

## Tools for Specific Topics in Closing Arguments

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### 1. LIARS!

Throughout the years, I have collected different comments to use when discussing a lying witness:

- *"Lying is not traditional in any culture."*
- *"Ms. Liar knows the truth and SHE'S NOT TELLING."*
- *"With Mr. Liar, if the truth won't work he'll change it.  
If a lie will give him benefit, he'll tell it.  
When caught in a lie, he'll deny it as long as possible."*
- *"You have to be truthful AND accurate. Can't be not lying but just inaccurate. That is just as bad."*
- *"How many times does Ms. Liar have to lie to you before you refuse to give her your trust? And, if she is lying to you about basic stuff, or small stuff, she is lying about everything. She is the type of person who measures her words, not against the truth, but against what is required to be said at any given moment in order to maximize a gain or minimize a loss."*

The **MALTESE FALCON** is a helpful resource. At the end, Sam Spade is confronting O'Shaughnessy, before he turns her in to authorities. During his confrontation, he lists her lies. Some of them are big. Some of them are not. Then he says:

- *"I'm not going to argue the importance of each lie. But just look at the number of them."*

I don't know who originally crafted this, but it came to me through **Song Richardson**, who now is the Dean of Law at the University of California, Irvine:

- *"I heard a story about a friend's mom. Her mom, probably like a lot of us, likes chocolate. I mean she really likes chocolate. So, each year for Christmas my friend got her something chocolate to put in her stocking. And every Christmas morning, the first thing her mother did was go for that treat.*

*Well, one year my friend got her mother this fancy imported bar. The wrapping looked fabulous and delectable. And again, the first thing her mother did on Christmas morning as go for her stocking and take out the candy bar. She got excited at the beautiful package. She unwrapped in and took a bite.*

*My friend described the horror on her mother's face as she spit it out. There was a maggot in it. A maggot! Her mother jumped up and dropped the bar and went to wash her mouth out.*

*This got me to thinking. You find a maggot in the very first bit of the candy bar. Are you really going to put the rest of it in your mouth in hopes you get a better piece?*

*You can approach Ms. Liar's testimony the same way. The State bases its case on the word of a woman who – very first chance she got – lied. And they admit she lied. And yet they expect you to buy what she has to say? To base a decision that will change someone's life forever on what she said? To find him guilty based on her word? Are you going to ignore the maggot in the first bite and trust it enough to put eat another piece?"*

I've built on this analogy when the list of lies gets long. A second lie = learning the cocoa in the bar was recalled. A third lie = learning it was past it's expiration date. Who would really take another bite?

**Laura Shaver** sent me an argument she used that deals with the subject of lying, but in a different context:

- *"You are all going to go back to the jury room soon, and you're going to begin deliberations. And inevitably, someone will ask, "Why would Chance lie? Why would he lie about his father doing this?" This is a natural question, and in my presentation today, I'll certainly provide some answers. But because this is a criminal trial, if you ask each other, "Why would Chance lie?" You are asking the wrong question. The only question in this trial is this: "Has the government proven beyond a reasonable doubt that Chance is telling the truth?" That is the ONLY question before you today, and on the evidence before you, it is a very easy question to answer."*

I believe this last example came from **Jeff Robinson**:

- *"You have a question to answer, a decision to make. When you answer the question, make the decision by looking at the testimony of the witnesses and the evidence that has been admitted. And when you look at the testimony of the witnesses, you have to judge their credibility. You are the sole judges of credibility. You – not I, not the prosecutor, and not the Judge – you determine whether witnesses are credible or not. In judging credibility, you do not necessarily have to determine whether a witness is lying. You judge not just truthfulness, but also the accuracy and reliability and memory of the witness.*

*You are told in the instructions that you are the sole judges of credibility. You are also told that you have to read the instructions as a whole. Therefore, when you judge credibility, you must never forget the presumption of innocence, the burden of proof, and reasonable doubt. Thus, when judging the credibility of a witness, the question you must ask yourself is not "Why should I disbelieve this person?" If you asked that question, you are starting with the presumption of guilt, rather than the presumption of innocence. If you start with the presumption of innocence you start with the presumption of disbelief, and when you consider the burden of proof and reasonable doubt, the question you must ask yourself is as follows: Starting with the presumption of innocence and therefore a presumption of disbelief, what has the State shown me such that I am willing to believe this person beyond a reasonable doubt?"*

## 2. SELF DEFENSE.

Excerpts from self-defense cases I've had:

- *"When someone hits you when you are not looking, that is the functional equivalent of saying 'THERE IS NOTHING FAIR ABOUT ME.' 'YOU CAN'T TRUST ME.' 'I HAVE NO GOOD INTENTIONS.' 'THERE IS NOTHING YOU CAN'T EXPECT FROM ME IN THIS FIGHT.'"*
- *"When Mr. Big Bad Alleged Victim (BBAV) was coming after my client, he wasn't thinking about the law. BBAV was a law unto himself. If you deal with BBAV, you got to answer to BBAV. You got to answer to his law."*
- *"When you act in self-defense, you are not violating the law. You are protected by it. When you are acting in self-defense, you are not taking the law into your own hands. You are taking the law back. Using it to save yourself."*

An excerpt from Mike Iaria:

- *"In a perfect world, we have no need for the instinct to defend ourselves, because there is no threat. But we are in our world where threats are real and fear can trigger the unyielding will to survive."*

*Don't say that no one is a villain, just that Mr. Client is a not a villain. Don't say that crime doesn't happen, but rather, this is not a crime. Not all tragedies are crimes."*

This was my Closing introduction in a self-defense case. The two-minute opener that told my story with facts woven in, and told the jury why they needed to acquit:

- *"The simple, consistent truth is that on November 17, 1994, when SF was going to the Sturgis apartment at AB's direction, he did not know that he was about to enter the fight of his life. The fight for his life. The fight that would change his life forever."*

*As Jose answered the door to the Sturgis apartment and let SF and LK in, and as Jose shut and locked the door behind them, SF did not know that this was about to become much more than a conversation, much more than a car trade, much more than what AB sent him there for.*

*As SF stepped between Jose and LK he was in for the shock of his life, because he then received the first blow to his head. He received a second blow to his head. And he looked up through the pain and ringing and his amazement to see a gun in his face.*

*There was no glory in what happened next. SF feels no honor. There was no victory when SF killed Jose. But SF defended himself as the law allows. And the simple, consistent, truth is that SF is on trial because he was the one who survived."*

## 3. BAD COPS/ SHODDY WORK.

Once, after a trial, a juror was kind enough to talk to us afterwards about the reasons for his verdict. One comment he made stuck with me. I attribute it to him in closings:

- *“Police officers are human, and some humans lie.”*

**Mark Mestel**, talking about an excuse given for the failure to investigate said in a recent closing:

- *“Now, I know there are time constraints and that this isn’t the only case, but if Sgt. Rodriguez can sit here and listen to me speak in court, rather than go out and investigate facts of the case, then they have ample time to do what they need to do. And their saying, “Well, we didn’t have enough time” really should fall on deaf ears because I suggest that perhaps investigating complaints is more important than listening to me give a closing argument.”*

**Chris Jackson** argues:

- *“Excuses [for whatever the police failed to do] aren’t good enough when you are asking someone to convict beyond a reasonable doubt.”*

Here are other arguments that I have used or collected:

- *“The ‘Blue Brotherhood’ – I’m not saying that it does or does not exist. But these officers all came in and backed each other up and the question you need to answer is have they convinced you that it does not exist?”*
- *“As you start to consider this case, you must believe what all the civilians have told you. Question what the police say. And don’t do this because the police have a motive. We’ll talk about that in a minute. Do it because of the law. You’ve been instructed about the presumption of innocence. Believe him when he pled not guilty. He was innocent the night he got arrested. He was innocent the day we started this trial. He is innocent as he sits here today and remains innocent until you are convicted of his guilt beyond a reasonable doubt.”*
- *“So here we are. My client and I are asking you to step into action on his behalf. But we do not make this request alone. Supreme Court Justice Brandeis has said that illegal or arbitrary abuse of state power has been regarded as even more threatening and deserving of resistance than the occasional street crime. If one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion, much more where it is done under a color of justice. The Court has declared that WE ARE ALL provoked by an unlawful arrest. We must consider it an affront to us all. You, members of the jury, are in a position to do something about it. And I am not asking you to change the police, or the way the system operates. But I am asking you to acquit Mr. Client. Restore his faith in justice. Show him that there is someone who will listen to him and care and believe.”*
- *“You’ve heard of the saying ‘view the world through rose colored glasses.’ They are seeing everything through guilt colored glasses. That is a shortcut. Justice Marshall said ‘The shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.’ I’m not saying that the prosecutor is trying to lie or deliberately trying to convict a person that he believes is innocent. But there are shortcuts we take when we believe someone is guilty. The road to hell is paved with the shortcuts of*

*police officers and prosecutors all over the world. The presumption of innocence leaves no room for them."*

Finally, even **George Washington**, a "trust no one" type, gave us something useful in closing. He said:

- *"Government is not reason, it is not eloquence – it is force! Like fire, it is a dangerous servant and a fearful master; never for a moment should it be left to irresponsible action."*

#### **4. ADDICTION.**

This discussion was from my case in which a material witness was arrested on the streets and held in custody until she testified for the state:

- *"William S. Burroughs book, "Naked Lunch," is a collection of stories about addiction. One is called "The Algebra of Need." The subtitle is "Wouldn't you? YES, YOU WOULD." In it, he writes:*

*A dope fiend is a man in total need of dope. Beyond a certain frequency, need knows absolutely no limit or control. In the words of total need: Wouldn't you? Yes, you would. You would lie, cheat, inform on your friends, steal, do anything to satisfy total need.*

*Why is Ms. Witness lying? Her addiction, her need, the monkey on her back is bigger than any lie. Bigger than any consequence of lying. The difference between you and Ms. Witness? The monkey on your back is doing what is just. The monkey on her back is scoring the next fix."*

#### **5. MUTATED LANGUAGE.**

- *"The book 1984 dealt with the slogans of "newspeak" such as "War is Peace," "Freedom is Slavery," and "Ignorance is Strength." Members of the jury, in this case we had  
"Not shaking a hand" = "friendly";  
"Not physically interfering or doing anything" = "physical obstructing";  
"Writhing in pain" = "resisting arrest".  
It is not acceptable in 1984 and it isn't good enough here."*

#### **6. JUSTICE AND JURY DUTY.**

As I've previously said, closing must be a *jury centered* process. But you are not going to accomplish that by simply thanking them for their time and commenting on how long and hard the trial has been. While that is polite, thanking will not get you up the mountain. (It is also boring.) They have to be inspired by something larger than your gratitude.

Use the language from Ferguson's "The Joy of Jury Duty," as he explains "[t]urning the dread of jury duty into a form of enjoyment begins with understanding why jury duty matters."

- *Simply put, it may well be the closest you ever come to the Constitution – not just exercising a right it gives you, but participating in the process through which constitutional rights and values come alive in practice. In a country formed from a single founding document, it is amazing how disconnected most of us are from its meaning and purpose. Jury duty changes that reality – It is a pass from your normal family and work responsibilities. It is the law of the land that you cannot complete your normal workaday routine. Jury duty thus provides an opportunity (with plenty of waiting time) to reflect on our shared constitutional values.*

*What are those constitutional values? Participation, deliberation, fairness, equality, accountability, liberty, and the common good – these are constitutional values, and they are embedded in jury service.*

*A jury summons is an invitation to participation. ...Each of these participatory skills – deliberation, debate, tolerance, cooperation, civility, legal decision making – is what we need for our democracy to work. ...*

*The invitation to jury service is thus an invitation to understand our most basic national principles. The simple fact is that jury duty is one of the few constitutional rights that every citizen has the opportunity to experience. It remains an American bond. It connects people across class, national origin, religion, and race. Jury experience exists as one of the remaining connecting threads in a wonderfully diverse United States. It links us to our founding principles and challenges us to live up to them.*

*[And how refreshing is it to find a place in our society where democratic skills and connecting bonds are alive and well? YOU DON'T SEE THAT IN CONGRESS. YOU DON'T SEE THAT OUT OF THE COURTROOM. IT IS IN THIS PLACE. THIS COURTROOM. YOUR JURY ROOM.] ...*

*I'm fairly certain this segment came from a closing in a case that **Jeff Robinson** and I co-tried. I'm giving him the credit:*

- *"You are the guardians of freedom. The reason may be obvious, but it is a reason none of us spends much time thinking about from day to day. Who here, even on Memorial Day, routinely thinks about the meaning of the battles fought by Americans, and why they were fought? The dead of the battlefield come up to us rarely, even in dreams, and when they do, we dismiss them quickly.*

*The Battle of Antietam was fought on September 17, 1862, the bloodiest day of fighting in the Civil War, a war fought to preserve this republic and that resulted ultimately in the abolition of slavery. The Army of the Potomac engaged the Confederates at Antietam Creek, outside of Sharpsburg, Maryland, and night fell on a scene of horror beyond imagining.*

*You can take Instruction No \_\_\_\_ and toss it aside, or you can read it and pay lip service to it, or you can give it, and the blood that has run in rivers to ensure that you carry it with you into that room, very real meaning. If you do that, follow it and give it meaning – you will acquit Mr. Client."*

**Former Supreme Court Justice Richard Sanders** wrote an article during his time on the bench titled “The Price of Liberty in the 21<sup>st</sup> Century.” He ends by explaining:

- *“The greatest price of Liberty is also Liberty’s greatest reward. It is our willingness to ensure that others have theirs and our tolerance for its free exercise. Everyone has something to gain from a system of liberty for all. There are no losers when justice is done.”*

This is based on a line from a speech made by **President Bill Clinton** (you decide if he – or anyone else – is too controversial to quote or assign the quote to):

- *“Disagreement is freedom’s pledge. Freedom is a living, breathing reality. It lives right here.”*

This is based on a speech given by actor **Tim Robbins** to the National Press Club in 2003:

- *“You have, whether you like it or not, an awesome responsibility and an awesome power: the fate of discourse, the health of this republic is in your hands, whether you fall on the left or the right or directly in the center. This is your time. This is the destiny for which you were chosen.”*

Other useful bits that I have collected or used over the years:

- *The door of the Justice Department in Washington D.C. has words on them. And they are so important and fundamental that they chiseled in stone – chiseled in stone. They say: The “United States of America wins a case every time justice is done to one of its citizens.”*
- *You send my client home and, when you go back to your homes and your families, if anybody asks, how could you do this? How could you acquit? You look them in the eye and say “We had the opportunity to condemn a young man and label him a robber, but we didn’t because the prosecutor didn’t prove he was guilty beyond a reasonable doubt.”*

## 7. TO EMPHASIZE FACTS YOU DEVELOPED AND THE PROSECUTION IGNORED.

- *“Why did you have to wait until I stood up to hear these things? Why didn’t they want you to know? Why didn’t they care to ask?”*

## 8. CIRCUMSTANTIAL EVIDENCE IS ONE TYPE OF SHORTCUT.

**Raul Mendez**, a fellow misdemeanor attorney at The Defender Association, used this great anecdote. I am not sure of its origin, but I he sold the hell out of it. Unlike him, I never felt totally genuine saying it. That is why one of my principles is “know yourself.” It is only a great tool to use if it is great for you.

- *“A farmer living in the country loved blueberry pie. His wife developed quite a specialty in cooking it. One day, she cooked her pie, and put it in the window to cool. A little boy walking by smelled the pie, saw it in the window, knocked at the door, and came in when no one answered. He ate one slice of the pie. It was delicious. He ate another, and soon the*

*whole pie was gone. Suddenly the little boy saw the farmer walking towards the house. He grabbed the farmer's puppy, rubbed the puppy's face in the pie tin, and ran out the back door. The farmer came in, saw the puppy with stains on his face, saw empty pie tin, took the puppy out to the barn, and shot it. That illustrates the risk with circumstantial evidence."*

An excerpt from one of my cases that depended heavily on circumstantial evidence:

- *The prosecutor has asked you to accept a guilty verdict based on an inference on an inference. That is a shortcut. Abraham Lincoln said, "An inference on an inference has as much substance as soup prepared by boiling the shadow of a pigeon that died from starvation."*

## 9. OTHER SHORTCUTS.

Justice Thurgood Marshall [in United States v. Salerno, (1987)] said:

- *"Honoring the presumption of innocence is often difficult ... no one said it would be easy to truly honor the commitment to the values we espouse. But at the end of the day, the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves."*

## 10. RACE/IMPLICIT BIAS.

Left to their own thoughts, people fail to see their preconceived feelings as bias or prejudice. We cannot eliminate bias or prejudice by anything we do in a trial. But by confronting it, we may be able to neutralize it.

This comes from an article that I had in my Closing Argument file, but I don't have the cover page that would help me give credit to who wrote it:

- *"You know, my client is not from Baker County. He didn't have the good fortune of being raised where people are neighbors, where folks know each other and throw up a greeting just because they are passing by. To be honest, he is a little worried about that because we all know that some folks don't understand that being neighborly should never stand in the way of being right and just. But we also know that "right is right" and "justice is justice" whether it is on Peachtree Street in Atlanta or on the street in front of this courthouse. And we know that by having the courage to do justice by a stranger, we have the wisdom to do justice by a neighbor.*

*If at any time during deliberations you sense that a fellow juror is biased against my client for any reason, it is incumbent on you to call on the jury to discard it in favor of justice. If you remain silent, the prejudice or bias will speak through the verdict."*

Last September, **Reid Burkland** of Northwest Defenders Assoc., talked about race and implied bias in such an impressive manner, that the appellate attorney sent me the transcript. I included his entire argument in my electronic materials. See Attachment A. I strongly encourage you to all read it. It is also clear from his argument that he set up the topic in *voir dire*.

- *“You know, in jury selection, we talked about this instinct that people have that when somebody comes in and says that they’ve been the victim of some kind of misconduct, we have to believe them. That it’s important to believe them. It’s important to give them credibility. It’s important to think that they’re telling the truth.*

*And we also talked about the distinction between maybe the way we work outside the courtroom and the way we work inside the courtroom that you, as members of the jury, have to hold the state to its burden. You, as the members of the jury, have to really probe the State’s case to see what the witnesses are talking about, see if they are telling the truth. And one thing that you need to look at is the biases of witnesses, their past experiences, their life experience, how that filters, how they see things, how they perceive the world, how they hear, how people talk to them, how they see how people act towards them.*

*It’s important to talk about these biases that are both explicit and implicit; both conscious and unconscious. It’s rare that you’re going to get somebody in court to come and sit down and say I am a racist. Let me tell you, ladies and gentlemen, how much I hate minorities. That’s the sort of thing that doesn’t happen. But that’s not the only form of bias that exists in the world. That’s not the only sort of prejudice that exists in the world, and we need to look deeper than just that.*

*So, let’s talk about Ms. Ramey. Ms. Ramey certainly doesn’t think that she’s racist. You know, she told you that she goes to Black Lives Matter protests. She goes to marches. She goes and lobbies in Washington. And these are all very worthy causes, but it’s also important to remember that they can be just buzz words. You know, there aren’t shields against the hundreds of years of pervasive racism, pervasive racial bias that exists in this country. We can’t just set aside our past. We can’t walk into the courtroom and ignore who we are as a people. Going to a protest doesn’t set aside slavery. It doesn’t set aside Jim Crow. We can’t set aside racism. We can’t set aside Jim Crow. We can’t set aside racism. We can’t set aside redlining. We can’t set aside racially disparate sentences.*

*You know, we can’t set aside the years of the stereotype of the hypersexualized black man. I mean, To Kill a Mockingbird is written about this. The horror that like, that black men might want to have sex with white women. That’s something we can’t set aside. And it’s a dark part of the American story. But it’s still a part of that story and to just ignore it isn’t reasonable. You can’t just shrug off hundreds of years of baked-in prejudice just when you walk through the courtroom door.*

*And you know, I think in the case, we can see that Ms. Ramey hasn’t shrugged it off. We can see it in her words. We can see it in her actions. And she told you, I mean, she even talked about it that everybody has biases, that she’s aware of this, and she certainly does.”*

## **11. THE PRESUMPTION OF INNOCENCE.**

**Emily Gause** uses the image of a “cloak of innocence” that is wrapped around her client. She talks about how that cloak has been over him for the entire trial. Even now, during closing, the cloak is still covering him and protecting him, just as it would for anyone accused of a crime. The cloak is heavy. It takes an effort to remove. The state must meet a very high burden for

that cloak to be lifted. She discusses all the reasons the cloak cannot be removed, and this leads to her discussion about the presumption of innocence and burden of proof.

**Song Richardson** also passed to me this discussion about the presumption of innocence:

- *“Common sense and the law tell you that when you have a set of facts that need to be interpreted, where you end up depends a lot on where you started. What you see at the end may depend on what you thought you saw at the beginning. The conclusion that you reach at the end may very well be influenced by the presumption you had at the beginning. Your prophecy may be self-fulfilling.*

*If you have started speculating toward the side of guilt, if you have the prosecutor and police’s picture of the case in your mind when you begin your deliberations, then every inference you draw from the evidence will be in favor of guilt. When you have a set of facts that are capable of different interpretations, where you end up depends on where you start.*

*A child who believes in ghosts hears a clanking noise in the night, and he scoots under the covers in fear at the sound. His father, meanwhile, with a much more mundane belief system, hears the same noise and thinks to himself, “That pipe is about to give out. I need to call a plumber in the morning.”*

*There is no mystery here. You are told where to start. The matter is just not open for discussion. You are told to start your deliberations with the presumption of innocence. You are told that Mr. Client is presumed innocent; that he has been presumed innocent throughout this trial, and that he is innocent right now.*

*The presumption of innocence is not just a bunch of words of a phrase. You’ve got to be able to say to yourselves: He is innocent in the eyes of the law, so in my eyes, and at this time, and as I begin my deliberations, he is innocent. He is innocent at all times during my deliberations until and unless I am overcome – overcome – by proof beyond a reasonable doubt.”*

## **12. BEYOND A REASONABLE DOUBT ... AND ...**

- *“Remember that there is a heavy burden on the State. They burden of proof means that I don’t have the same job. They can’t just show you that their facts are consistent with guilt. They have to prove to you that their view of this case is the only thing that is reasonable and correct. And all others are unreasonable. They have to show you that the only thing that the facts demonstrate is guilt. That is what they have to prove.*

*So, I don’t have to do that. But I can tell you about reasons to doubt. I can show you all the reasons that I can think of. That is my job. And when you deliberate, you need to think of more. That is your job. To think of all the reasons Mr. Client is innocent and demand that they have eliminated each of them.”*

What would it look like if your client is innocent? Make a list of everything you can think of AND that is consistent with the evidence at trial. Use this to add structure to your many points in closing.

- *“If Ms. Client were innocent then she would have .... And she DID.  
If Ms. Client were innocent, then this would have happened ... and it DID.  
If Ms. Client were innocent ....”*

Over my years at The Defender Association, I kept notes when I heard different argue “reasonable doubt” in a useful way:

- **Fernanda Torres:** *“You only need one reason. Any reason. A reason. One reason. One doubt. And each of you can have your own reason. Let me give you all of the reasons that I thought of.”*
- **Chris Jackson:** *“The state’s job is very difficult. Probably guilty is not good enough. Might be guilty is not good enough. Almost certainly guilty is not enough. Excuses aren’t good enough when you are asking someone to convict beyond a reasonable doubt.”*
- **Erick Spencer:** Erick brought a big poster board to closing. At the left side he wrote **“INNOCENT: WHERE YOU ARE.”** At the right side he wrote **“GUILTY: WHERE YOU NEED TO GET.”** He had the outline of his closing on a pad of post-its. As he discussed each point, he put the post-its in the middle. Each post-it was a “reason to doubt” and all would have to be removed before the jury could convict. By the end of his closing, the space between the two ends of the poster board were full of post-its. It was a useful visual.

**Mark Muenster** sets up his discussion in *voir dire*, by discussing fundamental principles of criminal law. These are, the presumption of innocence, reasonable doubt, and the burden of proof.

- *“We talked a little in voir dire about the three fundamental principles of criminal law, and I want to talk about them a bit more now.*

*These are the principles which make our justice system the best and fairest in the world.*

*First, the burden of proof. Why do we put the burden of proof on the government? Fairness and logic. Fairness because the government has the resources and power. The power to arrest. The power to haul a person into court. The power of the prosecutor’s office, and the power and presence of the police.*

*Logic because the government makes the accusation. The government, therefore, should prove it. It is hard to prove a negative. It is hard to prove you are not a witch. You weren’t drunk. In our system the citizen does not have to prove anything, and that is the way it should be.*

*He discusses the presumption of innocence by using a friend or family member as an example. The presumption that you would start with if a dear one is accused.*

*Reasonable doubt, arises from the evidence or lack of evidence. That means that if you are unhappy with either the quantity or quality of the state’s evidence, then you are not satisfied beyond a reasonable doubt. It means any doubt for which you can give a reason.*

*In Scotland, under Scotch law, juries have three choices for a verdict: Innocent, Guilty, and Not Guilty.*

*Under our law, a “not guilty” can be based on either one of two findings: Innocent or “not proven guilty.” Here, you have both. Mr. Client is innocent and the government has not proven beyond a reasonable doubt that he is guilty.”*

### 13. ... THE “ABIDING BELIEF” INSTRUCTION.

**David Donnan**, when talking to me about this CLE, said he had seen a recent discussion in which King County Judge Jeffrey Ramsdell observed : “I’ve seen defense counsel use that “abiding belief” language very effectively in closing.” David challenged me to discuss the topic. I initially thought “Thanks, David.” But I’m glad he did.

To start with, I looked up the definition of “abiding.” It is a “feeling or memory that lasts a long time. That is enduring or constant.” “Imperishable.”

I thought of times we all might make decisions based on an “abiding” belief:

- Marrying someone;
- Choosing or rejecting religious belief;
- Buying a house;
- Choosing one course of medical treatment over another.

We may say that the beliefs we have in our doctors, spouses, or religious leaders may be “abiding.”

I thought of the Christian hymn: “Abide with me.” It is a prayer for God to remain present with the speaker throughout life, through trials, and through death. These are some of the lyrics:

- “Abide with me; fast falls the eventide.”
- “When other helpers fail and comforts flee ... abide with me.”
- “Earth’s joys grow dim; its glories pass away; change and decay in all around I see; O Thou who changest not, abide with me.”
- “Thou on my head in early youth didst smile; and through rebellious and perverse meanwhile, Thou has not left me, oft as I left Thee.”

This speaks to the level of certainty that must be had in order to have an “abiding belief.”

I know that **Jeff Robinson** has *preferred* the “abiding belief” instruction. Here is how he has argued it in closing:

- “A reasonable doubt is one for which a reason exists, and may arise from the evidence or lack of evidence.” A reasonable doubt is one for which a reason exists. One doubt to which you can attach a reason. If you have a single, solitary doubt that you can attach a reason to in this case, then you must acquit. That is not subject to dispute, it is not open to question.

*That standard only makes sense when you think of the magnitude of your decision and the consequences of your decision if you convict and you are wrong.*

*You might have suspicions and think that a person might be guilty, or think they are probably guilty. Remember, innocent people have gone to prison because it seemed they were probably guilty. "Probably guilty" might be good enough in a civil trial where money is at stake, but here, you are told that if you have a single reason to doubt, you must err on the side of caution and on the side of freedom and you must acquit.*

*If you vote to convict, for you to have an abiding belief in the truth of your decision, you must be absolutely certain at the time you vote that you will never wonder if you made the right choice. You must be certain that you will not wake up one day and ask yourself, "Could I have been wrong?" Not the day after. Not the following week. Not in a month or two. Not in a year or more. Not ever. Freedom is more than a word.*

*Nothing in the instructions says anything about the size of the doubt, and that is because a reasonable doubt cannot be quantified; it cannot be reduced to a number. You don't add up reasonable doubt the way an accountant adds up numbers at tax time. It is a quality of doubt, and when all is said and done it is surely the quality of doubt that would make you hesitate to act in the more important affairs of your lives. And when the degree of importance increases, doesn't the size of the doubt that makes you hesitate become smaller and smaller?"*

#### **14. DELIBERATIONS.**

Challenge them to think about who they want to be the foreperson.

- *"The leadership role on this jury is very important. If you decide to vote for a foreperson, consider this. What are the qualities you would want in a discussion leader? Isn't it the kind of person who will facilitate everyone having the equal opportunity to talk and certainly not all at once? Isn't it the kind of person who will respect each juror's individual opinion, not the kind of person who will dominate those who don't go along with his or her view? The foreperson's job is not to persuade or dictate, but to patiently guide the discussion."*

Consider basing your argument on WPIC 4.73 – Suggestions for Deliberations Procedures. Using its suggestions, you can talk to them about:

- Letting each juror speak without interruption and then discussing the evidence before taking a vote. In fact, why not suggest that they write down (on a blackboard in the jury room so that it stays up during their deliberations) any questions, problems, or doubts that they have before they begin deliberations?
- Using an "evidence-driven" deliberation where each piece of evidence is discussed and analyzed for its significance, instead of a "verdict-driven" deliberation where members of a minority opinion are identified and pressured to change their minds.
- Not letting someone control how they vote in this case, just as they would not let anyone else make their decision about how to vote in an election.

- Unanimity. *“To convict, your verdict must be unanimous. Each of you must wholeheartedly agree with the verdict. That means that if you are outnumbered eleven to one in the jury room, regardless of which way the majority is going, you can’t say to yourself, ‘Well, the majority must be right.’ Because the majority isn’t always right. At one time, all but a few through the world was flat. Columbus was right and the whole world was wrong.”*

Encourage them to think independently.

## 15. HAND YOUR CLIENT OVER TO THE JURY.

When I get to the end of my closing, right before I loop back to my theme and why my client is innocent, I HAND MY CLIENT TO THE JURY. I say this while standing behind my client:

- *“Now my turn to speak is almost over. But before you get to deliberate, the State gets one more chance to talk. The State gets to come up here and tell you things that I don’t have a chance to rebut.*

*But that does not mean that you can accept what she says without question. At this point, your job becomes even more important. If the State says something, question it. How would the defense respond? What would I say? Is it really accurate and supported or is she just taking advantage of the fact that she gets the last word?*

*And this also mirrors what you must do during your deliberations. You see, I asked a lot of questions during this trial. But there is only one of me and there are 12 of you. If there is a question that I haven’t asked, ask it. If there is a problem that we haven’t uncovered, you do that. If there is something that does not make sense – you make sure that the State has provided the evidence to make it clear.*

*We have, during this trial, all of us, made jokes and made light of certain things. I hope that you realize that humor is sometimes necessary to lighten what might otherwise be an oppressive burden. And I hope that any joking that took place during this trial did not serve to diminish the seriousness of what you are about to engage in. There are certain trappings of a courtroom and of a trial that are meant to impress upon you the seriousness and solemnity of your duty as jurors. It is not for nothing that Judge \_\_\_\_\_ dresses in a black robe and sits on a bench, elevated from the rest of us. It is not for nothing that we stand when s/he enters the courtroom, and we all stand for you when you enter. This is a solemn and serious undertaking. And if I have seemed nervous at different points it is because I am. That is because the responsibility of a lawyer in a criminal case, whether for the defense or the State, is a great one. But it is nothing compared to the responsibility that is ahead of you.*

*There is one more instruction that I want to discuss and that is the first one:*

**YOU HAVE NOTHING WHATEVER TO DO WITH ANY PUNISHMENT THAT MAY BE IMPOSED IN A CASE OF A VIOLATION OF THE LAW. THE FACT THAT PUNISHMENT MAY FOLLOW CONVICTION CANNOT BE CONSIDERED BY YOU EXCEPT INsofar AS IT MAY TEND TO MAKE YOU CAREFUL. *Members of the jury, be very careful.*”**

**ATTACHMENT A**



1 Thank you all for your time.

2 THE COURT: And thank you, Counsel.

3 And now, if you'd please give  
4 your attention to Mr. Burkland, he'll present  
5 closing argument on behalf of the Defense.

6 Mr. Burkland, go ahead, sir.

7 MR. BURKLAND: Thank you, Your Honor.

8 Well, the State's right about one  
9 thing, this case is a lot about unconscious bias.  
10 It's a lot about bias, it's a lot about  
11 institutional racism. And is really is about a  
12 white woman who panicked when a big black guy came  
13 and sat down next to her.

14 There really isn't that much else  
15 to this case. I mean, I think we were picking a  
16 jury longer than we were actually presenting  
17 evidence. And the reason there wasn't a whole lot  
18 about this case, is because a lot of the  
19 information that you heard doesn't really have to  
20 do with what happened. It isn't really important  
21 in determining what actually happened.

22 I mean, think about this. We  
23 have Detective Peleczar. Well, he wasn't present  
24 at the scene. He didn't see anything. Detective  
25 Do, he wasn't present at the scene. He didn't see

1 anything. Mr. Howard, he wasn't present at the  
2 scene. He didn't see anything. At most, what  
3 these people are doing is just repeating what  
4 Ms. Ramey told them. Everything that they are  
5 saying is based on what Ms. Ramey told them. And  
6 this is important, because the State's entire case  
7 is being filtered through Ms. Ramey's perceptions.

8           You know, in jury selection we  
9 talked about this instinct that people have that  
10 when somebody comes in and says that they've been  
11 the victim of some kind of sexual misconduct, we  
12 have to believe them. That it's important to  
13 believe them. It's important to give them  
14 credibility. It's important to think that they're  
15 telling the truth.

16           And we also talked about the  
17 distinction between maybe the way we work outside  
18 the courtroom and the way we work inside the  
19 courtroom. And how it's really important inside  
20 the courtroom that you, as members of the jury,  
21 have to hold the State to its burden. You, as the  
22 members of the jury, have to really probe the  
23 State's case to see what the people are talking --  
24 see what the witnesses are talking about, see if  
25 they are telling the truth. And one thing that you

1 racial bias that exists in this country. We can't  
2 just set aside our past. We can't walk into the  
3 courtroom and ignore who we are as a people, who we  
4 are as a country. Going to a protest now doesn't  
5 set aside slavery. It doesn't set aside Jim Crow.  
6 We can't set aside racism. We can't set aside  
7 redlining. We can't set aside racially disparate  
8 sentences.

9                   You know, we can't set aside the  
10 years of the stereotype of the hypersexualized  
11 black man. And the horror that, I mean, To Kill A  
12 Mockingbird is written about this. The horror  
13 that, like, that black men might want to have sex  
14 with white women. That's something that we can't  
15 set aside. And it's a dark part of the American  
16 story. But it's still a part of that story and to  
17 just ignore it isn't reasonable. You can't just  
18 shrug off hundreds of years of baked-in prejudice  
19 just when you walk through the courtroom door.

20                   And, you know, I think in this  
21 case, we can see that Ms. Ramey hasn't shrugged it  
22 off. We can see it in her words. We can see it in  
23 her actions. And she told you, I mean, she even  
24 talked about it that everybody has biases, that  
25 she's aware of this, and she certainly does.

1                   Ms. Ramey was suspicious of  
2     Mr. Kamara from the outset. She was suspicious of  
3     him from the moment she saw him. And at that  
4     point, she knew nothing about the content of his  
5     character. She's just looking at the color of his  
6     skin. And I think that one thing that was really  
7     telling about Ms. Ramey's interactions with  
8     Mr. Kamara, was her description of his skin color.  
9     You know, she told this to the police. She told it  
10    to investigators. She told it to people here in  
11    court that she volunteered a description of his  
12    skin color. And not just that he was black, but  
13    that she volunteered a fairly specific description.  
14    And that's that he wasn't licorice dark. He wasn't  
15    mocha dark. He was like brown leather. And I  
16    think the State knows this is a problem, because  
17    when they got up and talked to her again, they had  
18    to come back and explain this a little bit. Why  
19    did you use those words?

20                   When she talks about how there --  
21    she thinks a lot about color in her work. As a  
22    programmer, she thinks about how to describe colors  
23    and there are a lot of ways to describe different  
24    colors. And that's true there are. But look at  
25    the ones that she chose, the ones that she

1     have a problem getting into the club, right? A --  
2     he's white and has money. He can tip the bouncers.  
3     He can get on the VIP list coming in. So he goes  
4     inside. He starts dancing; sees a girl. They  
5     start talking. They have some mutual interests.  
6     He thinks they kind of hit it off, and he makes a  
7     pretty crude pass at her.

8                     But she rebuffs, she says, I'm  
9     not interested. And, you know, at that point he  
10    just -- he stops. He backs off. He sits there and  
11    leaves, and he's kind of worried that he's messed  
12    up this person's life, this person's night. Talks  
13    to her. Asks if she's okay. She gets up and  
14    leaves. That's the end of the night.

15                    Is Ed Cameron going to go to  
16    jail? Is Ed Cameron going to have to talk to the  
17    police? Is Ed Cameron going to have to come in  
18    here and sit through trial and explain his actions?

19                    Ibrahim Kamara had to talk to the  
20    police. Ibrahim Kamara had to come to trial.  
21    Ibrahim Kamara is here having to defend himself.  
22    If Ibrahim Kamara were white, do you think he'd be  
23    here? Do you think Ms. Ramey would have called the  
24    police?

25                    Ms. Ramey was scared because

1 There's a big difference between standing right in  
2 front of somebody and just standing in the bus stop  
3 walking around in the bus stop waiting for your  
4 bus.

5 Did he unlawfully restrain her?  
6 Did he unlawfully imprison her when he walked  
7 outside of the bus stop to smoke a cigarette? When  
8 he walked outside the bus stop again to smoke  
9 another cigarette? Did he unlawfully restrain her  
10 when, as she described, he handed her a piece of  
11 the cigarette wrapper and she just couldn't leave  
12 because she was holding onto the cigarette wrapper  
13 and that somehow kept her there? Is that  
14 Mr. Kamara unlawfully restraining her?

15 Ms. Ramey could have left at any  
16 time. She didn't. She was waiting for a bus. She  
17 was waiting for a bus in a stop that she's been at  
18 for the last five to six weeks. She's in front of  
19 a fire station. She told you that she didn't know  
20 there was a fire station there, but you can look in  
21 the exhibits. You can see the picture of the  
22 crosswalk that she walked through every day walking  
23 straight towards the sign that says fire station.

24 There were people for -- there  
25 were places for her to go. There were people there

1 this man. She was afraid of a black man. She was  
2 afraid of a black man who didn't remind her of  
3 licorice. He didn't remind her of mocha, but he  
4 reminded her of brown leather.

5                   And then, on top of all this, the  
6 State wants you to believe that Mr. Kamara, this  
7 hypersexualized black man is doing all of this.  
8 That all of his actions in this case were driven to  
9 gratify his sexual desires. You know, the State  
10 wants you to think that Mr. Kamara threatened  
11 Ms. Ramey to gratify his sexual desires. The State  
12 wants you to believe that he patted her head to  
13 gratify his sexual desires. The State wants you to  
14 believe that Mr. Kamara stood off to her side near  
15 a bus stop in order to gratify his sexual desires.

16                   One thing to keep in mind is that  
17 all this that we've been talking about so far is  
18 the story from Ms. Ramey's perspective. Mr. Kamara  
19 told you he was just waiting at the bus stop. He  
20 comes up. There are people there. He's looking at  
21 his phone like everybody else does; talked to a  
22 person a little bit. The bus came. People got on,  
23 and that's the end of it.

24                   Mr. Kamara doesn't see any reason  
25 that Ms. Ramey panicked. But this isn't a case

1 of weird, let me check in with you. None of that  
2 happened.

3                   And if you are wondering at this  
4 point about what actually happened here. If you  
5 have questions about what actually happened, those  
6 are the reasonable doubts that exist for you in  
7 this case. You should ask yourself why the State  
8 put on the evidence that it did and didn't give you  
9 other bits of evidence. You should ask yourself  
10 why the State didn't bother to try to track down  
11 the other people in the bus stop. Would they have  
12 been useful for you to hear from? Would a third  
13 party telling you what they saw, how they  
14 interpreted the situation, would that have been  
15 useful for you? You should wonder why the State  
16 didn't give you those witnesses.

17                   Would it have been useful for you  
18 to see video of what happened? We know there are  
19 video cameras in the area. We also heard that  
20 nobody really tried that hard to find that video.  
21 They just kind of looked at it and assumed it  
22 wasn't going to capture anything. They didn't find  
23 out who controlled the cameras, if there was any  
24 useful video out there. You should wonder why the  
25 State hasn't given you this info.

1 actually happened. I would like to see the video.  
2 I would like to talk to some witnesses. That's the  
3 part of you that still has a reasonable doubt in  
4 this case.

5 I told you this case was about  
6 unconscious bias. I told you this case was about  
7 institutional racism. I told you this case was  
8 about a white woman panicking when a black man sat  
9 down next to her. We know that unconscious bias is  
10 a problem for everyone. We know that we all need  
11 to confront our own unconscious biases. Not to say  
12 they don't exist, not to pretend they don't exist,  
13 but to recognize that they're there, and to  
14 recognize that they color how we experience the  
15 world.

16 Scarily, Ms. Ramey seems to think  
17 that the unconscious biases don't -- aren't  
18 affecting her and don't apply to her. But  
19 fortunately, she's not deciding the case. You are.  
20 You need to recognize the part that race played in  
21 this case. You need to understand that we all have  
22 these biases, and we need to recognize that, and we  
23 need to evaluate the evidence separately from those  
24 biases. And when you try to do that in this case,  
25 when you set aside bias, when you set aside