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To: Hon. Tom Flugaur
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Hon. William Hanrahan
Hon. Jeffrey Kremers
Hon. Mitch Metropulos
Hon. Guy Reynolds

From: Michael D. Cicchini

Date: June 7, 2016

Re: Criminal Jury Instruction 140 – Burden of Proof and Presumption of Innocence

Dear Criminal Jury Instruction Committee Members:

I am a practicing criminal defense lawyer in Kenosha, Wisconsin. Ever since my first jury trial in 2002, I have been surprised by our state's burden of proof instruction. After defining reasonable doubt, it contradicts itself by instructing jurors "not to search for doubt," but instead "to search for the truth."

It has always appeared obvious to me that this qualifying, concluding language *diminishes* the constitutionally-mandated burden of proof which is "beyond a reasonable doubt." That is, if a jury believes the state's case is *slightly* more credible than the defendant's (i.e., the preponderance of the evidence standard), it would follow that, in a "search for the truth," the jury would be obligated to convict.

Contrary to our state's jury instruction, the jury's duty *is* to search for *doubt*. A Washington court put it best: "truth is not the jury's job. . . . 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).

I have done extensive research on truth-related language, and have found no court that believes such language is required, or even helpful. In fact, the best that courts can say about such language is that it is misleading, disfavored, and could in theory lower or even shift the burden of proof, but probably does no actual harm.

To put this judicial theory to the test, Lawrence T. White, Ph.D., and I coauthored a controlled study and law review article, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. RICHMOND L. REV. 1139 (2016). I have attached a copy of the article for your review. (An electronic version is available on the articles page of www.CicchiniLaw.com.) In short, we demonstrate that mock jurors who receive Wisconsin's concluding mandate to disregard doubt in favor of a "search for the truth" will convict at a much higher rate than jurors who receive a legally proper reasonable doubt instruction.

Dr. White and I have just concluded our second study, which is a "conceptual replication" of our first study. Our second study also produced a statistically significant gap in conviction rates, with jurors who received the mandate "not to search for doubt" but instead "to search for the truth" convicting at a higher rate than jurors who received a standard reasonable doubt instruction. We are currently writing the second article (about the second study), and will be submitting it for publication to law reviews later this summer.

In light of this newly-published empirical evidence (attached), I recommend that Wisconsin's jury instruction be changed to conclude as follows: **"It is your duty to give the defendant the benefit of every reasonable doubt."** It is difficult to imagine any prosecutorial objection to a closing instruction that so clearly and simply conveys the constitutionally-mandated burden of proof.

Sincerely,

CICCHINI LAW OFFICE, LLC



Michael D. Cicchini

Encl.

Cc: Lawrence T. White, Ph.D., Professor and Chair of Psychology, and Director of the Law & Justice Program, Beloit College