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A New Attempt at Defining an Old Maxim

by The Honorable
Marvin B. Steinberg

There is no better established precept in American criminal jurisprudence than the prosecution must convince the trier of fact of the defendant's guilt "beyond a reasonable doubt." The firmness with which this precept undergirds criminal justice is matched only by the determined, varied and ambiguous attempts to define, in objective terms, this inherently subjective state of mind.

Since the genesis of American criminal procedure, a significantly higher degree of persuasion has been required in criminal cases than in their civil counterpart. It was not until the late 1700's that this higher standard of persuasion was actually termed "beyond a reasonable doubt." See C. McCormick, Evidence § 341 (2d ed. 1972). Before the phrase "beyond a reasonable doubt" was coined, such phrases as "a clear impression," "upon clear grounds," "rational doubt," and "rational and well grounded doubt" were used to describe the burden of persuasion in criminal cases. See 9 J. Wigmore, Evidence § 2497 (Chadbourn rev. 1981).

Although unanimously adhered to by virtually all United States courts, the reasonable doubt standard was not established conclusively as a requirement of the due process clause of the fifth and fourteenth amendments until 1970. The United States Supreme Court had previously, in dicta, indicated that the reasonable doubt standard was constitutionally mandated. See, e.g., *Brinegar v. United States*, 338 U.S. 160, 174 (1949) (that guilt in a criminal case must be proven beyond a reasonable doubt is "to some extent embodied in the Constitution"); *Davis v. United States*, 160 U.S. 469, 488 (1895) (reasonable doubt standard is implicit in "constitutions . . . [that] recognize the fundamental principles that are deemed essential for the protection of life and liberty").

In 1970, the Supreme Court decided *In Re Winship*, 397 U.S. 358 (1970), wherein the Court stated, "[l]est there remain any doubt about the constitutional stature of

the reasonable doubt standard, we explicitly hold that the Due Process Clause 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." *Id.* at 364. The Court enunciated that:

The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law'.

Id. at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

Accordingly, the Supreme Court has indicated that the failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error. *Jackson v. Virginia*, 443 U.S. 307, 320 n. 14 (1979).

In 1980, the Court of Appeals of Maryland held that "a trial judge in a criminal case, must give an instruction explaining 'reasonable doubt' if requested by the accused." *Lansdowne v. State*, 287 Md. 232, 243, 412 A.2d 88, 93 (1980). It is this "explanation" of reasonable doubt that has fostered much confusion for trial judges and jurors alike. It is exceedingly difficult to create universally understood reasonable doubt standards considering the variety of meanings individuals give to everyday language and experience.

Prior to 1949, many Maryland trial judges felt the meaning of reasonable doubt was so difficult to convey that an attempt to define or explain "reasonable doubt" would further confuse the minds of the jurors; therefore, these judges refused to attempt to give any definition because it may have been grounds for reversal. In 1949, the court of appeals held that it would not

be so confusing to the jury so as to constitute error to give a correct explanation of "reasonable doubt." See *Lambert v. State*, 193 Md. 551, 560-61, 69 A.2d 461, 465 (1949). The *Lambert* holding was affirmed in *Lansdowne v. State*, 287 Md. 232, 412 A.2d 88 (1980), wherein the court noted:

The term 'reasonable doubt' is not so commonplace, simple, and clear that its meaning is self-evident to the jury. Even judges, who have 'professional expertise' and 'experience,' and who, by their 'legal training, traditional approach to problems, and the very state of the art of [their] profession . . . learn to perceive, distinguish and interpret the nuances of the law which are its warp and woof,' have difficulty construing the meaning of 'reasonable doubt.' Indeed, in a myriad of cases, trial judges have committed error by incorrectly explaining 'reasonable doubt.' Some unskilled and untutored lay jurors are at least as likely as some judges to misconstrue the meaning of 'reasonable doubt.' Consequently, a correct explanation may well serve the useful function of enlightening rather than confusing a jury.

Id. at 242, 412 A.2d at 93 (citations and footnotes omitted).

Conversely, a minority of jurisdictions still maintain that any instruction explaining "reasonable doubt" constitutes error. See, e.g., *People v. Cagle*, 41 Ill. 2d 528, 536, 244 N.E.2d 200, 204 (1969); *Blakely v. State*, 542 P.2d 857, 861 (Wyo. 1975).

Upon my judicial appointment to the Circuit Court for Baltimore City and subsequent assignment to hear criminal cases, I was faced with the dilemma of being required to give an instruction explaining "reasonable doubt" which I felt served to create rather than to remove confusion in the minds of jurors. An instruction regarding "reasonable doubt" as provided in D. Arronson, Maryland Criminal Jury Instructions and Commentary § 1.04 (1975),

or a slight modification thereto, was being used by many of my colleagues and was suggested for my use. Section 1.04 provides in pertinent part:

A reasonable doubt is a doubt founded upon reason. It is not a fanciful doubt or a whimsical or capricious doubt. It is such a doubt as would cause a reasonable person to hesitate to act in the graver or more important transactions of life. Thus, if the evidence is of such a character as to persuade you of the truth of the charges against the defendant with the same force that would be sufficient to persuade you to act on that abiding conviction of truth in the graver or more important transactions of your own life, you may conclude that the state has met its burden of proof beyond a reasonable doubt and to a moral certainty.

In my opinion, the terminology of this instruction did not aid the juror in comprehending the "reasonable doubt" standard; rather, the terminology made the definition more obscure by focusing the juror's consideration on certain principles without attempting to explain to the juror a standard by which these principles could be applied.

Recognizing that Maryland appellate courts have approved diverse versions of reasonable doubt instructions and have held there is no one instruction that must be given, *see Montgomery v. State*, 292 Md. 84, 95, 437 A.2d 654, 659-60 (1981), I chose to develop my own reasonable doubt instruction. I tried to develop an instruction that would include basic concepts, would aid the jurors in comprehending reasonable doubt without adding confusion, and would allow the jurors to relate "reasonable doubt" to events familiar to them. The following instruction was the result:

With regard to reasonable doubt, it can be explained in many ways, and I usually like to have something explained to me by comparing it with something else.

Reasonable doubt refers to the degree to which you are convinced about something, and if you think for a minute and think about the decisions that you have made in your life, sometimes your mind is evenly divided. You might call that six of one, half dozen of another, evenly divided.

The State's burden is more than that; you have to be convinced beyond that of the defendant's guilt. Sometimes you think of something and you will say to yourself, "Well it is probably so,

possibly not so, but probably so." The State's burden of proof in a criminal case goes beyond that, it must be more than probably so.

Sometimes you are absolutely and totally convinced of something the witness said, "2 + 2 is 4." Absolutely, we know that this is true. The State does not have to prove its case to that kind of absolute certainty, so that when we say beyond a reasonable doubt, we mean that you must be convinced more than probably, but not necessarily absolutely.

You [can not] have any reasonable doubt. You can have some doubt but only to the extent anything is possible, but you must not have reasonable doubt. If you have reasonable doubt, you have to find the defendant not guilty.

If you are convinced to such a degree, so that you would on that basis make a decision in your own life, an important decision based on that state of being convinced, then you could say that "yes" you are convinced beyond a reasonable doubt, but if you would not make that decision because your doubt is reasonable, then you would say you are not convinced at that point and that you do have reasonable doubt.

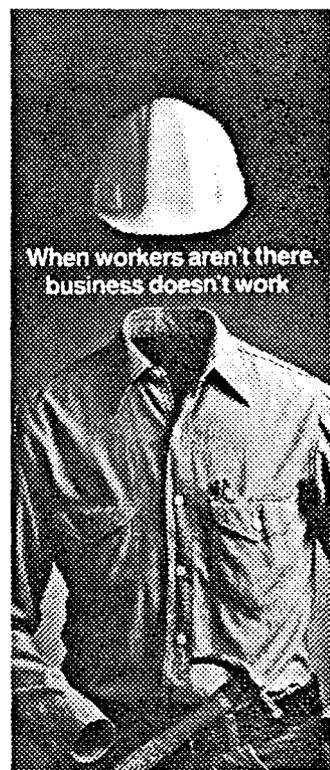
It is only complicated in the explaining. It is not really that complicated when you try and relate it to your everyday life, and if you are convinced beyond a reasonable doubt that this defendant is guilty, then your verdict should be guilty. If you are not so convinced, then your verdict should be not guilty.

The only limit the court of appeals has placed on the giving of a reasonable doubt instruction is that the instruction must be more than a mere statement that reasonable doubt is doubt based on reason, *Montgomery v. State*, 292 Md. 84, 95, 437 A.2d 654, 660 (1981). The instruction must focus the jurors "attention on the grave importance of their decision based on the evidence and their commitment to be bound by the result." *Id.* As long as the instruction is a correct statement of the law, the particular phraseology is not important.

In sum, the inherently subjective nature of the "reasonable doubt" standard invariably creates difficulties when one attempts to convey its meaning to another. Some guidance, however, is necessary. Moreover, the shorter and personally familiar the instruction can be to an individual juror, the greater the guarantee that no person will be deprived of life or liberty unless

the jurors are convinced upon their consciences that the evidence before them is sufficient proof beyond a reasonable doubt of every fact necessary to constitute the crime with which that person is charged.

Judge Marvin B. Steinberg is a graduate of the University of Baltimore School of Law. He is a Judge for the Circuit Court for Baltimore City and is presently a member of the Council for the Maryland State Bar Association's Section on Judicial Administration.



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