CICCHINI
LAW OFFICE LLC

620 56TH STREET
KENOSHA, WI 53140
www.CicchiniLaw.com

PH: (262) 652-7109
FAX: (262) 654-6388
E-MAIL: mdc@cicchinilaw.com

May 17, 2017

Senator Robert Wirch
P.O. Box 7882
Madison, WI 53707-7882

Re: Wisconsin's Low Burden of Proof in Criminal Cases

Dear Senator Wirch:

I am a practicing criminal defense attorney in Kenosha. I was recently talking with Attorney Terry Rose who said you heard a recent radio interview of mine and were interested in our state's burden of proof issue with regard to criminal cases.

We defense lawyers have long complained about our state's burden of proof. After defining reasonable doubt, our state's pattern criminal jury instruction 140 concludes in a way that is obviously unconstitutional: "you are *not* to search for doubt. You are to search for *the truth*" (emphasis added).

We defense lawyers have contended that such language lowers the burden of proof to a mere preponderance of the evidence standard. That is, if something is probably true, then the jury should convict. The United States Supreme Court has held, of course, that such a low burden is unconstitutional in criminal cases. Wisconsin's instruction stands in stark contrast to Vermont's, for example, which correctly instructs jurors that, even if they believe the charge is *probably* true, they must acquit if they have a reasonable doubt about guilt.

Additionally, to instruct the jury "not to search for doubt" is beyond the pale. Many courts in other states, including Washington, have stated the obvious: it is the jury's *duty* to evaluate the state's case for reasonable doubt, and if there is one, to acquit. And the Fifth Circuit Court of Appeals has held that language nearly identical to Wisconsin's would be unconstitutional when included in a burden of proof instruction.

Prosecutors deny that our jury instruction lowers the burden of proof yet, at the same time, fight vigorously to preserve the instruction. Of course, the reason they fight to preserve it is because it *does* lower the burden of proof; if it did not, they would not care. However, one of their responses has been to cite the lack of empirical evidence to support defense lawyers' position. While the burden-lowering effect of such language seems obvious, I recruited Dr. Lawrence T. White, Ph.D., of Beloit College, and we empirically tested the burden-lowering hypothesis.

I have attached both of our studies – published in the U. Richmond L. Rev. and the Columbia L. Rev. Online – along with a solo article of mine that is forthcoming in the U. Pittsburgh L. Rev. Our findings in the Richmond article are these:

1. Mock jurors who received Wisconsin's burden of proof instruction (with its admonition "not to search for doubt" but to "search for the truth") convicted at a significantly higher rate than mock jurors who received a standard burden of proof instruction.
2. Mock jurors who received Wisconsin's burden of proof instruction convicted at the statistically identical rate as mock jurors who received *no reasonable doubt instruction whatsoever*.

Our findings in the Columbia article are these:

1. We conducted a second study and replicated the findings from our first study.
2. In a post-verdict question, mock jurors who received Wisconsin's offending language in their burden of proof instruction were about *twice* as likely to mistakenly believe that, even if they had a reasonable doubt about guilt, it was *legally proper* to convict the defendant.

About one year ago I notified our state's jury instruction committee about our findings, yet I have not received a response. (The 2016 letter to the committee members is also attached.) The new instruction is to be released soon – probably in June – and I do not know if it will change. And while many individual trial judges – including three in Kenosha – *have* modified the pattern instruction since our first study was published, going judge by judge is an inefficient, patchwork-type of approach that fails to solve the underlying problem.

Not surprisingly, our research findings and the defense bar's argument to implement a simple "beyond a reasonable doubt" instruction are strongly opposed by prosecutors. Many of the arguments prosecutors have made in support of the status quo are either disingenuous or demonstrate a gross misunderstanding of social science methods. Therefore, I published a third article in the series that collects and debunks twenty invalid prosecutorial arguments. This article, published in the U. Pittsburgh L. Rev., is also attached.

Thank you for your interest in my work on this very important matter. Please contact me if you have any questions or would like to discuss.

Sincerely,

CICCHINI LAW OFFICE, LLC

Michael D. Cicchini

Encl.

Cc: Lawrence. T. White (via email, w/o encl.)
Terry W. Rose (via email, w/o encl.)