Exhibit A) is identical to Wisconsin's pattern instruction except that, rather than instructing the jury to disregard its constitutionally-mandated duty in favor of a speculative search for the truth, the defendant's instruction concludes with this mandate: "It is your duty to give the defendant the benefit of every reasonable doubt."

No prosecutor has offered, or would be able to offer, any legitimate objection to an instruction that so accurately and clearly conveys the state's constitutionally-imposed burden of proof.

Dated: _____

_____
Attorney for Defendant

EXHIBIT A

140 BURDEN OF PROOF AND PRESUMPTION OF INNOCENCE

In reaching your verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence.

Presumption of Innocence

Defendants are not required to prove their innocence. The law presumes every person charged with the commission of an offense to be innocent. This presumption requires a finding of not guilty unless in your deliberations, you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty.

State's Burden of Proof

The burden of establishing every fact necessary to constitute guilt is upon the State. Before you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant is guilty.

Reasonable Hypothesis

If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and return a verdict of not guilty.

Meaning of Reasonable Doubt

The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.

A reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.

It is your duty to give the defendant the benefit of every reasonable doubt.