

NO. 34398-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

SCOTT GREGER,

Appellant.

FILED
SEP 29, 2016
Court of Appeals
Division III
State of Washington

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

The Honorable Maryann C. Moreno, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Washington's pattern jury instruction on reasonable doubt is unconstitutional.

2. The trial court erred in imposing a \$200 criminal filing fee pursuant to RCW 36.18.020(2)(h) without considering Scott Howard Greger's ability to pay this legal financial obligation (LFO).

Issues Pertaining to Assignments of Error

1. Did the reasonable doubt instruction stating a "reasonable doubt is one for which a reason exists" misdescribe the burden of proof, undermine the presumption of innocence, and shift the burden to Greger to provide a reason for why reasonable doubt exists?

2. Is the \$200 criminal filing fee a discretionary LFO that requires consideration of financial circumstances and ability to pay before imposition?

B. STATEMENT OF THE CASE

The State charged Greger with one count of possession of a stolen motor vehicle. CP 1. The matter proceeded to trial.

Greger's jury was instructed with the pattern instruction defining reasonable doubt, WPIC 4.01¹:

¹ 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

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 29 (emphasis added); RP 234-35 (emphasis added).

The jury found Greger guilty of possession of stolen motor vehicle.

CP 38; RP 256-58.

At sentencing, the trial court determined Greger's chemical dependency contributed to the offense. CP 52. The trial court imposed a prison-based drug offender sentencing alternative pursuant to RCW 9.94A.662, which required Greger to spend 25 months in total confinement and then 25 months in community custody. CP 55; RP 285.

The trial court imposed no discretionary LFOs except for the criminal filing fee of \$200. CP 57.

Greger filed a motion and declaration for an order of indigency to pursue the instant appeal. Greger declared under penalty of perjury that he did not own any real or personal property of any kind, had no income, and received government cash assistance of \$190 per month in food stamps. CP 46-47.

The trial court permitted Greger to appeal at public expense, explicitly ordering that public funds must be made available to pay for filing fees, attorney fees and the cost of preparation of the briefs, and the cost of preparing the record on review. CP 49-50.

Greger filed a timely notice of appeal. CP 43.

C. ARGUMENT

1. THE JURY INSTRUCTION THAT TELLS JURORS “A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS” UNCONSTITUTIONALLY DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED

Greger’s jury was instructed, “A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.” CP 29; RP 234. This instruction, based on WPIC 4.01, 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. Not only must jurors have 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 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 exact thing.

WPIC 4.01 violates due process and the jury-trial guarantee. U.S. CONST. amends. VI, XIV; CONST. art. I, §§ 3, 22. Instructing jurors with WPIC 4.01 is structural error and requires reversal.

- a. WPIC 4.01's articulation requirement misstates the reasonable doubt standard, shifts the burden of proof, and undermines the presumption of innocence

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 139 (1991), rev'd on other grounds, 120 Wn.2d 196, 840 P.2d 172 (1992). In

examining how an average juror would interpret an instruction, appellate courts look to the ordinary meaning of words and rules of grammar. See, e.g., State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) (proper grammatical reading of self-defense instruction allowed jury to find actual imminent harm was necessary for self defense, resulting in court's determination that jury could have applied erroneous self defense standard), overruled in part on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009); State v. Noel, 51 Wn. App. 436, 440-41, 753 P.2d 1017 (1988) (relying on grammatical structure of unanimity instruction to determine ordinary reasonable juror would read clause to mean jury must unanimously agree upon same act); State v. Smith, 174 Wn. App. 359, 366-68, 298 P.3d 785 (discussing difference between use of "should" and use of word indicating "must" regarding when acquittal is appropriate), review denied, 178 Wn.2d 1008, 308 P.3d 643 (2013).

The error in WPIC 4.01 is obvious to any English speaker. Having a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to return a not guilty verdict. A basic examination of the meaning of the words "reasonable" and "a reason" reveals this grave flaw in WPIC 4.01.

Appellate courts consult the dictionary to determine the ordinary meaning of language used in jury instructions. See, e.g., Sandstrom v.

Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (looking to dictionary definition of “presume” to determine how jury may have interpreted instruction); Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 874-75, 281 P.3d 289 (2012) (turning to dictionary definition of “common” to ascertain the jury’s likely understanding of the word in instruction).

“Reasonable” is defined as “being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment . . .” WEBSTER’S THIRD NEW INT’L DICTIONARY 1892 (1993). For a doubt to be reasonable under these definitions it must be rational, logically derived, and have no conflict with reason. See 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)).

Thus, an instruction defining reasonable doubt as “a doubt based on reason” would be proper. WPIC 4.01 does not do that, however. WPIC 4.01

requires “a reason” for the doubt, which is different than a doubt based on reason.

The placement of the indefinite article “a” before “reason” in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. “[A] reason” in the context of WPIC 4.01, means “an expression or statement offered as an explanation of a belief or assertion or as a justification.” WEBSTER’S, supra, at 1891. In contrast to definitions employing the term “reason” in a manner that refers to a doubt based on reason or logic, WPIC 4.01’s use of the words “a reason” indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable, reasonable doubt.

Due process “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Washington’s pattern instruction on reasonable doubt is unconstitutional because its language requires more than just a reasonable doubt to acquit. It instead explicitly requires a justification or explanation for why reasonable doubt exists.

Under the current instruction, jurors could have reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable.

A case might present such voluminous and contradictory evidence that jurors having legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. Yet, despite reasonable doubt, acquittal would not be an option.

Scholarship on the reasonable doubt standard elucidates similar concerns with requiring jurors to articulate their doubt:

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 various 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 beyond-a-reasonable-doubt standard 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." Winship, 397 U.S. at 363. 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." Bennett, 161 Wn.2d at 316. The "doubt for which a reason exists" language in WPIC 4.01 does just that by directing jurors they must have a reason to acquit rather than a doubt based on reason.

In prosecutorial misconduct cases, appellate courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. Such fill-in-the-blank arguments "improper impl[y] that

the jury must be able to articulate its reasonable doubt” and “subtly shift[] the burden to the defense.” State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); 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); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). These arguments are improper “because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence.” Emery, 174 Wn.2d at 759. Simply put, “a jury need do nothing to find a defendant not guilty.” Id.

These improper burden shifting arguments are not the mere product of prosecutorial malfeasance, however. The offensive arguments did not originate in a vacuum but sprang directly from WPIC 4.01’s language. In Anderson, for instance, 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.” 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.” 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 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 doubt in order to have reasonable doubt. If trained legal professionals mistakenly believe WPIC 4.01 means reasonable doubt does not exist unless jurors are able to provide a reason why it does exist, then how can average jurors be expected to avoid the same hazard?

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)). An ambiguous instruction that permits erroneous interpretation of the law is improper. LeFaber, 128 Wn.2d at 902. Even if it is possible for an appellate court to interpret the instruction in a manner that avoids constitutional infirmity—which Greger does not concede—that is not the correct standard for measuring the adequacy of jury instructions. Courts have arsenals of interpretative aids at their disposal whereas jurors do not. Id.

WPIC 4.01 fails to make it manifestly clear that jurors need not be able to give a reason for why reasonable doubt exists. Far from making the proper reasonable doubt standard manifestly apparent to the average juror, WPIC 4.01's infirm language affirmatively misdirects the average juror into believing a reasonable doubt cannot exist unless and until a reason for it can be articulated. Instructions must not be "misleading to the ordinary mind." Dana, 73 Wn.2d at 537. WPIC 4.01 is readily capable of misleading the average juror into thinking that acquittal depends on whether a reason for reasonable doubt can be stated. The plain language of the instruction and the fact that legal professionals have been misled by the instruction compels this conclusion.

Recently, in State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015), the Washington Supreme Court held a trial court's preliminary instruction that a reasonable doubt is "a doubt for which a reason can be given" was erroneous because "the law does not require that a reason be given for a juror's doubt."² 183 Wn.2d at 585. The point the Kalebaugh

² This conclusion is sound:

Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not

court missed, however, is that if it is error to instruct jurors reasonable doubt requires a reason to be given, it is just as much error to tell jurors reasonable doubt requires a reason to exist.

b. No appellate court in recent times has directly grappled with the challenged language in WPIC 4.01

In Bennett, the Washington Supreme Court directed trial courts to give WPIC 4.01, at least “until a better instruction is approved.” 161 Wn.2d at 318. In Emery, the court contrasted the “proper description” of reasonable doubt as a “doubt for which a reason exists” with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. Emery, 174 Wn.2d at 759. In Kalebaugh, the court similarly contrasted “the correct jury instruction that a ‘reasonable doubt’ is a doubt for which a reason exists” with an improper instruction that “a reasonable doubt is ‘a doubt for which a reason can be given.’” 183 Wn.2d at 585. The Kalebaugh court concluded the trial court’s erroneous instruction—“a doubt for which a reason can be given”—was harmless, accepting Kalebaugh’s concession at

finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.

State v. Cohen, 78 N.W. 857, 858 (Iowa 1899); see also Siberry v. State, 33 N.E. 681, 684-85 (Ind. 1893) (criticizing instruction “a reasonable doubt is such a doubt as the jury are able to give reason for” 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 which the law requires before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case”).

oral argument “that the judge’s remark ‘could live quite comfortably’ with the final instructions given here.” Id.

The court’s recognition that the instruction “a doubt for which a reason can be given” can “live quite comfortably” with WPIC 4.01’s language amounts to a tacit acknowledgment that WPIC 4.01 is readily interpreted to require the articulation of a reasonable doubt. Jurors are undoubtedly interpreting WPIC 4.01 as requiring them to give a reason for their doubt. The plain language of WPIC 4.01 requires this articulation. No Washington court has ever explained how this is not so.

Kalebaugh provided no answer, as appellate counsel conceded the correctness of WPIC 4.01 in that case. In fact, none of the appellants in Kalebaugh, Emery, or Bennett argued the doubt “for which a reason exists” language in WPIC 4.01 misstates 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); accord In re Electric Lightwave, Inc. 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (“We do not rely on cases that fail to specifically raise or decide an issue.”). Because WPIC 4.01 was not challenged on appeal in those cases, the analysis in each flows from the

unquestioned premise that WPIC 4.01 is correct. As such, their approval of WPIC 4.01's language does not control.

- c. 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

Forty years ago, Division Two addressed an argument that “[t]he doubt which entitled the defendant to an acquittal must be a doubt for which a reason exists’ (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt, in order to acquit.” State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (quoting jury instruction). Thompson brushed aside the articulation argument in one sentence, stating “the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary.” Thompson, 13 Wn. App. at 5.

Thompson's cursory analysis is untenable. The first sentence on the meaning of reasonable doubt plainly requires a reason to exist for reasonable doubt. The instruction directs jurors to assign a reason for their doubt and no further “context” erases the taint of this articulation requirement. The Thompson court did not explain what “context” saved the language from constitutional infirmity. Its suggestion that the language “merely points out that [jurors’] doubts must be based on reason” fails to account for the

obvious difference in meaning between a doubt based on “reason” and a doubt based on “a reason.” Thompson wished the problem away by judicial fiat rather than confront the problem through thoughtful analysis.

The Thompson court began its discussion by recognizing “this instruction has its detractors” but noted it was “constrained to uphold it” based on State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959), and State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). Thompson, 13 Wn. App. at 5.

In holding the trial court did not err in refusing the defendant’s proposed instruction on reasonable doubt, Tanzymore simply stated that the standard instruction “has been accepted as a correct statement of the law for so many years” that the defendant’s argument to the contrary was without merit. State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959). Nabors cites Tanzymore as its support. Nabors, 8 Wn. App. at 202. Neither case specifically addressed the “doubt for which a reason exists” language in the instruction, so it was not at issue.

The Thompson court observed “[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years,” citing State v. Harras, 25 Wash. 416, 65 P. 774 (1901). Thompson, 13 Wn. App. at 5. Harras found no error in the following language: “It should be a doubt for which a good reason exists,—a doubt which would cause a reasonable and

prudent man to hesitate and pause in a matter of importance, such as the one you are now considering.” Harras, 25 Wash. at 421. Harras simply maintained the “great weight of authority” supported it, citing the note to Burt v. State, 48 Am. St. Rep. 574, 16 So. 342 (Miss. 1894).³ However, 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

So our supreme court in Harras viewed its “a doubt for which a good reason exists” instruction as equivalent to those instructions requiring a reason to be given for the doubt. And then Thompson upheld the doubt “for which a reason exists” instruction by equating it with the instruction in Harras. Thompson did not grasp the ramifications of this equation, as it amounts to a concession that WPIC 4.01’s doubt “for which a reason exists” language means a doubt for which a reason can be given. This is a serious problem because, under current jurisprudence, any suggestion that jurors must be able to give a reason for why reasonable doubt exists is improper.

³ The relevant portion of the note cited by Harras is appended to this brief.

⁴ See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 119 (La. 1891) (“A reasonable doubt, gentlemen, 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, 255-59, 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.”).

Kalebaugh, 183 Wn.2d at 585; Emery, 174 Wn.2d at 759-60. The Kalebaugh court explicitly held, moreover, that it was a manifest constitutional error to instruct the jury that reasonable doubt is “a doubt for which a reason can be given.” Kalebaugh, 183 Wn.2d at 584-85.

State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), sheds further light on this dilemma. Harsted took exception to the instruction, “The expression, ‘reasonable doubt’ means in law just what the words imply—a doubt founded upon some good reason.” Id. at 162. The court explained the meaning of reasonable doubt:

[I]f it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. 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. In support of its holding that there was nothing wrong with the challenged language, the Harsted court cited a number of out-of-state cases upholding instructions defining a reasonable doubt as a doubt for which a reason can be given. Id. at 164. Among them was Butler v. State, 78 N.W. 590, 591-92 (Wis. 1899), which stated, “A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given.” While the Harsted court noted some courts had disapproved of similar

language, it was “impressed” with the view adopted by the other cases it cited and felt “constrained” to uphold the instruction. 66 Wash. at 165.

We now arrive at the genesis of the problem. More than 100 years ago, the Washington Supreme Court in Harsted and Harras equated two propositions in addressing the standard instruction on reasonable doubt: a doubt for which a reason exists means a doubt for which a reason can be given. This revelation annihilates any argument that there is a real difference between a doubt “for which a reason exists” in WPIC 4.01 and being able to give a reason for why doubt exists. Our supreme court found no such distinction in Harsted and Harras.

More recent case law confirms that there is no meaningful distinction between the acceptable a doubt “for which a reason exists” and the erroneous a doubt “for which a reason can be given.” In State v. Weiss, 73 Wn.2d 372, 378-79, 438 P.2d 610 (1968), the Washington Supreme Court determined the instruction, “A reasonable doubt is a doubt for which a sensible reason can be given,” was “a correct statement of the law.” Although the court disapproved of the instruction overall because it was too abbreviated, the court nonetheless concluded that “the trial court did not err in submitting the instruction given.” Id. at 379. Weiss, like Harras and Harsted, shows that there is no substantive difference between an instruction requiring reasonable

doubt to merely exist versus an instruction requiring reasonable doubt to be given.

This problem 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 Harras, Harsted, and Weiss explicitly contradict Emery's and Kalebaugh's condemnation. The law has evolved, and what was acceptable 100 years ago is now forbidden. But WPIC 4.01 remains stuck in the past, outpaced by the Washington courts' modern understanding of the reasonable doubt standard and swift eschewal of any articulation requirement.

It is time for a Washington appellate court to seriously confront the problematic language in WPIC 4.01. There is no appreciable 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 a reason for why reasonable doubt exists. This repugnant requirement distorts the reasonable doubt standard to the detriment of the accused.

d. This structural error requires reversal

Defense counsel did not object to the instruction at issue here. See 5RP 29-39 (discussion regarding exceptions or objections to jury instructions). However, the error may be raised for the first time on appeal

as a manifest error affecting a constitutional right under RAP 2.5(a)(3). Structural errors qualify as manifest constitutional errors for RAP 2.5(a)(3) purposes. State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012).

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury trial guarantee. Id. at 279-80. Where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates all the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

WPIC 4.01's language requires more than just a reasonable doubt to acquit; it requires an articulable doubt. Its articulation requirement undermines the presumption of innocence, shifts the burden of proof, and misinstructs jurors on the meaning of reasonable doubt. The trial court's use of WPIC 4.01 was structural error and requires reversal of Greger's conviction and a new trial.

2. THE \$200 CRIMINAL FILING FEE IS NOT MANDATORY AND THE TRIAL COURT SHOULD HAVE INQUIRED INTO GREGER'S ABILITY TO PAY BEFORE IMPOSING IT

The trial court imposed a \$200 criminal filing fee. CP 57. Because this fee is discretionary, not mandatory, the trial court erred in imposing it without first conducting an adequate inquiry into Greger's financial conditions and ability to pay.

RCW 9.94A.760 permits trial courts to order LFOs as part of a criminal sentence. However, RCW 10.01.160(3) prohibits imposing LFOs unless "the defendant is or will be able to pay them." To determine whether to impose LFOs, courts "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

The Washington Supreme Court held RCW 10.01.160(3) requires trial courts to first consider an individual's current and future ability to pay before imposing discretionary LFOs. State v. Blazina, 182 Wn.2d 827, 837-39, 344 P.3d 680 (2015). The record must reflect this inquiry, which should include at minimum the length of incarceration and other debts. Id. at 838.

Division Two has indicated that the \$200 criminal filing fee is mandatory, not discretionary. State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). Greger disagrees. The Lundy court provided no rationale

or analysis of the statutory language supporting its conclusion that the fee is mandatory. See id.; see also State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016) (this court’s mere citation to Lundy for proposition that filing fee must be imposed regardless of indigency without statutory analysis). Lundy was wrongly decided and the pernicious effects of LFOs recognized in Blazina demonstrate the harmfulness of imposing discretionary LFOs without an adequate ability-to-pay inquiry. This court should therefore overrule Lundy’s determination that the filing fee is a mandatory LFO. See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (stare decisis “requires a clear showing that an established rule is incorrect and harmful before it is abandoned”).

The language of RCW 36.18.020(2)(h), which provides authority to impose a filing fee, differs from other statutes authorizing mandatory fees. For instance, the victim penalty assessment statute provides, “When any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment.” RCW 7.68.035 (emphasis added). This statute is unambiguous in its mandate that the assessment “shall be imposed.” The same is true of the DNA collection fee statute, which provides, “Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.” RCW 43.43.7541 (emphasis added).

RCW 36.18.020(2)(h) is not the same. It provides that, upon conviction, “an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.” (Emphasis added.) In contrast to the DNA collection and victim penalty assessment statutes—both of which demonstrate that the legislature knows how to unambiguously mandate the imposition of a legal financial obligation—RCW 36.18.020(2)(h) does not mandate the imposition or inclusion of a \$200 criminal filing fee.

Nowhere in RCW 36.18.020(2)(h)’s language is the requirement that trial courts must impose the \$200 filing fee upon conviction. Although RCW 36.18.020(2) states that “[c]lerks of superior courts shall collect” the fee, no language indicates the fee cannot be waived by a judge. Many superior courts never impose the \$200 filing fee. The \$200 filing fee is a discretionary LFO, not a mandatory one.

Moreover, being liable for a fee and being required to pay a fee are different things. “Liability” for a fee does not make the fee mandatory given that the term “liable” encompasses a broad range of possibilities, from making a person “obligated” in law to paying to imposing a “future possible or probable happening that may not occur.” BLACK’S LAW DICTIONARY 915 (6th ed. 1990). Thus, “liable” can mean a situation that *might* give rise to legal liability. At best, the statutory language is ambiguous as to whether it is mandatory. Under the rule of lenity, the statutory language must be

interpreted in Greger's favor. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

This court should not adhere to Lundy, which contained no reasoning to support its conclusion that the criminal filing fee is mandatory. The Washington Supreme Court recently appeared skeptical that the \$200 filing fee was mandatory, noting it has only "been treated as mandatory by the Court of Appeals." State v. Duncan, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016). That the court would identify those fees designated as mandatory by the legislature on the one hand, and then separately identify the criminal filing fee as one that has merely been *treated* as mandatory on the other, shows the supreme court sees a distinction. See id. This court should not follow Lundy, provide meaningful consideration of RCW 36.18.020(2)(h)'s language, and hold that the criminal filing fee is a discretionary LFO.

In response, the State might argue that this court should decline to consider this argument because Greger did not specifically object to it at sentencing. However, RAP 2.5(a) provides that this court "may refuse to review any claim of error which was not raised in the trial court"—so this court has ample discretion. And RAP 1.2 expresses a clear preference to liberally interpret the rules of appellate procedure "to promote justice and facilitate the decision of cases on the merits." In light of Blazina's call to address a "broken LFO systems," 182 Wn.2d at 835, and the Washington

Supreme Court's recent skepticism in Duncan that the filing fee is mandatory, this court should address Greger's claim and decide it on the merits.

Greger asks this court to hold the criminal filing fee is a discretionary LFO and remand for resentencing so that the \$200 fee may be stricken from the judgment and sentence.

3. APPELLATE COSTS SHOULD BE DENIED

a. Greger is presumed indigent throughout review

Appellate courts indisputably have discretion to deny appellate costs. RCW 10.73.160(1); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034, 377 P.3d 733 (2016). This court should exercise this discretion and deny any request by the State for thousands of dollars in appellate costs.

The trial court determined Greger was indigent and entitled to appellate representation and the creation of the appellate record at public expense. CP 49-50. Based on this determination, Greger is presumed indigent throughout this review. RAP 15.2(f). The Sinclair court stated, "We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve We therefore presume Sinclair remains indigent." 192 Wn. App. at 393. Because the trial court

here likewise found Greger indigent, this court should presume he remains so and deny any request by the State for appellate costs.

Furthermore, any reasonable person reading the trial court's indigency order would believe (1) Greger was entitled to an attorney to represent him and to the preparation of an appellate record "paid from public funds" and (2) "paid from public funds" meant Greger would pay nothing due to his indigency, win or lose. The imposition of appellate costs would convert the trial court's indigency order into a complete falsehood. This alone is a sound reason for this court to exercise discretion and deny appellate costs.

- b. Attempting to fund the Office of Public Defense on the backs of indigent persons when their public defenders lose their appeals undermines the attorney-client relationship and creates a perverse conflict of interest

Because the courts do not do so, appellate defenders must explain to their indigent clients that if their arguments do not prevail, they will be assessed, at minimum, thousands of dollars in appellate costs. Unlike other lawyers whose clients pay them, the client's ability to pay does not factor into an appellate defender's representation of his or her client. Yet appellate defenders must still play the role of financial planner, hedging the strength of their arguments against the vast sums of money their clients will owe and attempting to advise their clients accordingly. This undermines the appellate

defender's important role in advancing all issues of arguable merit on clients' behalf and thereby undermines the relationship between attorney and client.

This relationship is further undermined when clients see that the Office of Public Defense is the primary beneficiary—to the tune of thousands of dollars—of their unsuccessful arguments. This creates a perverse incentive: the Office of Public Defense, which pays the salaries of all appellate defenders and through which all appellate defenders represent their clients, collects money only when the appellate defender is unsuccessful. This is readily apparent as a conflict of interest and undermines any appearance that the appellate cost scheme is fair. See RPC 1.7(a)(2) (a conflict exists where “there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer”); Wood v. Georgia, 450 U.S. 261, 268-70, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981) (acknowledging conflict when interest of third party paying lawyer is at odds with client's interest); Winkler v. Keane, 7 F.3d 304, 308 (2d Cir. 1993) (contingent fee in criminal case created actual conflict of interest); United States v. Horton, 845 F.2d 1414, 1419 (7th Cir. 1988) (conflict of interest arises when defense attorney must “make a choice advancing his own interest to the detriment of his client's interests”).

The current appellate cost system works as a contingent fee arrangement in reverse: rather than pay their attorneys upon winning their cases, indigent clients must pay the organization that funds their attorneys when they lose. Franz Kafka himself would strain to imagine such a design. This court should deny appellate costs.

- c. Imposing costs on indigent persons without assessing whether they have the ability to pay does not rationally serve a legitimate state interest and accordingly violates substantive due process

Both the state and federal constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. CONST. amends. V, XIV; CONST. art. I, § 3. “The due process clause of the Fourteenth Amendment confers both procedural and substantive protections.” Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006).

“Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” Id. at 218-19. Deprivations of life, liberty, or property must be substantively reasonable and are constitutionally infirm if not “supported by some legitimate justification.” Nielsen v. Dep’t of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013).

The level of scrutiny applied to a substantive due process challenge depends on the nature of the right at issue. Johnson v. Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130 (2013). Where a fundamental right is not at issue, as is the case here, courts apply rational basis scrutiny. Nielsen, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the regulation must be rationally related to a legitimate state interest. Id. Although this is a deferential standard, it is not meaningless. Mathews v. DeCastro, 429 U.S. 181, 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976) (rational basis standard “is not a toothless one”).

The vast majority of the money awarded in an appellate cost bill is earmarked for indigent defense funding and goes to the Office of Public Defense. Although funding the Office of Public Defense is a legitimate state interest, the imposition of costs on appellants who cannot pay them does not rationally serve this interest.⁵

As the Washington Supreme Court recently recognized, “the state cannot collect money from defendants who cannot pay.” Blazina, 182 Wn.2d at 837. Imposing appellate costs under RCW 10.73.160 and RAP

⁵ It is by no means clear that the appellate cost system produces a net positive balance in the state’s coffers. It is increasingly likely that imposition and enforcement efforts—if fairly quantified to include the time that trial and appellate lawyers, clerks, commissioners, and judges spend on these issues—would exceed the limited sums extracted from indigent persons.

14.2 on indigent persons who cannot pay them fails to further any state interest. There is no rational basis for appellate courts to impose this debt upon indigent persons who lack the ability to pay.

Likely intending to avoid such a result, the legislature expressly granted discretion to deny a request to impose costs on indigent litigants: “The court of appeals, supreme court, and superior courts may require an adult or a juvenile convicted of an offense or the parents of another person legally obligated to support a juvenile offender to pay appellate costs.” RCW 10.73.160(1) (emphasis added). “The authority is permissive as the statute specifically indicates.” State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). No rational legislation would expressly grant discretion to courts that refuse to exercise it. Washington courts must, at minimum, require an ability-to-pay determination *before* imposing costs to comport with the due process clauses.

The state also has a substantial interest in reducing recidivism and promoting postconviction rehabilitation and reentry into society. Blazina, 182 Wn.2d at 836-37. Appellate costs immediately begin accruing interest at 12 percent, making this reentry unduly onerous, if not impossible, to achieve. See id.; RCW 10.82.090(1). This important state interest cuts directly against the discretionless imposition of appellate costs.

When applied to indigent persons who do not have the ability or likely future ability to pay, as here, the imposition of appellate costs under title 14 RAP and RCW 10.73.160 does not rationally relate to the state's interest in funding indigent defense programs. This court should hold that any imposition of appellate costs without a preimposition determination of his ability to pay would violate his substantive due process rights.

d. The record establishes that this court should waive discretionary appellate costs

The Sinclair court indicated that both parties “can be helpful to the appellate court’s exercise of its discretion by developing fact-specific arguments from information that is available in the existing record.” 192 Wn. App. at 392. The existing record here shows a man who has no real property, no personal property, no income, no checking account, no savings account, and no gainful employment. CP 46-47. The record also establishes that Greger suffers from serious and longstanding chemical dependency and that this chemical dependency has resulted in difficulty retaining employment. RP 272-73. The imposition of thousands of dollars in appellate costs will serve only to make Greger’s reentry into society as a sober, productive member all the more difficult.

Further, the record establishes Greger received food stamps, ostensibly through the Department of Social and Health Services (DSHS)

needs-based, means tested programs. CP 47 (indicating Greger received \$190 per month in food stamps at the time of sentencing); RCW 74.04.510 (authorizing DSHS to administer food stamps); WAC 388-478-0005(1) (DSHS needs standards that represent “the amount of income required by individuals and families to maintain a minimum and adequate standard of living”); RCW 74.04.770 (directing that DSHS’s needs standards be based on “actual living costs”). Very recently, the Washington Supreme Court again directed courts to GR 34 “as a guide for determining whether someone has the ability to pay costs.” Richland/Kennewick v. Wakefield, ___ Wn.2d ___, ___ P.3d ___, 2016 WL 5344247, at *4. “Under GR 34, ‘courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps.’” Id. (emphasis added) (quoting Blazina, 182 Wn.2d at 838). “[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person’s ability to pay LFOs.” Id. (quoting Blazina, 182 Wn.2d at 839). “This is true for both the imposition and enforcement of LFOs.” Id. (emphasis added). In Wakefield, the supreme court held that the district court “should not have disregarded Wakefield’s eligibility for needs-based, means-tested assistance when evaluating her ability to pay LFOs.” Id. This court should not disregard Greger’s eligibility for government assistance programs either. Instead,

faithful to Wakefield, which is binding on this court, this court “should regard [Greger’s] eligibility as strong evidence of indigency.” Id. By appropriately exercising discretion, this court should deny appellate costs.

D. CONCLUSION

The defective reasonable doubt instruction given in Greger’s trial is structural error, requiring reversal and a new trial. Alternatively, this court should remand for resentencing so the court can consider Greger’s ability to pay prior to imposing the criminal filing fee.

DATED this 29th day of September, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

KEVIN A. MARCH
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Office ID No. 91051

Attorneys for Appellant

APPENDIX

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*, 123 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. Shaefter*, 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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and no other person, committed the offense; It is, therefore, error to instruct the jury, the defendant guilty, although they may not be, and no other person, committed the alleged Cal. 446; *People v. Carrillo*, 70 Cal. 643.

—In a case where the evidence as to the defendant, the evidence must lead to the conclusion as to exclude every reasonable hypothesis in a case of that kind an instruction in these terms is to have the benefit of any doubt. Established necessarily lead the mind to the conclusion that there is a bare possibility that he may be found guilty." It is not enough that the evidence leads the mind to a conclusion, for it must be such as to assure the mind that a conclusion is necessary, beyond a reasonable doubt, that it is not. *State*, 128 Ind. 189; 25 Am. St. Rep. 429. Evidence must produce "in" effect "a" reasonable doubt if defendant's guilt is probably as clear, practical as that of an ordinary juror as if the court had charged the jury with the effect "of" a reasonable and moral doubt. A charge is not error; *Loggins v. State*, 32 Mo. 271, 282, the jury were charged with the rule as to reasonable doubt you will find the facts and circumstances proven can be reconciled with the theory that the defendant is guilty; in another form, if all the facts and circumstances be as reasonably reconciled with the theory that the defendant is guilty, you will find the facts favorable to the defendant, and return a verdict. This instruction was held to be erroneous, as it is in a civil case, and not in a criminal one. A charge of a reasonable doubt in criminal cases is a charge that a defendant has in a civil case, with respect to the facts. The following is a full, clear, explicit, instruction in a capital case turning on circumstantial evidence: "You are to convict the defendant in this case, if the evidence is not only consistent with his guilt, but also consistent with his innocence, and such as to exclude every other hypothesis of his guilt, for, before you can infer his guilt, the existence of circumstances tending to be compatible and inconsistent with any other hypothesis of his guilt"; *Lancaster v. State*, 91 Tenn.

define a reasonable doubt as one that "the jury are to tell them that it is a doubt for which a reasonable doubt, or want of evidence, can be given, the courts have approved: *Fann v. State*, 83 Ga. 44; 11 Am. St. Rep. 145; *United States v. Cassidy*, 43 La. Ann. 995; *People v. Stubenvoll*, 96 Ala. 93; *United States v. Butler*, 1 Jones, 31 Fed. Rep. 716; *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; *Fann 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