

# Chicago Daily Law Bulletin®

Volume 157, No. 241

Friday, December 9, 2011

## Defining 'reasonable doubt' proves challenging

If a potential juror asked me what is the most important concept in criminal law I would say "No question ... the concept of proof beyond a reasonable doubt."

But what if the person then said, "Thanks! Now tell me what a 'reasonable doubt' is?"

In that case I would smile patronizingly and say, "In Illinois it's so important a concept that we don't even define it for the jury."

Jurors ask such stupid questions — which is pretty much the message of a recent case from the 1st District Appellate Court, *People v. Donnell Turman*, 954 N.E.2d 845 (Ill.App. 1st Dist. 2011). After several hours of deliberations in a criminal sexual assault case, the jury sent out a note asking for a "more explicit, expansive definition of reasonable doubt." The reason they needed to ask, of course, is that Illinois refuses to define "reasonable doubt" for the jury. See IPI Criminal 4th Edition, 2.05.

The trial judge proposed the following: "Reasonable doubt is not defined under Illinois law. It is for the jury to collectively determine what reasonable doubt is." Both parties agreed to this. The judge gave it to the jurors and the defendant was found guilty.

On appeal, the defendant for the first time contended that the judge's supplemental instruction was reversible error. The 1st District agreed, found the judge's action to be plain error and remanded the case for a new trial.

*Turman* begins by noting that "[T]he principle that a jury is entitled to have answers to its legal questions does not include a request to have reasonable doubt defined." It then concludes — with no analysis — that telling the jury to collectively determine what constitutes reasonable doubt probably led the jury to use a standard "below the threshold of a reasonable doubt standard."

So what should the trial judge have done? *Turman* tells us: "The best response for the trial court to have made would have been to refuse to give the jury any additional explanation."

To sum up: 1) Illinois holds that reasonable doubt should not be defined because we trust the jury to collectively determine what constitutes reasonable doubt, but 2) telling the jury that they should collectively decide what constitutes reasonable doubt is reversible error.

I wish I were making this up.

So what is "proof beyond a reasonable



### Criminal Procedure

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doubt"? Is it 80 percent certainty? Is it 90 percent certainty? Is it 99.99 percent certainty?

According to James Q. Whitman, a professor of comparative and foreign law at Yale, the answer is "none of the above." And the reason is that the origins of "proof beyond a reasonable doubt" had absolutely nothing to do with setting any kind of standard for factual proof in order to protect the criminal defendant from unjust convictions.

On the contrary, "proof beyond a reasonable doubt" was originally used by courts to convince acquittal-prone, Christian juries in England to feel comfortable convicting more criminal defendants. Anyone with even a passing interest in criminal law should read Whitman's book "The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial" (Yale, 2008).

The Gospel according to Matthew warns "Judge not, that ye be not judged. For with what judgment ye judge, ye shall be judged: and with what measure ye mete, it shall be measured to you again." (Matthew. 7: 1-2) A group of Christian philosophers going back 16 centuries to St. Augustine used this as the basis for admonishing judges tasked to decide whether to send an accused criminal to his death. Quite simply, the philosophers warned, condemning an innocent man to death was a mortal sin — a sin that would consign the judge to an eternity of punishment. Wrongly condemning an innocent man meant that the judge himself actually became a murderer and would be punished accordingly by God.

Not surprisingly, Christian philosophers tried to offer judges an "out." They developed what became known as

the "safer way" formula: "In cases of doubt, the safer way is not to act at all ... A judge who is in doubt must refuse to judge." (This is the forerunner of our legal principle of lenity.)

As the role of jurors developed in common law, the moral dangers of judging now became a problem for ordinary citizens. Whitman puckishly describes it as a "special glory of the common law that, by leaving the job of the verdict to the jury, it avoided putting the souls of its professional judges in any jeopardy." English moral philosopher William Paley wrote in 1785 that jurors simply were afraid to convict. Although jurors should refuse to convict if they harbored a real doubt, Paley said they should not acquit where they merely perceived "the minutest possibility" of innocence.

Thus, in the 1780s, English judges begin charging criminal juries that they should not acquit based solely on the merest doubt, speculation or possibility. Rather, jurors should acquit only if their doubt could actually be considered "reasonable."

Therefore, Whitman contends, "reasonable doubt" was never meant to be a rule about how to determine facts in a rational or scientific way. Rather, it was a "moral comfort" rule. It was meant to reassure Christian jurors terrified of rendering an incorrect conviction that could literally result in their eternal damnation. It told jurors that not every doubt was "reasonable." The "reasonable doubt" rule was designed to encourage jurors to return guilty verdicts in the appropriate cases. It was meant to make it easier for juries to convict, not harder.

Whitman's book thus sheds light on why Illinois cannot define "reasonable doubt" in order to aid the jury in how to make its factual findings: It cannot define it because the rule was never intended to perform that role in the first place.

So where do we go from here?

Whitman concedes that the "reasonable doubt" rule is too ingrained to ever be replaced in Anglo-American law. But he contends that this history should remind us that judging and punishing are, in his words, "morally fearsome" acts. We need to bring a sense of awe to any proceeding where we might order the punishment of another human being. Reminding jurors that they are making a serious moral choice in any criminal case may "in the last analysis, [be] the only meaningful modern way to be faithful to the original spirit of reasonable doubt."