SUPREME COURT NO. 94174-2
COA NO. 74401-1-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ISRAEL OSBORNE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Ellen J. Fair, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Israel Osborne asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Osborne requests review of the decision in State v. Israel Osborne, Court of Appeals No. 74401-1-I (slip op. filed Jan. 23, 2017), attached as appendix A.

C. ISSUE PRESENTED FOR REVIEW

Whether the pattern instruction defining reasonable doubt as "one for which a reason exists" misdescribes the burden of proof, undermines the presumption of innocence, and shifts the burden to the accused to provide a reason for why reasonable doubt exists?

D. STATEMENT OF THE CASE

The State charged Osborne with attempted theft of a motor vehicle. CP 56-57. The case proceeded to trial, where the jury was given the following instruction:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless

> during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 43 (Instruction 2).

The jury found Osborne guilty. CP 38. The court imposed a standard range sentence of 40 months in confinement. CP 24.

On appeal, Osborne argued the reasonable doubt instruction contained an unconstitutional articulation requirement. Brief of Appellant at 1-23. The Court of Appeals rejected the argument because "the supreme court requires that trial courts use the challenged jury instruction." Slip op. at 1. Osborne seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE MANDATORY JURY INSTRUCTION, "A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS," IS UNCONSTITUTIONAL.

The jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 43.

This instruction, based on WPIC 4.01,[1] is constitutionally defective for two related reasons.

First, it tells jurors they must be able to articulate a reason for having a reasonable doubt, either to themselves or to fellow jurors. This engrafts an additional requirement onto reasonable doubt. Jurors must have more than just a reasonable doubt; they must also have an articulable doubt. This makes it more difficult for jurors to acquit and easier for the prosecution to obtain convictions.

Second, telling jurors a reason must exist for reasonable doubt undermines the presumption of innocence and is substantively identical to the fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases. If fill-in-the-blank arguments impermissibly shift the burden of proof, so does an instruction requiring the same thing. For these reasons, WPIC 4.01 violates due process and the right to a jury trial. U.S. Const. amends. VI, XIV; Wash. Const. art. I, §§ 3, 22.

Review is appropriate under RAP 13.4(b)(1) because the case law is in conflict on whether it is permissible to require jurors to have a reason to doubt in order to acquit. Review is also appropriate under RAP

[1] 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3d ed. 2008).

13.4(b)(3) because Osborne's challenge presents a significant question of constitutional law that affects all state criminal cases tried to a jury in Washington.

a. WPIC 4.01's articulation requirement misstates the reasonable doubt standard.

Jury instructions must be "readily understood and not misleading to the ordinary mind." State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). "The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words." State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 138 (1991), rev'd on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). The error in WPIC 4.01 is readily apparent to the ordinary mind. To have a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. WPIC 4.01 erroneously requires both for a jury to acquit.

"Reasonable" is defined as "being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining in the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment . . . ." Webster's Third New Int'l Dictionary 1892 (1993). Under these definitions, for a doubt to be reasonable it must be rational, logically

derived, and not in conflict with reason. This definition comports with United States Supreme Court precedent defining the reasonable doubt standard. E.g., Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) ("A 'reasonable doubt,' at a minimum, is one based upon 'reason.'"); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965)).

The placement of the indefinite article "a" before "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. "[A] reason," as employed in WPIC 4.01, means "an expression or statement offered as an explanation or a belief or assertion or as a justification." Webster's, supra, at 1891. WPIC 4.01's use of the words "a reason" indicates reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a doubt based on reason; it requires a doubt that is articulable.

Jury instructions "'must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.'" State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). Ambiguous instructions that permit an erroneous

interpretation of the law are improper. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), overruled in part on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). Even if it is possible for judges and lawyers to interpret the instruction to avoid constitutional infirmity, this is not the correct standard for measuring the adequacy of jury instructions. Judges and lawyers have arsenals of interpretative aids at their disposal whereas jurors do not. Id.

Recent prosecutorial misconduct cases exemplify how WPIC 4.01 fails to make the reasonable doubt standard manifestly apparent even to trained legal professionals. The appellate courts of this state have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. These fill-in-the-blank arguments "improperly impl[y] that the jury must be able to articulate its reasonable" and "subtly shift[] the burden to the defense." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).[2] These arguments are improper "because they misstate the reasonable doubt standard and impermissibly undermine the

[2] Accord State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011); State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010); State v. Venegas, 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813 (2010), review denied, 170 Wn.2d 1003, 245 P.3d 226 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010).

presumption of innocence." Emery, 174 Wn.2d at 759. Simply put, "a jury need do nothing to find a defendant not guilty." Id.

These prosecutorial misconduct cases are telling given that the improper burden shifting arguments are not merely the product of prosecutorial malfeasance but the consequence of WPIC 4.01's plain text. The offensive arguments did not materialize out of thin air but sprang directly from the language "[a] reasonable doubt is one for which a reason exists." In Anderson, the prosecutor recited WPIC 4.01 before arguing, "in order to find the defendant not guilty, you have to say, 'I don't believe the defendant is guilty because,' and then you have to fill in the blank." Anderson, 153 Wn. App. at 424. In Johnson, likewise, the prosecutor told jurors, "What [WPIC 4.01] says is 'a doubt for which a reason exists.' In order to find the defendant not guilty, you have to say, 'I doubt the defendant is guilty and my reason is . . . .' To be able to find a reason to doubt, you have to fill in the blank; that's your job." Johnson, 158 Wn. App. at 682.

If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the same undermining to occur through a jury instruction. The prosecutorial misconduct cases make clear that WPIC 4.01 is the true culprit. Its doubt "for which a reason exists"

language provides a natural and seemingly irresistible basis to argue that jurors must give a reason why there is reasonable. Lawyers mistakenly believe WPIC 4.01 means reasonable doubt does not exist unless jurors are able to provide a reason why it does exist. Average jurors certainly believe they must give a reason for having reasonable doubt.

Under the current instruction, jurors could have a reasonable doubt but also have difficulty articulating why their doubt is reasonable to themselves or others. Scholarship explains this problem:

> An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, "I didn't think the state's witness was credible," the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.
>
> One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.
>
> A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to "give a reason," an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which

> the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 Notre Dame L. Rev. 1165, 1213-14 (2003) (footnotes omitted).

In these scenarios, despite having reasonable doubt, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. Because the State will avoid supplying a reason to doubt in its own prosecutions, WPIC 4.01 requires that the defense or the jurors supply a reason to doubt, shifting the burden and undermining the presumption of innocence.

The standard of beyond a reasonable doubt enshrines and protects the presumption of innocence, "that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The presumption of innocence, however, "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." State v. Bennett, 161 Wn.2d 303, 316, 165 P.3d 1241 (2007). The doubt "for which a reason exists" language in WPIC 4.01 does that in directing jurors the must have a reason to acquit rather than a doubt based on reason. This Court should accept review under RAP 13.4(b)(3) to evaluate WPIC 4.01's articulation requirement.

b. WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which a reason exists with a doubt for which a reason can be given.

The Court of Appeals rejected Osborne's argument because Bennett directed trial courts to use the pattern instruction. Slip op. at 2. But Bennett did not address a direct challenge to WPIC 4.01 and therefore does not fairly resolve Osborne's dispute.

Bennett requires the instruction be given in every criminal case only "until a better instruction is approved." Bennett, 161 Wn.2d at 318. The Bennett court clearly signaled that WPIC 4.01 has room for improvement. This is undoubtedly true given WPIC 4.01's repugnant articulation requirement. To avoid constitutional infirmity, the reasonable doubt instruction should simply state "a doubt for which *reason* exists," as opposed to "a doubt for which *a reason* exists."

More recently in Kalebaugh, this Court concluded that the trial court's erroneous instruction — "a doubt for which a reason can be given" — was harmless, accepting appellate counsel's concession at oral argument "that the judge's remark 'could live quite comfortably' with final instructions given here," which included WPIC 4.01. State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015). While Kalebaugh and Bennett might be read to tacitly approve WPIC 4.01, neither of the petitioners in

those cases argued the "one for which a reason exists" language in WPIC 4.01 misstated the reasonable doubt standard.

"In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Because WPIC 4.01 was not challenged in Kalebaugh or Bennett, the analysis in each case flows from the unquestioned premise that WPIC 4.01 is correct. Because this Court has suggested WPIC 4.01 can be improved and because no appellate court has recently addressed flaws in WPIC 4.01's language, this Court should take this opportunity to closely examine WPIC 4.01 pursuant to RAP 13.4(b)(3).

Furthermore, this Court's own precedent is in disarray. Kalebaugh's observation that it is error to require articulation of reasonable doubt overlooks this Court's precedent that approved WPIC 4.01's "for which a reason exists" by relying on cases approving of the "for which a reason can be given" language.

In State v. Weiss, 73 Wn.2d 372, 378-79, 438 P.2d 610 (1968), the Court found no error in this instruction: "A reasonable doubt is a doubt for which a sensible reason can be given." Weiss conflicts with Emery and its recognition that a jury need not give a reason for acquittal: "a jury

need do nothing to find a defendant not guilty." Emery, 174 Wn.2d at 759. Weiss conflicts with Kalebaugh for the same reason. Kalebaugh, 183 Wn.2d at 585 ("the law does not require that a reason be given for a juror's doubt.").

Drilling further down through the case law reveals further fracture in this Court's precedent that has yet to be resolved. In State v. Harras, 25 Wn. 416, 421, 65 P. 774 (1901), this Court found no error in the instruction, "It should be a doubt for which a good reason exists." This Court maintained the "great weight of authority" supported this instruction, citing as authority the note to Burt v. State, 16 So. 342, 48 Am. St. Rep. 574 (Miss. 1894).[3] This note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.[4]

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[3] The relevant portion of the note is attached as Appendix B.

[4] See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 119 (La. 1891) ("A reasonable doubt . . . is not a mere possible doubt; it should be an actual or substantial doubt as a reasonable man would seriously entertain. It is a serious sensible doubt, such as you could give a good reason for"); Vann v. State, 9 S.E. 945, 947-48 (Ga. 1889) ("But the doubt must be a reasonable doubt, not a conjured-up doubt, — such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for."); State v. Morey, 25 Or. 241, 256, 36 P. 573 (1894) ("A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice, or groundless conjecture. A reasonable doubt is such a doubt as a juror can give a reason for.").

In Harras, this Court viewed "a doubt for which a good reason exists" as equivalent to requiring that a reason must be given for the doubt. Harras directly conflicts with both Kalebaugh and Emery, which strongly reject any requirement that jurors must be able to give a reason for why reasonable doubt exists. Kalebaugh, 183 Wn.2d at 585; Emery, 174 Wn.2d at 760 (the suggestion that the jury must be able to articulate its reasonable doubt "is inappropriate because the State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden.").

This Court's decision in State v. Harsted, 66 Wn. 158, 119 P. 24 (1911) demonstrates further inconsistency in this Court's decisional law regarding the reasonable doubt instruction. Harsted objected to the instruction, "The expression 'reasonable doubt' means in law just what the words imply—a doubt founded upon some good reason." Harsted, 66 Wn. at 162. This Court opined, "As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given." Id. at 162-63. This Court proceeded to cite out-of-state cases upholding instructions that defined reasonable doubt as a doubt for which a reason can be given. Id. at 164. One of the authorities this Court relied on was Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (1899), which stated, "A doubt cannot be reasonable unless a

reason therefor exists, and, if such reason exists, it can be given." Though this Court noted that some courts had disapproved of similar language, it was "impressed" with the Wisconsin view and felt "constrained" to uphold the instruction. Harsted, 66 Wn. at 165.

Harsted and Harras provide the origins of WPIC 4.01's infirmity. In both cases this Court equated a doubt "for which a reason exists" with a doubt "for which a reason can be given." These cases held that if a reason exists, it defies logic to suggest that the reason cannot also be given. Harsted and Harras conflict with Kalebaugh and Emery. There is no real difference between the supposedly acceptable doubt "for which a reason exists" in WPIC 4.01 and the plainly erroneous doubt "for which a reason can be given." Kalebaugh, 183 Wn.2d at 585.

The articulation problem in WPIC 4.01 has continued unabated to the present day. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. Emery and Kalebaugh condemned any suggestion that jurors must give a reason for having reasonable doubt. Yet Emery and Kalebaugh explicitly contradict Harras, Harsted and Weiss. The law has evolved. What was acceptable 100 years ago is now forbidden. But WPIC 4.01 remains a relic of the misbegotten past, outpaced by this Court's modern understanding of the reasonable doubt standard and eschewal of any articulation requirement.

It is time for a Washington court to seriously confront the problematic articulation language in WPIC 4.01. There is no meaningful difference between WPIC 4.01's doubt "for which a reason exists" and the erroneous doubt "for which a reason can be given." Both require articulation. Articulation of reasonable doubt is repugnant to the presumption of innocence. Because this Court's and the Court of Appeals' decisions demonstrate the case law is in disarray on the significant constitutional issue of properly defining reasonable doubt for Washington juries, Osborne's arguments merit review under RAP 13.4(b)(1) and (3).

F. CONCLUSION

For the reasons stated, Osborne requests that this Court grant review.

DATED this 22nd day of February 2017.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ISRAEL DAVID OSBORNE, Appellant.	)	No. 74401-1-I DIVISION ONE UNPUBLISHED FILED: January 23, 2017

Cox, J. – Israel Osborne appeals his judgment and sentence, arguing that the jury instruction provided at his trial, WPIC 4.01, unconstitutionally defined a reasonable doubt. Because the supreme court requires that trial courts use the challenged jury instruction, we affirm.

The State charged Osborne with attempted theft of a motor vehicle. After trial, the trial court provided the jury with WPIC 4.01. That instruction defines reasonable doubt as a doubt "for which a reason exists and may arise from the evidence or lack of evidence."[1] The jury found Osborne guilty as charged.

Osborne appeals.

JURY INSTRUCTION

Osborne argues WPIC 4.01, in relevant part quoted above, is unconstitutional. Because controlling case authority directs use of this instruction, we disagree.

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[1] Clerk's Papers at 43.

Osborne claims that the instruction requires a juror to be able to articulate the reason for his doubt. He argues that such a requirement erodes the presumption of innocence.

The supreme court has ordered trial courts to use WPIC 4.01 in all criminal cases.[2] For over a century, that court has explained that the challenged language does not threaten the presumption of innocence or the standard of proof beyond a reasonable doubt.[3] We have several times addressed and rejected the same concerns raised here.[4] We reject Osborne's argument on the same basis.

COSTS

Osborne argues that this court should decline to award the State appellate costs should he not prevail. We agree.

RCW 10.73.160(1) gives appellate courts discretion to decline to impose appellate costs on appeal.[5] Under State v. Sinclair, there is a presumption that indigency continues unless the record shows otherwise.[6]

Here, the trial court granted Osborne's motion seeking appellate review at public expense. The court did so based on Osborne's declaration, which listed

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[2] State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

[3] See State v. Harsted, 66 Wash. 158, 164-65, 119 P. 24 (1911).

[4] State v. Lizarraga, 191 Wn. App. 530, 567, 364 P.3d 810 (2015), review denied, 185 Wn.2d 1022 (2016).

[5] State v. Nolan, 141 Wn.2d 620, 629, 8 P.3d 300 (2000).

[6] 192 Wn. App. 380, 392-93, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016).

his minimal assets. Osborne's conviction, incarceration, and resultant loss of meaningful income make him further unable to pay such costs and expenses.

The State counters that the record demonstrates Osborne will become able to pay in the future.

The State also points generally to Osborne's age and previous work history. But it fails to show Osborne will be able to return to his previous work after incarceration in this matter.

Such evidence is insufficient to overcome the presumption of indigency.

Thus, an award to the State for appellate costs is inappropriate under these circumstances.

We affirm the judgment and sentence and deny any award of costs to the State.

Cox, J.

WE CONCUR:

Trickey, ACJ

Appelwick, J.

APPENDIX B

convict, that the defendant, and no other person, committed the offense: *People* v. *Kerrick*, 52 Cal. 446. It is, therefore, error to instruct the jury, in effect, that they may find the defendant guilty, although they may not be "entirely satisfied" that he, and no other person, committed the alleged offense: *People* v. *Kerrick*, 52 Cal. 446; *People* v. *Carrillo*, 70 Cal. 643.

CIRCUMSTANTIAL EVIDENCE.—In a case where the evidence as to the defendant's guilt is purely circumstantial, the evidence must lead to the conclusion so clearly and strongly as to exclude every reasonable hypothesis consistent with innocence. In a case of that kind an instruction in these words is erroneous: "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." It is not enough that the evidence necessarily leads the mind to a conclusion, for it must be such as to exclude a reasonable doubt. Men may feel that a conclusion is necessarily required, and yet not feel assured, beyond a reasonable doubt, that it is a correct conclusion: *Rhodes* v. *State*, 128 Ind. 189; 25 Am. St. Rep. 429. A charge that circumstantial evidence must produce "in" effect "a" reasonable and moral certainty of defendant's guilt is probably as clear, practical, and satisfactory to the ordinary juror as if the court had charged that such evidence must produce "the" effect "of" a reasonable and moral certainty. At any rate, such a charge is not error: *Loggins* v. *State*, 32 Tex. Cr. Rep. 364. In *State* v. *Shaeffer*, 89 Mo. 271, 282, the jury were directed as follows: "In applying the rule as to reasonable doubt you will be required to acquit if all the facts and circumstances proven can be reasonably reconciled with any theory other than that the defendant is guilty; or, to express the same idea in another form, if all the facts and circumstances proven before you can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty, you must adopt the theory most favorable to the defendant, and return a verdict finding him not guilty." This instruction was held to be erroneous, as it expresses the rule applicable in a civil case, and not in a criminal one. By such explanation the benefit of a reasonable doubt in criminal cases is no more than the advantage a defendant has in a civil case, with respect to the preponderance of evidence. The following is a full, clear, explicit, and accurate instruction in a capital case turning on circumstantial evidence: "In order to warrant you in convicting the defendant in this case, the circumstances proven must not only be consistent with his guilt, but they must be inconsistent with his innocence, and such as to exclude every reasonable hypothesis but that of his guilt, for, before you can infer his guilt from circumstantial evidence, the existence of circumstances tending to show his guilt must be incompatible and inconsistent with any other reasonable hypothesis than that of his guilt": *Lancaster* v. *State*, 91 Tenn. 267, 285.

REASON FOR DOUBT.—To define a reasonable doubt as one that "the jury are able to give a reason for," or to tell them that it is a doubt for which a good reason, arising from the evidence, or want of evidence, can be given, is a definition which many courts have approved: *Vann* v. *State*, 83 Ga. 44; *Hodge* v. *State*, 97 Ala. 37; 38 Am. St. Rep. 145; *United States* v. *Cassidy*, 67 Fed. Rep. 698; *State* v. *Jefferson*, 43 La. Ann. 995; *People* v. *Stubenvoll*, 62 Mich. 329, 332; *Welsh* v. *State*, 96 Ala. 93; *United States* v. *Butler*, 1 Hughes, 457; *United States* v. *Jones*, 31 Fed. Rep. 718; *People* v. *Guidici*, 100

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e, 96 Ala. 93; United States v. Butler, 1
es, 31 Fed. Rep. 718; People v. Guidici, 100

N. Y. 503; Cohen v. State, 50 Ala. 108. It has, therefore, been held proper to tell the jury that a reasonable doubt "is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give good reason for": State v. Jefferson, 43 La. Ann. 995. So, the language, that it must be "not a conjured-up doubt—such a doubt as you might conjure up to acquit a friend—but one that you could give a reason for," while unusual, has been held not to be an incorrect presentation of the doctrine of reasonable doubt: Vann v. State, 83 Ga. 44, 52. And in State v. Morey, 25 Or. 241, it is held that an instruction that a reasonable doubt is such a doubt as a juror can give a reason for, is not reversible error, when given in connection with other instructions, by which the court seeks to so define the term as to enable the jury to distinguish a reasonable doubt from some vague and imaginary one. The definition, that a reasonable doubt means one for which a reason can be given, has been criticized as erroneous and misleading in some of the cases, because it puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty required by law before there can be a conviction; and because a person often doubts about a thing for which he can give no reason, or about which he has an imperfect knowledge: Siberry v. State, 133 Ind. 677; State v. Sauer, 38 Minn. 438; Ray v. State, 50 Ala. 104; and the fault of this definition is not cured by prefacing the statement with the instruction that "by a reasonable doubt is meant not a captious or whimsical doubt": Morgan v. State, 48 Ohio St. 371. Spear, J., in the case last cited, very pertinently asks: "What kind of a reason is meant? Would a poor reason answer, or must the reason be a strong one? Who is to judge? The definition fails to enlighten, and further explanation would seem to be needed to relieve the test of indefiniteness. The expression is also calculated to mislead. To whom is the reason to be given? The juror himself? The charge does not say so, and jurors are not required to assign to others reasons in support of their verdict." To leave out the word "good" before "reason" affects the definition materially. Hence, to instruct a jury that a reasonable doubt is one for which a reason, derived from the testimony, or want of evidence, can be given, is bad: Carr v. State, 23 Neb. 749; Cowan v. State, 22 Neb. 519; as every reason, whether based on substantial grounds or not, does not constitute a reasonable doubt in law: Ray v. State, 50 Ala. 104, 108.

"HESITATE AND PAUSE"—"MATTERS OF HIGHEST IMPORTANCE," ETC. A reasonable doubt has been defined as one arising from a candid and impartial investigation of all the evidence, such as "in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause before acting": Gannon v. People, 127 Ill. 507; 11 Am. St. Rep. 147; Dunn v. People, 109 Ill. 635; Wacaser v. People, 134 Ill. 438; 23 Am. St. Rep. 683; Boulden v. State, 102 Ala. 78; Welsh v. State, 96 Ala. 93; State v. Gibbs, 10 Mont. 213; Miller v. People, 39 Ill. 457; Willis v. State, 43 Neb. 102. And it has been held that it is correct to tell the jury that the "evidence is sufficient to remove reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent men with such force that they would act upon that conviction, without hesitation, in their own most important affairs": Jarrell v. State, 58 Ind. 293; Arnold v. State, 23 Ind. 170; State v. Kearley, 26 Kan. 77; or, where they would feel safe to act upon such conviction "in matters of the highest concern and importance" to their own dearest and most important interests, under circumstances requiring no