IN THE SUPREME COURT OF FLORIDA

SCOO-906

IN RE:
STANDARD JURY
INSTRUCTIONS – CRIMINAL
CASES (200-1)
_____/

COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC.

The Florida Public Defender Association, Inc., offers the following comments to the proposed jury instruction on plea of not guilty; reasonable doubt; and burden of proof.

INTRODUCTION

"[A] standard of proof represents an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). Where the adjudication entails a loss of liberty, the degree of confidence the fact-finder must have before voting for conviction is one of virtual or near certainty. *See In re Winship,* 397 U.S. at 364; *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). In *Winship*, the United States Supreme Court held that the fact-finder's mind must be in a **"subjective state of certitude"** and that proof beyond a reasonable doubt is the equivalent of proof to an **"utmost certainty."** 397 U.S. at 364 (emphasis added). Similarly, in *Jackson v. Virginia*, 443 U.S. at 315, the Court declared that in order to find a defendant

guilty, the juror's mind must be in a **"subjective state of near certitude."** More recently, in *Cage v. Louisiana*, 498 U.S. 39, 41 (1990), the Court recognized that **"evidentiary certainty"** was necessary.

Therefore, a standard jury instruction on reasonable doubt should focus on the government's burden of presenting "proof beyond a reasonable doubt" to a degree of near or virtual certainty of guilt. The proposed instruction fails to impress this on the jury.

If the proposed instruction is to be adopted, it needs improvement in three discrete areas: (1) it should define "proof beyond a reasonable doubt" in much stronger terms; (2) reasonable doubt should not be defined in negative terms; and (3) it should end with language that keeps the jury's consideration focused on whether the State has proven its case beyond a reasonable doubt. Additionally, the "plea of not guilty" section should be modified to make it more succinct and understandable.

A. THE PROPOSED INSTRUCTION INADEQUATELY EXPLAINS THE HIGH DEGREE OF PROOF NECESSARY TO SECURE A CRIMINAL CONVICTION

The proposed instruction is plainly inadequate when compared to the instruction on clear and convincing evidence recently approved by the Court for use in Jimmy Ryce Act cases. *See Standard Jury Instructions-Criminal Cases (99-2).,*

25 Fla. L. Weekly S476, 477, 480 (Fla. June 15, 2000).

Proposed Instruction:	Proof beyond a reasonable doubt is proof that leaves you with a firm, stable, and unwavering conclusion that the defendant is guilty. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt.
Instruction on Clear and Convincing Evidence:	Clear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.[1]

"Proof beyond a reasonable doubt" is a legal standard an echelon higher than "proof by clear and convincing evidence." Therefore, it must be stronger than that formula employed to commit a person civilly. Yet, all that this proposed instruction does is to tell jurors that they must have a "firm, stable, and unwavering" conclusion. These three adjectives are synonymous, and thus reinforce only one idea. Moreover, in its next sentence, the proposed instruction circumscribes "proof beyond a reasonable doubt" by explaining what it is **not**. Nowhere does it tell jurors

[1] As noted by this Court when approving the instructions for proceedings under the Jimmy Ryce Act, this instruction is based on the existing instruction for civil theft and is consistent with established caselaw. *See, e.g.*, *In re Davey*, 645 So. 2d 398, 404 (Fla. 1994); *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

about the quality of that evidence which the State must produce to secure a conviction.

In contrast, the approved instruction on "clear and convincing evidence" explains to jurors that the State must present evidence that is [1] precise, [2] explicit, and [3] lacking in confusion. The instruction additionally explains that the evidence must produce [4] a firm belief, [5] without hesitation, before the matter is proven by clear and convincing evidence. Incongruously, the approved instruction on the lesser standard for civil commitment utilizes clearer concepts and stronger language than the proposed instruction on the higher standard for criminal imprisonment.

The approved instruction on "clear and convincing evidence" describes for jurors the quality of the evidence the State must present; the proposed instruction on "proof beyond a reasonable doubt" gives no such explanation. Though both instructions tell jurors that the evidence must produce a "firm" belief or conclusion about the matter in issue, only the approved instruction on "clear and convincing evidence" stresses the certainty needed by adding that the "firm" belief must be produced "without hesitation." Logically, therefore, the proposed instruction can not be accepted as a matter of law.

The proposed instruction must at least be strengthened by (1) incorporating

the description of the quality of the evidence found in the clear and convincing evidence instruction, and (2) adding modifiers that reflect the higher degree of confidence required for proof beyond a reasonable doubt, such as the United States Supreme Court's phrase "near certainty." *See Jackson v. Virginia*, 443 U.S. 307, 315 (1979). This should be complemented by "without hesitation" language, such as from the approved instruction on proof by clear and convincing evidence,[2] and by maintaining the explanation found in the current instruction that jurors must have "an abiding conviction of guilt."[3] There simply is no reason not to do this in view of the lesser clear and convincing standard approved by this Court.

B. REASONABLE DOUBT SHOULD NOT BE DEFINED

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[2] The Committee rejected a "hesitate to act" description, but most federal courts use similar language when instructing on proof beyond a reasonable doubt. *See, e.g.*, *United State Eleventh Circuit District Judges Ass'n, Pattern Jury Instructions: Criminal Cases, Basic Instruction 3* ("proof of such a convincing character that you would be willing to rely and act upon it **without hesitation** in the most important of your own affairs") (emphasis added). The main concern of the Committee was the analogy to one's own affairs. By simply using the phrase "without hesitation," while not using the analogy to one's own affairs, such as in the instruction on clear and convincing evidence, the strength of the certainty required for a conviction is emphasized while the possibility of misleading jurors is eliminated.

[3] The United States Supreme Court has expressly approved such an instruction. "An instruction cast in terms of an abiding conviction as to guilt . . . correctly states the government's burden of proof." *Victor v. Nebraska*, 511 U.S. 1, 14-15 (1994). If the Court is concerned about the homonym "conviction," then the phrase "abiding belief" could be used instead.

Any attempt to define "reasonable doubt" inevitably tends to shift the jury's focus to whether the defendant has demonstrated reasonable doubt, when the sole focus of the jury should be on whether the government has demonstrated guilt beyond a reasonable doubt.[4] "Reasonable doubt is a term that can stand alone and which signifies something quite distinct from the burden itself." Stephen J. Fortunato, Jr., *Instructing on Reasonable Doubt After Victor v. Nebraska: A Trial Judge's Certain Thoughts on Certainty*, 41 Vill. L. Rev. 365, 415 (1996). "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury.'" *Holland v. United States*, 348 U.S. 121, 140 (1954) (quoting *Miles v. United States*, 103 U.S. 304, 312 (1880)).

> Reasonable doubt . . . is an internal disposition, a subjective state of mind. It is not a cause, but rather an effect, a result, and a consequence

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[4] In the comment to the proposed instruction, the Committee stated that it was "careful to avoid any language . . . that would make it harder to find reasonable doubt." That comment, with due respect to the Committee, is not the correct way to approach instructing the jury on "Burden of Proof and Reasonable Doubt." Suggesting that the jury's job is to try "to find reasonable doubt" puts the cart before the horse as it entails an assumption that the State has met its burden of proof, unless the defendant can show a reasonable doubt. The proper focus of the jury, however, should be on whether the State has, in fact, sufficiently proven its case. While this may seem a subtle distinction, in truth it is crucial. Is a properly instructed jury supposed to focus on the strength of the proof advanced by the state, or on the degree of doubt advanced by the defendant? The focus should be on the former, while the Committee's proposed instruction, as evidenced by its comment, focuses the jury's attention too much on the latter.

> of the impartial examination of the evidence presented at trial. . . . If the juror's mind is in a state of less than near certitude regarding the state's allegations, his or her degree of uncertainty is what we commonly label 'reasonable doubt.'

Fortunato, *Instructing on Reasonable Doubt*, 41 Vill. L. Rev. at 417.

1. <u>The Jury Should Not be Instructed That Doubts Based On Speculation or Imagination Are Not Reasonable Doubts</u>

Proposed Instruction: Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Doubts based on speculation or imagination are not reasonable doubts.

The apparent intent of this part of the proposed instruction is to deter jurors from relying upon fanciful or whimsical doubts and considering matters extraneous to the trial's evidence. Since the current and proposed instructions elsewhere specifically instruct jurors that they must consider only the evidence at trial in deciding the charges, the proposed instruction against speculation is superfluous. More importantly, the language of this proposed instruction is impermissibly broad since it effectively bans speculation based on reasonable inferences arising from the evidence or lack of evidence. Evidence is not self-interpreting. Drawing inferences and constructing hypotheticals are an essential part of evaluating evidence, and the use of speculation and imagination are integral to this process.

An instruction that tells jurors not to consider "speculative" or "imaginary" doubts, "while perhaps well intentioned, is tantamount to telling the jury not to

consider any doubts at all." Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 Tex. L. Rev. 105, 142-43 (1999). "Doubting, after all, is a matter of speculation and imagination. It requires one to imagine alternative models consistent with the evidence." *Id*. at 143.

In this regard, the circumstantial evidence formula requires acquittal where there is a reasonable hypothesis of innocence. As illustrated by the recent decision in *Shores v. State*, 756 So.2d 114 (Fla. 4th DCA 2000), imagination and speculation are at the very heart of engaging in hypotheticals. In *Shores*, the defendant's fingerprints were on an ammunition box ensconced within a bedroom drawer ransacked by a burglar. The Fourth District reversed the conviction on the following hypothesis of innocence: The court imagined that the defendant could have touched the box while it was on a shelf in the store; then the court speculated that this was reasonable because the state did not prove that the store was outside of Florida or that the ammunition box was behind the counter.

"Jury instructions that tell jurors not to speculate or imagine can and should be eliminated by trial judges and jury reform panels, or, if necessary, struck down by appellate courts." Solan, *Refocusing the Burden of Proof in Criminal Cases*, 78 Tex. L. Rev. at 143. "A juror hearing such an instruction is likely to draw the inference that the judge is trying to tell her not to take her doubts too seriously

unless they are extremely strong." *Id*. The proposed instruction explains that proof beyond a reasonable doubt does not mean proof "beyond all possible doubt." There is no need for any further explanation. The instruction that "Doubts based on speculation or imagination are not reasonable doubts" should thus be eliminated from the amended instruction.[5]

2. The Jury Should Not Be Instructed That a Reasonable Doubt Is a Doubt Based on Reason

Proposed Instruction: A reasonable doubt is a doubt based on reason and common sense.

"A juror hearing the 'doubt based on reason' formulation might think that a generalized unease or skepticism about the prosecution's evidence is not a valid basis to resist entreaties to vote for conviction. That is probably a distortion of the concept that courts are seeking to implement." Jon O. Newman, *Beyond "Reasonable Doubt"*, 68 N.Y.U. L. Rev. 979, 983 (1993). Indeed, the United States Supreme Court has explained that jurors "need to reach a **subjective** state of near certitude of the guilt of the accused" before voting for conviction. *Victor v.*

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[5] There is also another problem with this portion of the proposed instruction: One study found that over forty percent of potential jurors did not understand what the term "speculate" meant. Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 B.Y.U. L. Rev. 601, 615 (1975). Instructions that contain words which are unfamiliar to many jurors do nothing to improve juror comprehension.

Nebraska, 511 U.S. at 15 (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (emphasis added)). Thus, "[t]he standard ought not to mean that a doubt is reasonable only if the juror can articulate to himself or herself some particular reason for it." Newman, *Beyond "Reasonable Doubt"*, 68 N.Y.U. L. Rev. at 983.

Another problem with this portion of the proposed instruction is that it defines the quality of the doubt, rather than the strength of the proof needed, and so tends to shift the burden by transferring the jury's focus from whether the government has sufficiently proved its case to whether the defendant has raised sufficient doubts. The jury's focus should at all times be on whether the government has proved its case because a criminal defendant does not have to prove anything. "One could modify the oft used tautology that 'reasonable doubt is a doubt based on reason' to say that reasonable doubt is the doubt that remains if the trial evidence has not left the factfinder in a subjective state of near certainty that the defendant committed the crime." Fortunato, *Instructing on Reasonable Doubt*, 41 Vill. L. Rev. at 419.

C. THE END OF THE INSTRUCTION SHOULD FOCUS ON THE STATE'S BURDEN OF PROOF

Proposed Instruction: If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty.

Ending the instruction this way is likely to shift the burden of proof. There is

no mention about what the government must do – only mention of doubt. A much better end for the instruction is that used in New Jersey, which is a slight modification of the Federal Judicial Center instruction:

> If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you are not firmly convinced of defendant's guilt, you must give defendant the benefit of the doubt and find him not guilty.

State v. Medina, 685 A.2d 1242, 1251-52 (N.J. 1996). This instruction "directs the jury to focus on the strength of the government's case" and reminds jurors "that the real issue is whether the government has made a strong, convincing case." Solan, *Refocusing the Burden of Proof in Criminal Cases*, 78 Tex. L. Rev. at 117-18.

D. MODIFICATIONS TO "PLEA OF NOT GUILTY " SECTION

We request that the first two paragraphs of the proposed amended standard jury instruction on plea of not guilty; reasonable doubt; and burden of proof be revised in order to promote clarity and to focus the jurors on the sole issue in every criminal case: whether the State has proven guilt beyond a reasonable doubt.

Proposed Instruction: The defendant has entered a plea of not guilty. This means you must presume the defendant is innocent. The presumption stays with the defendant as to each material allegation in the [information] [indictment] through each stage of the trial unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

> To overcome the defendant's presumption of innocence the State has the burden of proving that the crime was committed and that the defendant committed the crime.

In one study, the phrase "material allegation" "was misunderstood by jurors who thought it meant physical evidence." Anna E. Saxman & Kerry B. DeWolfe, *It's Unanimous: Jurors Don't Understand Instructions! A Proposal for Eliminating Juror Misunderstanding*, 24 Vermont Bar J. & L. Digest 55 (Dec. 1998) (citing Elwork, Sales, & Alfini, *Making Jury Instructions Understandable*, at 179 (Michie 1982)). Another study found that eliminating the phrase "as to" enhanced jurors' comprehension. *Id*. at 56 (citing Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1303, 1336 (1979)).

The third sentence of the first paragraph of the proposed instruction is an awkward and unwieldy 37 words long. It can be revised, as can the rest of the portion quoted, to make it more understandable and to emphasize the job the jurors face. Our proposed revision is contained in the suggested instruction in the next section.

E. THE FPDA'S SUGGESTED INSTRUCTION

There is nothing inherently "wrong" with the current instruction on burden of proof and reasonable doubt. It has been used for over a century. *Lovett v. State*, 30 Fla. 142, 162-63, 11 So. 550, 554 (1892). It is not unconstitutional.

If the Court is going to modify the instruction, however, the FPDA suggests the following instruction. This instruction adheres to the Committee's stated goal of using clear and concise language and simple and positive terms that will be helpful to jurors. At the same time, the suggested instruction does a better job than the one proposed by the Committee of focusing the jury's attention on whether the State has adequately proven its case.

> The defendant has entered a plea of not guilty. This means that the defendant is innocent unless proven guilty. This is called the presumption of innocence. This presumption continues through the whole trial and applies to every element of each crime charged in the [information] [indictment]. To overcome the presumption of innocence, the State must prove to the exclusion of and beyond a reasonable doubt that the crime was committed and that the defendant committed the crime.
>
> It is to the evidence introduced in this trial, and to it alone, that you are to look for that proof. A reasonable doubt may arise from a careful and impartial consideration of all the evidence, from conflicts in the evidence, or from the lack of evidence.
>
> The defendant is not required to present evidence or to prove anything.
>
> Proof beyond a reasonable doubt is proof that leaves you with a firm, unwavering and abiding conclusion that the defendant is guilty.

The law does not require proof beyond all possible doubt. However, the State's evidence must be precise, explicit and lacking in confusion so that, after careful consideration of the evidence, you are firmly convinced without hesitation that the defendant is guilty.

If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you are not firmly convinced of the defendant's guilt, you must give defendant the benefit of the doubt and find him not guilty.

CONCLUSION

Underlying these suggestions is the goal of making the reasonable doubt instruction clearer to jurors by focusing their attention solely on the need to be virtually certain of the defendant's guilt. **Everyone** benefits when this is done.

> One study after another . . . shows that jurors convict more often in weak cases when the burden of proof centers around the meaning of doubt. . . . The conclusion is clear: courts should abandon all efforts to tell jurors which doubts are legitimate and which ones are not. Instead, they should tell jurors not to convict unless the government has proven its case to a very high degree of certainty.

Solan, *Refocusing the Burden of Proof in Criminal Cases*, 78 Tex. L. Rev. at 131. Amending the proposed instruction as discussed above will help to ensure that jurors' deliberations are focused solely on whether the State has proven guilt beyond a reasonable doubt.

Respectfully submitted,

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