

---

No. \_\_\_\_\_

---

In the

**Supreme Court of the United States**

---

**EVER LEE HOLLEY,**  
*Petitioner,*

v.

**STATE OF CONNECTICUT,**  
*Respondent.*

---

Petition for Writ of Certiorari  
to the Supreme Court of the  
State of Connecticut

---

**PETITION FOR WRIT OF CERTIORARI  
APPENDIX TO THE PETITION**

---

Jeremiah Donovan  
123 Elm Street  
Unit 400  
Post Office Box 554  
Old Saybrook, CT 06475  
(860) 388-3750  
FAX 388-3181  
Juris no. 305346  
Fed.bar.no. CT 03536  
*Attorney for the Petitioner*

## **LIST OF PARTIES**

All parties appear in the caption of this case on the cover page.

### **QUESTION PRESENTED**

Does a jury instruction that a reasonable doubt is “such a doubt as would cause reasonable men and women to hesitate to act *upon it* in matters of importance” make sense, and, if not, does it violate the fifth and fourteenth amendment guarantee of due process and the sixth and fourteenth amendment right to a jury verdict?

## **TABLE OF CONTENTS**

|                                                        |    |
|--------------------------------------------------------|----|
| LIST OF PARTIES.....                                   | 3  |
| QUESTION PRESENTED.....                                | iv |
| TABLE OF AUTHORITIES .....                             | vi |
| OPINIONS BELOW.....                                    | 1  |
| JURISDICTION .....                                     | 1  |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... | 1  |
| STATEMENT OF THE CASE.....                             | 2  |
| REASONS FOR GRANTING THE WRIT .....                    | 4  |
| CONCLUSION.....                                        | 10 |

## **TABLE OF CONTENTS TO APPENDIX**

|                                                                       |   |
|-----------------------------------------------------------------------|---|
| Decision of the Connecticut Supreme Court denying certification ..... | 1 |
| Decision of the Connecticut Appellate Court.....                      | 2 |

## **TABLE OF AUTHORITIES**

### **Federal Decisions**

|                                                                                                             |      |
|-------------------------------------------------------------------------------------------------------------|------|
| Bishop v. United States, 71 App. D. C. 132, 107 F. 2d 297, 303 (1939) . . . . .                             | 7    |
| Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954) . . . . .                  | 5    |
| In re Winship, 397 US 358, 363-6490 S. Ct. 1068, 107207325 L. Ed. 2d 368, 375 (1970). . . .                 | 8, 9 |
| Jackson v. Virginia, 443 U.S. 307, 316 (1979). . . . .                                                      | 9    |
| McGill v. United States, 348 F.2d 791(D.C.Cir. 1965) . . . . .                                              | 8    |
| Sullivan v. Louisiana, 508 U.S. 275, 278, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182, 188 (1993)<br>. . . . . | 8, 9 |
| United States v. Johnson, 343 F.2d 5, 6 (2d Cir. 1965) . . . . .                                            | 6    |
| United States v. Nuncio, 373 F.2d 168, 174-75 (2d Cir. 1967) . . . . .                                      | 5    |
| United States v. Pepe, 501 F. 2d 1142, 1143 (10th Circuit 1974) . . . . .                                   | 7    |
| Victor v. Nebraska, 511 U.S. 1, 20 (1994) . . . . .                                                         | 5    |

### **State Decisions**

|                                                                                 |   |
|---------------------------------------------------------------------------------|---|
| People v. Quinones, 123 AD 2d 793 (N.Y.Appellate Div., 2nd Dept. 1986). . . . . | 7 |
| People v. Simon, 224 AD 2d 458 (N.Y. Appellate Div., 2nd Dept. 1996). . . . .   | 7 |
| Rivett v. State, 578 P. 2d 946 (Supreme Court, Alaska 1978) . . . . .           | 8 |
| State v. Alberto M., 120 Conn. App. 104, 991 A.2d 578, 585 (2010) . . . . .     | 5 |
| State v. Arceniega, 73 Conn. App. 288, 296-97 & n.8 (2002) . . . . .            | 5 |

|                                                                                                                                                 |      |
|-------------------------------------------------------------------------------------------------------------------------------------------------|------|
| State v. Bivrell, 116 Conn. App. 556, 976 A.2d 60, 67 (2009) .....                                                                              | 5    |
| State v. Bowman, 289 Conn. 809, 811 n. 2, 960 A.2d 1027, 1036 n.2 (2008).....                                                                   | 5    |
| State v. Colon, 272 Conn. 106, 234 n.82, 864 A.2d 666, 747 n.83 (2004), cert. denied, 546 U.S. 848, 126 S.Ct. 102, 163 L.Ed.2d 116 (2005) ..... | 5    |
| State v. Colon, 28 Conn. App. 231, 242 & n.1, 611 A.2d 902 (1992), cert. denied, 223 Conn. 922, 614 A.2d 827 (1992).....                        | 6    |
| State v. Delvalle, 250 Conn. 466, 470-74 & n.11, 736 A.2d 125 (1999).....                                                                       | 5    |
| State v. Elkins, 580 A.2d 1200 (VT Supreme Court 1990).....                                                                                     | 7    |
| State v. Elson, 116 Conn. App. 196, 975 A.2d 678, 700 (2009) .....                                                                              | 5    |
| State v. Gomez, 225 Conn. 347, 353-54 & n. 8, 622 A.2d 1014 (1993).....                                                                         | 6    |
| State v. Green, 62 Conn. App. 217, 242, 774 A.2d 157 (2001), aff'd on other grounds, 261 Conn. 653, 804 A.2d 810 (2002).....                    | 5    |
| State v. Griffin, 253 Conn. 195, 204, 749 A.2d 1192 (2000).....                                                                                 | 5, 6 |
| State v. Hernandez, 91 Conn. App. 169, 179, 883 A.2d 1, cert. denied, 276 Conn. 912, 886 A.2d 426 (2005).....                                   | 5    |
| State v. Hines, 243 Conn. 796, 820, 709 A.2d 522 (1998).....                                                                                    | 6    |
| State v. Holley, 90 Conn. App. 350, 877 A.2d 872 (2005) .....                                                                                   | 5    |
| State v. Johnson, 214 Conn. 161, 177-80 & n.15, 571 A.2d 79 (1990) .....                                                                        | 6    |
| State v. Johnson, 288 Conn. 236, 951 A.2d 1257. 1291 n.49 (2008) .....                                                                          | 5    |
| State v. Kellman, 56 Conn. App. 279, 288, 742 A.2d 423, cert. denied, 252 Conn. 939, 747 A.2d 4 (2000).....                                     | 5    |
| State v. Lytell, 206 Conn. 657, 664-65 & n.4, 539 A.2d 133 (1988) .....                                                                         | 6    |
| State v. Mark R., 300 Conn. 590, 617.....                                                                                                       | 5    |

|                                                                                                               |   |
|---------------------------------------------------------------------------------------------------------------|---|
| State v. Martin, 100 Conn. App. 742, 919 A.2d 508, 515 (2007).                                                | 5 |
| State v. Martinez, 95 Conn. App. 162, 192-93, 896 A.2d 109, cert. denied, 279 Conn. 902, 901 A.2d 1224 (2006) | 5 |
| State v. Morant, 242 Conn. 666, 701 A.2d 1 (1997)                                                             | 6 |
| State v. Nunes, 58 Conn. App. 296, 307 n.7, 752 A.2d 93, cert. denied, 254 Conn. 944, 762 A.2d 906 (2000).    | 6 |
| State v. Ober, 24 Conn. App. 347, 358 n.4, 588 A.2d 1080 (1991)                                               | 5 |
| State v. Osimanti, 111 Conn. App. 700, 962 A.2d 129, 140 n. 8 (2008), aff'd on other grounds, 299 Conn. 1, 6  | 5 |
| State v. Otero, 49 Conn. App. 459, 470-73, 715 A.2d 782, cert. denied, 247 Conn. 910, 719 A.2d 905 (1998).    | 5 |
| State v. Pauling, 102 Conn. App. 556, 925 A. 2d 1200, 1215 (2007)                                             | 6 |
| State v. Perry, 108 Conn. App. 788, 543, 949 A.2d 537 (2008).                                                 | 5 |
| State v. Small, 242 Conn. 93, 114 n.17, 700 A.2d 617 (1997).                                                  | 6 |
| State v. Smith, 210 Conn. 132, 147-50, 554 A.2d 713 (1989)                                                    | 6 |
| State v. Susler, 109 Conn. App. 852, 953 A. 2d 919, 938 (2008)                                                | 6 |
| State v. Vazquez, 119 Conn. App. 249, 987 A.2d 1063, 1070 (2010)                                              | 5 |
| State v. Velasco, 253 Conn. 210, 248-49, 751 A. 2d 800 (2000).                                                | 6 |
| State v. Wallace, 290 Conn. 261, 962 A.2d 781, 792 n.16 (2009).                                               | 5 |
| State v. West, 167 Conn. App. 406, 142 A.3d 1250 (2016).                                                      | 5 |
| State v. Whipper, 258 Conn. 229, 293-94 & n.29 (2001).                                                        | 5 |
| State v. Wilson, 111 Conn. App. 614, 960 A.2d 1056 (2008)                                                     | 5 |

|                                       |   |
|---------------------------------------|---|
| State v. Winfrey, 302 Conn. 195. .... | 5 |
|---------------------------------------|---|

#### Constitutional Provisions

|                                                 |         |
|-------------------------------------------------|---------|
| United States Constitution, Amendment V. ....   | 1, 4    |
| United States Constitution, Amendment VI. ....  | 1, 4, 8 |
| United States Constitution, Amendment XIV. .... | 2, 4    |

The Petitioner, Ever Lee Holley, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court, entered in this proceeding on September 27, 2017, denying certification of a decision of the Connecticut Appellate Court.

### **OPINIONS BELOW**

The opinion of the Connecticut Supreme Court is reported at 327 Conn. 907, 170 A.3d 3 and is set forth at App. 1.

The opinion of the Connecticut Appellate Court is reported at 174 Conn. App. 488, 167 A.3d 1000 (2017), and is set forth at App. 2.

### **JURISDICTION**

The judgment of the Supreme Court of Connecticut was entered on September 27, 2017. A copy of the judgment is attached at App.1.

No application for an extension of time within which to file this petition has been filed.

The Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

United States Constitution, Amendment V

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

#### United States Constitution, Amendment XIV

##### Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### **STATEMENT OF THE CASE**

Following a jury trial in the Superior Court for the Judicial District of Middletown, Connecticut, the petitioner, Ever Lee Holley, was convicted of possession of a controlled substance with intent to distribute it, in violation of Connecticut General Statutes §21a-279(a).

During the course of the trial, the court conducted a charging conference at which a number of issues were resolved – except for one. The trial court intended to instruct, and did instruct, that a reasonable doubt is

not a surmise, a guess, or mere conjecture. It is not a doubt raised by anyone simply for the sake of raising a doubt. It is such a doubt as, in serious affairs that concern you, you will heed; that is, such a doubt as would cause reasonable men and women to hesitate to act ***upon it*** in matters of importance. It is not hesitation springing from any feeling of pity or sympathy for the accused or any other person who might be affected by your decision. It is, in other words, a real doubt, and honest doubt, a doubt that has its foundation in the evidence or lack of evidence. It is doubt that is honestly entertained and is reasonable in light of the evidence, after a fair comparison and careful examination of all the evidence,

Proof beyond a reasonable doubt does not mean proof beyond all doubt; the law does not require absolute certainty on the part of the jury before it returns a verdict of guilty. The law requires that, after hearing all the evidence, if there is something in the evidence that leaves in you minds, as reasonable men and women, a reasonable doubt as to the guilt of the accused, then the accused must be given the benefit of the doubt and acquitted. Proof beyond a reasonable doubt precludes every reasonable hypothesis except guilty, and is inconsistent with any other rational conclusion.

11/3 Tr. (Jury Trial) 33-34 (emphasis added).

The defense excepted:

[O]n page 6 [of the trial court's written proposed charge]. In describing reasonable doubt, Your Honor will instruct that Jury that reasonable men and women would hesitate to act upon it, in matters of importance. And so, our request is that the words "upon it" be removed because it's not so much that the reasonable men and women act upon the reasonable doubt, but rather that the reasonable doubt causes them to hesitate to act upon the matter which they're considering.

I recognize that this is language that has been approved by [a]ppellate [c]ourts, but nevertheless, I take that exception.

*Id.* 2-3.<sup>1</sup>

The trial court overruled the exception and delivered the instruction, including the questioned "upon it" prepositional phrase. 11/3 Tr. (Jury Trial) 33-34.

Mr. Holley appealed to Connecticut's Appellate Court, recognizing, as he had in the trial court, that although Connecticut appellate courts had sometimes approved the language of the instruction, including the "upon it" prepositional phrase, the instruction violated his fifth and fourteenth amendment guarantee of due process, the sixth and fourteenth amendment right to a jury verdict, and Connecticut constitutional provisions.

---

<sup>1</sup>The transcript originally did not include the preposition "upon," but after requesting that the court reporter review the tapes recorded proceedings, the transcript was amended.

The Appellate Court held that because the Connecticut Supreme Court had approved the language of the questioned instruction, the Appellate Court, “as an intermediate court of appeal [, is] unable to overrule, reevaluate or reexamine controlling precedent of our Supreme Court,” 174 Conn. App. at 495, App. 9. The court affirmed Mr. Holley’s conviction, *id.* at 507, App. 21, and the Connecticut Supreme Court denied Mr. Holley’s petition for certification. 327 Conn. 907, App. 1.

### **REASONS FOR GRANTING THE WRIT**

At the outset, it should be noted that the instruction as delivered – reasonable doubt is a “a doubt as would cause reasonable men and women to hesitate to act ***upon it*** in matters of importance” – is, as Justice Antonin Scalia might have said, argle-bargle. It means the inverse of what it should. If a doubt is ephemeral, fleeting, baseless, and downright silly (*i.e.*, the kind of doubt which a reasonable person would hesitate long and hard before acting upon), it is a reasonable doubt. If (argumentum a contrario) a doubt is serious, profound, supported by facts and reason (*i.e.*, the kind of doubt upon which a reasonable person would *not* hesitate to act upon), it is not a reasonable doubt. The insertion into the instruction of the prepositional phrase “upon it” renders the instruction nonsensical.

Nevertheless, the instruction is published as the approved reasonable-doubt instruction in Connecticut’s official compilation of suggested jury instructions, STATE OF CONNECTICUT, JUDICIAL BRANCH, *Criminal Jury Instructions* § 2.2-3, and has always received the imprimatur

of the Connecticut Supreme and Appellate Courts.<sup>2</sup>

In Mr. Holley's view, in the view of most appellate courts, and, frequently, in the view of appellate courts in Connecticut, a reasonable doubt is "such a doubt, as in serious affairs that concern you, you would heed, that is, such a doubt as would cause reasonable men and women to hesitate to act in matters of importance." *State v. Griffin*, 253 Conn. 195, 204, 749 A.2d 1192 (2000). This explanation of reasonable doubt has been "repeatedly approved." *Victor v. Nebraska*, 511 U.S. 1, 20 (1994). *Accord*, *Holland v. United States*, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954); *United States v. Nuncio*, 373 F.2d 168, 174-75 (2d Cir. 1967) (Friendly, J.); *United States v. Johnson*, 343 F.2d 5, 6 (2d Cir. 1965); *State v. Smith*, 210 Conn.

---

<sup>2</sup> See, e.g., *State v. Mark R.*, 300 Conn. 590, 617, 17 A.3d 1 (2011); *State v. Winfrey*, 302 Conn. 195, 24 A.3d 1218, 1233 (2011); *State v. Wallace*, 290 Conn. 261, 962 A.2d 781, 792 n.16 (2009); *State v. Bowman*, 289 Conn. 809, 811 n. 2, 960 A.2d 1027, 1036 n.2 (2008); *State v. Johnson*, 288 Conn. 236, 951 A.2d 1257, 1291 n.49 (2008); *State v. Colon*, 272 Conn. 106, 234 n.82, 864 A.2d 666, 747 n.83 (2004), *cert. denied*, 546 U.S. 848, 126 S.Ct. 102, 163 L.Ed.2d 116 (2005); *State v. Whipper*, 258 Conn. 229, 293-94 & n.29 (2001); *State v. Delvalle*, 250 Conn. 466, 470-74 & n.11, 736 A.2d 125 (1999); *State v. West*, 167 Conn. App. 406, 142 A.3d 1250 (2016); *State v. Alberto M.*, 120 Conn. App. 104, 991 A.2d 578, 585 (2010); *State v. Vazquez*, 119 Conn. App. 249, 987 A.2d 1063, 1070 (2010); *State v. Bivrell*, 116 Conn. App. 556, 976 A.2d 60, 67 (2009); *State v. Elson*, 116 Conn. App. 196, 975 A.2d 678, 700 (2009); *State v. Osimanti*, 111 Conn. App. 700, 962 A.2d 129, 140 n. 8 (2008), *aff'd on other grounds*, 299 Conn. 1, 6 A.3d 790 (2010); *State v. Wilson*, 111 Conn. App. 614, 960 A.2d 1056, 1071 n. 9 (2008); *State v. Perry*, 108 Conn. App. 788, 543, 949 A.2d 537 (2008); *State v. Martin*, 100 Conn. App. 742, 919 A.2d 508, 515 (2007); *State v. Martinez*, 95 Conn. App. 162, 192-93, 896 A.2d 109, *cert. denied*, 279 Conn. 902, 901 A.2d 1224 (2006); *State v. Hernandez*, 91 Conn. App. 169, 179, 883 A.2d 1, *cert. denied*, 276 Conn. 912, 886 A.2d 426 (2005); *State v. Holley*, 90 Conn. App. 350, 877 A.2d 872 (2005); *State v. Arceniega*, 73 Conn. App. 288, 296-97 & n.8 (2002); *State v. Green*, 62 Conn. App. 217, 242, 774 A.2d 157 (2001), *aff'd on other grounds*, 261 Conn. 653, 804 A.2d 810 (2002); *State v. Kellman*, 56 Conn. App. 279, 288, 742 A.2d 423, *cert. denied*, 252 Conn. 939, 747 A.2d 4 (2000); *State v. Otero*, 49 Conn. App. 459, 470-73, 715 A.2d 782, *cert. denied*, 247 Conn. 910, 719 A.2d 905 (1998); *State v. Ober*, 24 Conn. App. 347, 358 n.4, 588 A.2d 1080 (1991).

132, 147-50, 554 A.2d 713 (1989); *State v. Pauling*, 102 Conn. App. 556, 925 A. 2d 1200, 1215 (2007). It too, has frequently received the blessing of Connecticut appellate courts.<sup>3</sup>

For convenience sake, we shall refer to the erroneous delivered instruction as a “hesitate-to-act-on-the-*doubt*” instruction, and the proper instruction as a “hesitate-to-act-on-the *matter*” instruction.<sup>4</sup>

While most federal district courts instruct juries on the basis of pattern instructions that properly follow the hesitate-to-act-on-the-*matter* school or some variant of it, some federal trial courts have also approved hesitate-to-act-on-the-*doubt* instructions. *See, e.g., United States v. Dowlin*, 408 F.3d 647, 665 n.9 (10th Cir. 2005); *McGill v. United States*, 348 F.2d 791, 795-96 (D.C.Cir. 1965). So too, have state courts. *People v. Quinones*, 123 AD 2d 793, 793 (N.Y.Appellate Div., 2d Dept. 1986); *People v. Simon*, 224 AD 2d 458 (N.Y. Appellate Div., 2d

---

<sup>3</sup> *See, e.g., Griffin*, 253 Conn. 195 at 204-05; *State v. Velasco*, 253 Conn. 210, 248-49, 751 A. 2d 800 (2000); *State v. Hines*, 243 Conn. 796, 820, 709 A.2d 522 (1998); *State v. Morant*, 242 Conn. 666, 688, 701 A.2d 1 (1997); *State v. Gomez*, 225 Conn. 347, 353-54 & n. 8, 622 A.2d 1014 (1993); *State v. Susler*, 109 Conn. App. 852, 953 A. 2d 919, 938 (2008); *State v. Pauling*, 102 Conn. App. 556, 925 A. 2d 1200, 1215 (2007); *State v. Nunes*, 58 Conn. App. 296, 307 n.7, 752 A.2d 93, cert. denied, 254 Conn. 944, 762 A.2d 906 (2000), *State v. Colon*, 28 Conn. App. 231, 242 & n.1, 611 A. 2d 902 (1992), cert. denied, 223 Conn. 922, 614 A.2d 827 (1992).

<sup>4</sup> To make matters even more muddled, the erroneous hesitate-to-act-on-the-*doubt* instructors fall into two camps: the orthodox, such as the trial court here, who instruct jurors that a reasonable doubt is one that you would *hesitate* to act upon; and the heretics, who instruct the jurors the opposite: that a reasonable doubt is one which “you would be *willing* to rely on . . . *without hesitation*.” *State v. Small*, 242 Conn. 93, 114 n.17, 700 A.2d 617 (1997) (emphasis added). Both camps enjoy unqualified appellate approval, even though their instructions mean almost exactly the opposite. *Id.*; *State v. Johnson*, 214 Conn. 161, 177-80 & n.15, 571 A.2d 79 (1990); *State v. Lytell*, 206 Conn. 657, 664-65 & n.4, 539 A.2d 133 (1988).

Dept. 1996); *State v. Elkins*, 580 A. 2d 1200, 1204 (VT Supreme Court 1990).<sup>5</sup>

How has an instruction that seems so plainly wrong survived so long and been given so frequently?

The answer may lie in this Court's most important pronouncement on the issue, *Holland v. United States*, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954) itself. There,

[the trial court instructed that reasonable doubt is] "the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon." We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act, *see Bishop v. United States*, 71 App. D. C. 132, 137-138, 107 F. 2d 297, 303 [1939], rather than the kind on which he would be willing to act.

348 U.S. at 140.

While most courts have interpreted to decision to mean that a trial court should instruct the jury that a reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act, the Court's approving reference to *Bishop* has confused other courts, because the trial court in the *Bishop* case described reasonable doubt as "just such a doubt as would cause reasonable men to hesitate to act *upon it* in matters of importance to themselves." *Bishop*, 107 F.2d at 303 (emphasis added). The point of *Holland* is that a doubt on which a juror would be willing to act is

---

<sup>5</sup>In an odd pair of decisions, the Court of Appeals for the 10th Circuit affirmed a conviction in one case in which the trial court had instructed that "[p]roof beyond a reasonable doubt is established if the evidence is such as a reasonably prudent man would *be willing to rely and act upon* in the most important of his own affairs," *United States v. Pepe*, 501 F. 2d 1142, 1143 (10th Circuit 1974), and another in which the trial court had instructed that "[p]roof beyond a reasonable doubt is established if the evidence is such as would cause a reasonably prudent man *to hesitate to act upon it* in the most important of his own affairs." *United States v. Leaphart*, 513 F.2d 747, 749 (10th Cir. 1974)(emphasis in original).

a much more intense doubt than a doubt that would cause a juror to hesitate to act, and that requiring a doubt of the former kind may set an inappropriately high standard for reasonable doubt. Unfortunately, in citing *Bishop* approvingly for its “hesitate to act” language, the Court was also citing Bishop’s addling prepositional phrase “on it,” which would bedevil future reasonable doubt instructions in Connecticut and elsewhere.<sup>6</sup>

Our attack on the prepositional phrase “on it” is not nitpicking. That prepositional phrase strikes deep at the heart of what our forefathers believed about the near certitude, the utmost certainty, that is required before a government is authorized to deprive a citizen of his liberty. Due process mandates that “the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.” *Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182, 188 (1993). A jury instruction that fails to communicate the State’s burden to prove guilt beyond a reasonable doubt is not amenable to harmless-error analysis and requires reversal. *Id.* 508 U.S. at 278-81. The reasonable-doubt standard provides “concrete substance for the presumption of innocence,” and reduces the risk of wrongful conviction. *In re Winship*, 397 US 358, 363-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). “This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common-law jurisdictions, applies in state as well as federal proceedings.” *Sullivan v. Louisiana*, 508 U.S. at 278.

Use of such an instruction (and appellate approval of such instructions) casts into question

---

<sup>6</sup>See, e.g., discussion of *Bishop* in *McGill v. United States*, 348 F.2d 791, 795-96 (D.C.Cir. 1965) and *Rivett v. State*, 578 P. 2d 946, 949-950 (Supreme Court, Alaska 1978).

our traditional belief that the “use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law,” that “[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned,” that “[i]t is . . . important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with *utmost certainty*.” *In re Winship*, 397 U.S. at 364 (emphasis added). Instructions that hopelessly muddle the description of what a reasonable doubt *is* and primarily describe what reasonable doubt is *not* are hardly likely to “impress. . . upon the factfinder the need to reach a subjective state of *near certitude* of the guilt of the accused, [or to inform that factfinder that the reasonable doubt] standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself.” *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) (emphasis added).

The trial court’s erroneous instruction, blessed over and over again in Connecticut appellate decisions, does little to assure that the jury which found Mr. Holley guilty ever reached anything close to “utmost certainty” or “a subjective state of near certitude” as to his guilt. The long string-cite of Connecticut defendants who have been convicted on the basis of this erroneous instruction, *see* note 2, *supra*, and the certainty that another generation of defendants will be convicted on the basis of the instruction, as trial judges dutifully pull it from Connecticut’s pattern jury instructions – as well as the use of the instruction in certain other jurisdictions -- suggest that

Mr. Holley's is a decision which should be reviewed by this Court.

**CONCLUSION**

For the above-stated reasons, the petitioner respectfully requests that his petition for certiorari be granted.

Respectfully submitted,

/s/

JEREMIAH DONOVAN  
123 Elm Street--Unit 400  
P.O. Box 554  
Old Saybrook, CT 06475  
(860) 388-3750  
Juris no. 305346

Date: November 22, 2017

