To: Wisconsin criminal defense lawyers
From: Michael D. Cicchini
Re: SECOND brief in support of modified JI 140

The brief: Starting on the following page is a second brief that I have filed in support of my request for a modified JI 140. It requests modification as set forth in Exhibit A of the brief. As an alternative, it requests the modification in Exhibit B. This brief is tailored to preempt arguments typically made by Kenosha County prosecutors. These arguments may not be raised in other counties, and therefore the brief should be modified in that regard.

The motion: Given that JI 140 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.

 The brief is written in the first person with regard to the published studies on JI 140; it will therefore need to be modified in that regard as well.

For additional material on this issue, including the studies and subsequent articles addressing prosecutor arguments, see the articles page of http://www.cicchinilaw.com**.** 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 A MODIFIED JURY INSTRUCTION 140

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."[1] Strangely, however, after defining reasonable doubt, Wisconsin's pattern instruction (JI 140) concludes by telling the jury "you are not to search for doubt. You are to search for the truth."

This brief demonstrates that JI 140 lowers the burden of proof below the constitutionally-guaranteed standard. To correct this problem, the defendant proposes a jury instruction that is identical to JI 140, except that it deletes the closing mandate and simply concludes: "It is your duty to give the defendant the benefit of every reasonable doubt." (*See* Exhibit A.) It is difficult to imagine a less controversial request, as the burden of proof *is* beyond a reasonable doubt. However, if this request is denied, the defendant proposes the jury instruction committee's alternative ending to JI 140. (*See* Exhibit B.)

Modifying the last sentence of JI 140 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."[2] In fact, not only *may* a court do so, but often it has an *obligation* to do so. "A circuit court must, however, 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."[3]

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. "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

[1] In Re Winship, 397 U.S. 358, 364 (1970).
[2] State v. Vick, 104 Wis. 2d 678, 690 (1981).
[3] State v. Neumann, 32 N.W.2d 560, 584 (Wis. 2013).

discern whether that has occurred *without examining the evidence for reasonable doubt*."[4]

Second, telling the jury "to search for the truth" also lowers the burden of proof. 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."[5] In other words, "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."[6]

Worse than merely lowering the burden of proof, instructing the jury to search for truth instead of doubt 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" entirely.[7] Further, other courts have recognized that, worse than 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."[8]

B. Empirical Evidence

This problem—lowering, sweeping aside, or even shifting the burden of proof to the defendant—is obvious from the plain language of JI 140. However, Wisconsin prosecutors have long argued that there was no actual evidence to support this claim; rather, they argued, the claim was nothing more than the defense lawyer's personal opinion. In response to this call for evidence, Dr. Lawrence T. White—Professor of Psychology at Beloit College—and I published a controlled study that empirically tested the effect of JI 140 on juror decision-making.[9]

In this controlled study, 298 participants served as mock jurors. They 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 JI 140 but *without* the closing mandate to search for truth instead of doubt; and Group C was given the unaltered JI 140.

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 JI 140, convicted at a rate of 29 percent. This 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 difference in conviction rates, we can conclude with more than 97 percent certainty—with a *p*-value of 0.028—that we did not commit a

[4] State v. Berube, 286 P.3d 402, 411 (Wash. Ct. App. 2012) (emphasis added).
[5] U.S. v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir. 1994) (emphasis added).
[6] State v. Giroux, 531 A.2d 403, 406 (Vt. 1989).
[7] *Berube*, 286 P.3d at 411.
[8] State v. Aleksey, 343 S.C. 20, 27 (2000).
[9] Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. RICHMOND L. REV. 1139 (2016).

"Type I error." That is, we are more than 97 percent certain (1-*p*) that we did not obtain a "false positive" when testing the hypothesis.

After the publication of this article, we conducted a follow-up study in order to test the reliability of the findings and expand the original work.[10] In this conceptual replication, we 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, 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[.]" And 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, Wisconsin's truth-related language creates in jurors a mistaken belief about the burden of proof; the jurors, in turn, base their verdicts on this mistaken belief, which results in a significantly higher conviction rate.

Statistically significant evidence now demonstrates—quite unsurprisingly—that telling a jury "not to search for doubt" but instead "to search for the truth" lowers the state's burden below the reasonable doubt standard.

III. DEBUNKING PROSECUTOR ARGUMENTS

Prosecutors have raised several arguments, including criticisms of the published studies, in their attempts to preserve JI 140's closing mandate. However, their arguments are riddled with factual errors, misstatements of law, and logical fallacies. The result of such sloppy thinking is that their arguments are a lot like landmines: they are easy to lay but very time-consuming to clean up (which explains the length of this document). I will therefore preempt only the arguments that have been raised by *Kenosha County* prosecutors, as I expect they will be recycling their now-familiar criticisms in this case.

When addressing the arguments, I will often quote Dodge County Circuit Court Judge Steven Bauer, a former prosecutor who holds "a master of science degree in resource economics with a concentration in quantitative methods."[11] Judge Bauer and at least twenty other Wisconsin judges (including three in Kenosha County) have modified the pattern jury instruction to better communicate to jurors the state's high burden of proof.[12]

A. "A defendant is not entitled to a jury that is predisposed to acquit him"

In arguing that JI 140 should not be changed because "a defendant is not entitled to a jury that is predisposed to acquit him," the state relies on *State v. Loukota*, which deals with *jury selection*, not jury instructions. In *Loukota*, the state conceded, and the court held, that

[10] 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).

[11] Decision Re: Motion for Reconsideration of Decision Modifying Burden of Proof Jury Instruction, Wisconsin v. Linde, No. 2016-CF-193 (Cir. Ct. Dodge Cty. 2017), at 2 [hereinafter "Decision Re: Motion"], at http://www.cicchinilawoffice.com/uploads/ji_140_bauer_decision.pdf.

[12] For a list of such judges along with many CCAP links, a written order, and a written decision see http://www.cicchinilawoffice.com/Wis_JI_140.html.

it was *error* to remove from the array those citizens who had previously acquitted the defendant in an unrelated case. While everyone in the case agreed this was an improper government tactic, the defendant lost his appeal because he could not demonstrate that the panel he *did* receive was unable to "conscientiously apply the law and find the facts."[13]

Loukota has nothing to do with how a jury is instructed on reasonable doubt. And, contrary to what prosecutors claim, a defendant *is* entitled "to a jury that is predisposed to acquit him." (This quote is the prosecutor's; it is *not* found in the *Loukota* case.) It is called the presumption of innocence. And jurors must not only be "predisposed to acquit," but must *actually* acquit unless they find, during deliberations, that the state overcame this presumption with compelling evidence that proves guilt beyond all reasonable doubt.

More importantly for our purposes, a defendant *is* entitled to a jury instruction that does not dilute this high burden of proof. The Supreme Court has equated proof beyond a reasonable doubt with jurors having "a subjective state of near certitude" regarding guilt.[14] To instruct jurors "not to search for doubt" violates this constitutional mandate.

B. The jury instruction committee found "very serious flaws" in the studies

Prosecutors often claim that our jury instruction committee has identified "very serious flaws" in the two published studies (discussed above), which then led it to reject the studies and my proposed change to JI 140 (Exhibit A). This is false.

In June 2016, I wrote to the committee asking it to change its pattern instruction based in part on the findings of our first published study.[15] By September 2016, prosecutors were announcing—sometimes in court filings—that the committee decided *not* to change the instruction.[16] More than a year after my letter, the committee eventually informed me that it had made a decision—allegedly "in December, 2016"—not to change the instruction.[17] How prosecutors knew of this decision months before the committee supposedly made it remains a mystery.

In any case, at no time has the committee identified "very serious flaws," or any flaws at all, in the two published studies. Its email to me indicates no criticisms of the research but instead refers me to footnote 5 of the 2017 edition of JI 140. That footnote, in turn, says nothing at all critical about the research. If the committee has said or written anything about the published studies, it has not shared its opinions with me. More importantly, the prosecutor does not cite to these "very serious flaws" allegedly identified by the committee. I am therefore unable to address these mystery criticisms.

C. A study using "a few words on a printed page ensures unreliable results"

[13] State v. Loukota, 508 N.W.2d 896, 898 (Wis. Ct. App. 1993).
[14] Jackson v. Virginia, 443 U.S. 307, 315 (1979).
[15] Michael D. Cicchini, Letter to Jury Wisconsin Instruction Committee (June 7, 2016), at http://www.cicchinilawoffice.com/Wis_JI_140.html
[16] Letter from Brandon Wigley, Assistant District Attorney, Milwaukee County, Wisconsin (Sept. 22, 2016) ("the a [sic] state-wide [sic] jury instruction committee . . . have [sic] elected not to change the language of jury instruction 140") (on file with author). Many other prosecutors were also sharing the news as early as September 2016.
[17] E-mail from David Schultz, Reporter, Wisconsin Criminal Jury Instructions Committee (June 29, 2017, 11:19 a.m. CST), at http://www.cicchinilawoffice.com/uploads/Letter_from_JI_Committee.pdf.

Prosecutors have been highly critical because our two published studies use the written case summary method as opposed to a video-recorded trial simulation. But first, our written test materials are described at length in the two studies, and they are far more than "a few words on a printed page." And second, the state offers *no reasons* why it believes the case summary method "ensures unreliable results." (In fact, this criticism should immediately raise a red flag: Why would a Ph.D. coauthor two studies using a methodology that "ensures unreliable results"?)

The prosecutor who makes this argument likely did not even read either of the studies. In them, we discuss our use of the case summary method at length. Not only is this method commonly used in behavioral research—we cite several other studies that used it and even compared it with other methodologies—but we also explain why the *written* case summary method is especially well-suited to testing the effect of a *written* jury instruction (as opposed to, say, the physical attractiveness bias or some other visual phenomenon that researchers often test).

As Judge Bauer, a former prosecutor, explains, the state's criticism of the case summary method is a red herring:

> It is a red herring because in no way does not using live witnesses undermine the validity of [the] Cicchini & White [study]. One could have presented live witnesses, but that would have been a different study. *As long as the variable of the story told in the study was consistent among groups, how the story is told makes no difference*—the differences between groups would not be biased.[18]

Finally, the Court should not overlook the irony in this prosecutorial criticism from an office that is perfectly willing to convict *real-life* defendants by reading a transcript—"a few words on a printed page"—into the record at a jury trial.[19]

D. The studies have not been "validated" or "peer reviewed"

A common prosecutor argument is that the studies have not been peer reviewed, i.e., replicated or validated, and, therefore, the judge should continue to use the closing truth-not-doubt mandate. This argument is flawed in three ways.

First, peer review and study replication are not the same thing and should not be confused. Peer review simply means that, before a journal extends an offer of publication, the editors will send the article to one or more anonymous "peers" outside of the journal who provide comments. (Not only are the flaws of this process well documented,[20] but prosecutors would no doubt have their confidence in the process shaken to learn that *I*

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[18] Decision Re: Motion, *supra* note 11, at 6 (emphasis added).

[19] *See, e.g.*, State v. Stuart, 2005 WI 47, ¶ 14-15. In *Stuart*, the prosecutor's office filed a mid-trial "emergency petition for review" to permit it to read a preliminary hearing transcript into evidence at trial. The office won its petition and convicted the defendant at trial based in large part on "a few words on a printed page"—the very thing it now condemns in the context of controlled experiments. Fortunately for the real-life defendant in *Stuart*, his conviction was eventually reversed.

[20] Steven Lubet, *Law Review v. Peer Review: A Qualified Defense of Student Editors*, 2017 U. ILL. L. REV. ONLINE 1 (2017).

have been invited to be a reviewer for a peer-reviewed journal on police practices.[21]) On the other hand, study replication means that a study has been reproduced—either directly or conceptually—in a subsequent study, and the findings of the original study have been confirmed.

Second, it is true that, while the University of Richmond journal that published our original study uses a competitive selection process, it likely did not solicit peer comments before offering to publish our study. (However, other journals may have; law review articles are submitted to multiple journals simultaneously and we also received publication offers from the *American Criminal Law Review* and the *NYU Law Review Online*, among others.[22]) On the other hand, the Columbia University journal that published our replication study is not only highly selective, but *does* solicit peer comments.[23] Contrary to prosecutors' claims, our second study *was* peer reviewed[24]—for whatever that is worth. More importantly, as is obvious from that article's subtitle—"a conceptual replication"—that study replicated the results of the first study.

Third, based on these two misrepresentations of fact regarding study replication and peer review, the prosecutor then claims that judges should therefore preserve JI 140's truth-related closing mandate. But even if the prosecutor's first two claims were true—i.e., that the Richmond study was not replicated and the Columbia study was not peer reviewed—these claims still would not support the conclusion that the court should maintain JI 140 in its current form.[25]

Rather, as Judge Bauer wrote of our Richmond study (before he even knew of our Columbia study), "the Court believes that the result of this study raises an issue that should not be lightly dismissed."[26] And in changing the pattern instruction, he wrote, "[t]he Court can't close its eye to empirical evidence that may help the criminal justice system . . . be more faithful to the stricture of the Constitution of the United States requiring a criminal charge to be proven beyond a reasonable doubt."[27]

E. "Even the authors acknowledge the results could be different"

Some prosecutors have seized upon the language from our first study—that "we cannot know the *extent* to which this effect will also be observed in other cases"—and then use this to paint the studies as somehow flawed. They have argued that "[e]ven the authors acknowledge that the results could be different in a case where there is more evidence of guilt," as if this is somehow a concession of a methodological weakness.

This claim is yet another red herring. It is true that JI 140 could have a greater or

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[21] E-mail from Robert D. Hanser, Ph.D., Associate Managing Editor, POLICE PRACTICE AND RESEARCH: AN INTERNATIONAL JOURNAL (Feb. 3, 2015, 11:04 a.m. C.S.T.) ("I would be grateful if you would kindly agree to act as a reviewer") (on file with author).

[22] Several offers of publication are on file with the author.

[23] COLUM. L. REV., SUBMISSION INSTRUCTIONS: PEER REVIEW, at http://columbialawreview.org/submissions-instructions/.

[24] E-mail from Shu-en Wee, Former Editor, COLUM. L. REV. ONLINE (July 11, 2017, 08:28 a.m. CST) (on file with author).

[25] The prosecutor who makes this argument is committing the fallacy known as "denying the antecedent." D.Q. McInery, BEING LOGICAL: A GUIDE TO GOOD THINKING 104-05 (Random House: 2004).

[26] Decision Re: Motion, *supra* note 11, at 2.

[27] Id.

smaller effect (or no effect at all) on verdicts depending upon the strength of the evidence in a given case. For example, in cases with very strong (or very weak) evidence of guilt, jurors will convict (or acquit) whether they receive JI 140, another state's instruction, or no instruction at all.

However, this is certainly *not* a justification for preserving JI 140's closing mandate, only to hope the evidence falls near one of the two extremes on the strength-of-evidence spectrum (thus rendering the burden of proof instruction irrelevant to verdict choice). Rather, the court's duty is to properly instruct the jury in the first place.

F. This is "a biased study . . . executed by a criminal defense attorney"

The *ad hominem* attack is, at best, amateurish, and it is a logical fallacy that I have discussed elsewhere.[28] Further, the prosecutor who commits this logical error does not think through the implications of this line of reasoning. If I am precluded from offering argument or evidence based on my alleged "bias," then how can we rely on a jury instruction committee comprised almost entirely of former prosecutors (and entirely of former government agents), many of whom boast more than twenty years of experience putting citizens behind bars?[29]

Similarly, if the two controlled studies are biased and unreliable because I am a criminal defense lawyer, then wouldn't all photo-array identification procedures, for example, be biased and unreliable because they are conducted by the police? Of course, the answer is no. Rather, to determine if controlled studies (or photo-array procedures) are biased, we look to the methodology employed, not the perceived personal shortcomings of the researcher (or the photo-array administrator).

With regard to the studies, Dr. White and I controlled for experimenter and participant bias using a double-blind methodology and random assignment of participants to test groups. Further, our articles discuss our case summary materials, findings, and statistical analysis in great detail. The prosecutor's generalized claim of bias, without pointing to any bias, is an invalid criticism of which this Court should be leery.

Judge Steven Bauer responded to these *ad hominem* attacks and claims of unidentified biases this way: "The state provides no evidence or argument of how bias affected how the study was conducted or the presentation of the results. The study was apparently biased because the state says it was biased. The Court is generally highly skeptical of *ipse dixit* arguments and refuses to accept it on this topic."[30]

G. The closing mandate offers the jury "a neutral objective"

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[28] *See* Michael D. Cicchini, *The Battle Over the Burden of Proof: A Report from the Trenches*, 79 U. PITT. L. REV. 61, 77-79 (2017); Michael D. Cicchini & Lawrence T. White, *Educating Judges and Lawyers in Behavioral Research: A Case Study*, 53 GONZAGA L. REV. 101, 107-08 (2017-18).

[29] The website www.ballotpedia.org has "an editorial staff of over 60 writers and researchers" to collect and report information on elected officials, including the elected trial-court judges that are subsequently appointed to the jury instruction committee. It reports that eight committee members are former prosecutors, with many of them being career-long prosecutors, before joining the committee. Four members each have twenty or more years of experience stripping citizens of their liberty. None of the members are former public defenders, and while two have had experience in private practice, it is not clear whether either of them ever defended a citizen against the government.

[30] Decision Re: Motion, *supra* note 11, at 3-4.

Several prosecutors have argued that JI 140's closing mandate should be preserved because "it directs the jury to a *neutral* objective, finding the truth, rather than directing them to look for evidence that supports the position of either of the parties—the position of the State to find guilt or the position of the defendant to find doubt." This argument is flawed in two ways.

First, there is nothing neutral about a jury's job. The jury must begin with a presumption of innocence from which it must not depart unless and until it decides, after deliberations, that the state has proved guilt beyond all reasonable doubt. To direct the jury to go into the jury room to pursue a "neutral" objective runs contrary to the jury's duty and the defendant's constitutional rights.

Second, the prosecutor who makes this argument commits the logical fallacy know as "equivocation": he or she is "employ[ing] words with multiple meanings for the purpose of deception."[31] More specifically, the "neutral objective" argument portrays the "search for the truth" as a middle-of-the-road alternative to which neither party lays claim. But JI 140 and the prosecutor's closing argument uses the phrase "search for the truth" in a dramatically different and one-sided way. Once again, Judge Bauer explains:

> During closing arguments, the defense attorney often argues the burden of proof instruction . . . and then the prosecutor, on rebuttal, says "Defense counsel read you only part of the jury instruction on reasonable doubt. What counsel left out were these two lines: 'you are not to search for doubt. You are to search for the truth.'"
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> Prosecutors make this argument because they know that the [jury instruction] prohibiting the search for doubt diminishes the beyond a reasonable doubt burden of proof and makes it easier for the State to obtain a conviction. I have had these lines used against me as a defense attorney, and *mea culpa*, *mea culpa*, I have used them against defense counsel as district attorney.[32]

Or, as another court has held, telling the jury to search for truth instead of doubt is not neutral, but rather it "impermissibly portray[s] the reasonable doubt standard *as a defense tool for hiding the truth*."[33]

H. "Verdict is Latin for say the truth"

Prosecutors often argue that "verdict" is Medieval Latin for "to say the truth," and therefore JI 140's closing mandate is justified. However, 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.

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[31] McInery, *supra* note 25, at 107.

[32] Hon. Steven Bauer, *Why Wisconsin's Criminal Burden of Proof Instruction Had to be Changed*, TO SPEAK THE TRUTH (Oct. 24, 2017), at http://bauersteven.blogspot.com/2017/10/why-wisconsins-criminal-burden-of-proof.html.

[33] State v. Berube, 286 P.3d 402, 411 (Wash. Ct. App. 2012) (emphasis added).

> [T]he medieval English jury . . . 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 . . . they reported facts to the judges*. They were self-informing; *they came to court more to speak than to listen*.[34]

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, not to come to court to report the facts—and therefore has no part in a modern jury instruction.

I. "Trials are about finding the truth"

Prosecutors often argue that trials are searches for the truth, and therefore the closing mandate in JI 140 should be preserved. 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[.]"[35]

Far from searching for truth, the modern jury trial goes to great lengths to *hide* it from the jury—particularly when it comes to the defendant's evidence. For example, accuser-advocate privileges and rape-shield statutes intentionally exclude *relevant* evidence of innocence because a competing interest—a witness's privacy—is elevated *above* the trial's truth-seeking function. And our statutes even permit the court to control the evidence to "protect witnesses from . . . embarrassment."[36] When our criminal justice system elevates concerns of a witness's privacy and their potential, temporary embarrassment over a defendant's right to present a defense or cross-examine witnesses, prosecutors can no longer hide behind this truth mantra.

These three brief examples demonstrate that the modern trial "may in some ways be a search for the truth"; however, "truth is not the jury's job."[37] That is why the Constitution demands that even if the jury concludes that a charge is *probably* true, it is still obligated to acquit the defendant.

And if any doubt remains about the purpose of jury trials, we need only look to the state's own words. When a prosecutor wants to introduce other-acts evidence for which the defendant was found *not* guilty at jury trial, the state abandons its "trials are about truth" argument. Instead, the state argues, and the courts have held, that "an acquittal only establishes that there was a reasonable doubt in the jury's mind as to

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[34] 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).
[35] Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. SCH. L. REV. 912, 912 (2011).
[36] Wis. Stats. § 906.11(1).
[37] *Berube*, 286 P.3d at 411.

whether the defendant committed the prior crime, not that the defendant is innocent."[38]

J. The "uncontroverted" and "unequivocal" case law

Finally, prosecutors have argued that the case law is "uncontroverted" and "unequivocal" and justifies JI 140's closing mandate. However, no case holds that the closing mandate is required or even preferable. With regard to the two cases cited by the jury instruction committee, both predate the published studies by several decades—one case is nearly a *century* old and has nothing to do with the burden of proof jury instruction,[39] and the other is nearly twenty-five years old.[40] Most significantly, the dated commentary in these two cases has now (twice) been empirically tested and debunked.

Additionally, while other case law discusses "truth" in several different contexts, none support the prosecutor's argument. For example, prosecutors frequently cite *Tehan v. United States*, 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.'"[41] Prosecutors also cite *Wardius v. Oregon*, which is discussed in *State v. McClaren*, but this case involves 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."[42]

Most frequently, prosecutors, like the jury instruction committee, cite *Manna v. State*. But not only was this century-old 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 to apply once it resolves factual disputes.

> 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.[43]

Other Wisconsin cases (often cited by the state) that address "the truth" in the context of resolving such credibility and factual conflicts are also inapplicable for our purposes.[44] Further, Wisconsin jurors are already instructed on how to carry out this part of their role. For example, other jury instructions routinely given by the court state that,

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[38] State v. Landrum, 528 N.W.2d 36, 41 (Ct. App. Wis. 1995) (citing *Dowling v. United States*, 493 U.S. 342 (1990)).
[39] Manna v. State, 192 N.W. 160 (1923). This case does not even involve the burden of proof instruction.
[40] State v. Avila, 532 N.W.2d 423 (1995).
[41] Tehan v. United States, 328 U.S. 406, 415 (1966).
[42] Wardius v. Oregon, 412 U.S. 470, 475 (1973) (discussed in State v. McClaren, 767 N.W.2d 550 (Wis. 2009)).
[43] *Manna*, 192 N.W. at 166.
[44] *See, e.g., 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); *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).

"You, the jury, are the sole judges of the facts," 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."

It is true that, to avoid reversing convictions, many appellate courts have tolerated "search for the truth" language in jury instructions regarding how juries should resolve credibility conflicts.[45] However, the jury's role involves far more than resolving such conflicts and similar factual disputes. "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."[46]

IV. 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 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 ever offered any legitimate objection to an instruction that so accurately and clearly conveys the state's constitutionally-imposed burden of proof. However, if the Court is unable to depart from the truth-related language, then it should at least delete the most egregious portion of JI 140—the mandate "not to search for doubt"—and adopt the committee's own modified version of the instruction (Exhibit B).

Dated: June 25, 2018.

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[45] State v. Aleksey, 343 S.C. 20 (2000) (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 (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).

[46] State v. Giroux, 531 A.2d 403, 406 (Vt. 1989).

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.

EXHIBIT B

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.

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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.

You are to search for the truth and give the defendant the benefit of any reasonable doubt that remains after carefully considering all the evidence in this case.