



2. “[I]t is the responsibility of the trial judge to ensure that in a criminal case, the jury is fully and correctly instructed as to the applicable law.” *Caldwell v. State*, 920 So. 2d 727, 731 (Fla. 5th Dist. Ct. App. 2006).
3. Jury instructions that incorrectly define reasonable doubt infringe a defendant’s constitutional rights.
  - a. For example, in *Cage v. Louisiana*, the United States Supreme Court reversed a conviction in finding that the trial court had improperly instructed the jury on reasonable doubt. *See Cage v. Louisiana*, 498 U.S. 39, 41 (1990).
    - i. The Court found that terms used in the instruction “suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard.” *Id.*
    - ii. The Court concluded that “it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.” *Id.*<sup>2</sup>
4. Given the requirement of heightened reliability in capital cases, *see Beck v. Alabama*, 447 U.S. 625, 638 (1980), it is especially important for this Court to provide an accurate instruction on reasonable doubt.
5. The ambiguous and confusing way in which Florida’s standard jury instruction on reasonable doubt is written makes it reasonably likely that jurors will believe that a higher degree of doubt is necessary to acquit the defendant or disregard an

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constitutional under *Ring* if this Court were to correct the instruction as requested. Miss Anthony argues that Florida’s death penalty statute is unconstitutional under *Ring* in a separate motion. *See Def.’s Motion to Declare Fla. Stat. 921.141 Unconstitutional Under Ring v. Arizona.*

<sup>2</sup> As discussed in the accompanying Memorandum of Law, the Supreme Court has since clarified the standard of review for jury instructions by endorsing a standard in which the reviewing court determines “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution.” *Estelle v. McGuire*, 502 U.S. 62, 73 (1991) (citing *Boyd v. California*, 494 U.S. 370, 380 (1990)).

aggravating circumstance than is constitutionally permitted. Thus, Florida's standard jury instruction suffers from problems similar to those at issue in *Cage*.

- a. A juror is likely to understand the second sentence of the instruction as effectively stating, "A reasonable doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt."<sup>3</sup> This sentence incorrectly indicates to jurors that there are some circumstances in which even a reasonable doubt should not prevent them from returning a guilty verdict or finding that an aggravating circumstance exists.
  - b. The standard instruction's statement that "[a] reasonable doubt is not *a mere possible doubt* . . ." (emphasis added) suggests that a higher degree of doubt is required to acquit or disregard an aggravating circumstance than is constitutionally permitted, thereby creating the same problem that the United States Supreme Court condemned in *Cage*.
6. This Court cannot rely on other statements in the standard instruction, the jurors' common sense, or defense counsel's argument to cure the defective instruction.
  7. Prior opinions that have approved Florida's standard jury instruction on reasonable doubt, *see, e.g., Esty v. State*, 642 So. 2d 1074, 1080 (Fla. 1994), are not dispositive here.
  8. The instruction that Miss Anthony proposes contains a clear and correct statement of the law on reasonable doubt.

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<sup>3</sup> A juror is likely to understand the version of this instruction given during the penalty phase as effectively stating, "A reasonable doubt must not influence you to disregard an aggravating circumstance if you have an abiding conviction that it exists."

9. In support of this motion, Miss Anthony presents the attached Memorandum of Law. Miss Anthony's proposed instruction on reasonable doubt is attached hereto as Exhibits A and B.<sup>4</sup>
10. Therefore, in the interests of Miss Anthony's constitutional rights, the Defense respectfully asks this Honorable Court to:
  - a. Order the prosecution to file a written response and memorandum of law within thirty days of the filing of this written Objection and accompanying memorandum of law;
  - b. Allow the defense ten business days from the prosecution's filing of its response and memorandum of law to file a reply and memorandum of law;
  - c. Set a hearing date, at which time this Honorable Court may hear arguments relating to this Objection;
  - d. Protect Miss Anthony's right to due process under Article I, Section 9 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution and Miss Anthony's right to be free from cruel and unusual punishment under Article I, Section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution by using the proposed instruction instead of Florida's standard jury instruction on reasonable doubt.

WHEREFORE, the Defendant CASEY MARIE ANTHONY respectfully objects to the use of Florida's standard jury instruction on "reasonable doubt" and requests that this Court use her proposed instruction in its place.

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<sup>4</sup> Exhibit B is a version of the definition of reasonable doubt provided in Exhibit A that has been modified to fit the sentencing context.

Respectfully submitted,



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for CASEY MARIE ANTHONY.



JOSE A. BAEZ, one of the attorneys for  
CASEY MARIE ANTHONY.

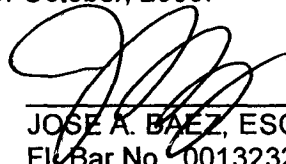
Dated: 11/25, 2009

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801; via facsimile and /or U.S. Mail on this 25 day of October, 2009.



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	)	In the Circuit Court of the
	)	Ninth Judicial Circuit, in and for
	)	Orange County, Florida
STATE OF FLORIDA	)	
	)	Case No.: 48-2008-CF-0015606-O
v.	)	Division 16
	)	
CASEY MARIE ANTHONY,	)	Hon. Stan Strickland
	)	
Defendant.	)	
	)	

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT’S OBJECTION TO THE STANDARD JURY INSTRUCTION ON REASONABLE DOUBT**

COMES NOW the Defendant, CASEY MARIE ANTHONY, by and through her attorneys, ANDREA D. LYON and JOSE A. BAEZ, and respectfully submits this Memorandum of Law in support of her Objection to the Standard Jury Instruction on Reasonable Doubt, pursuant to Fla. R. Crim. P. 3.390.

**SUMMARY OF ARGUMENT**

Florida’s Standard Jury Instruction in Criminal Cases 3.7 defines “reasonable doubt” as follows:

A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.

It is to the evidence introduced in this trial, and to it alone, that you are to look for that proof.

A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence, or the lack of evidence.

If you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty.

Standard Jury Instruction in Criminal Cases 7.11<sup>1</sup> repeats this definition of reasonable doubt in instructing jurors regarding their determination of aggravating circumstances, modifying it to fit the sentencing context.<sup>2</sup>

Miss Anthony objects to this instruction because the instruction suggests to the jury that it must have a higher degree of doubt to acquit or disregard an aggravating circumstance than is required under the reasonable doubt standard. Using such an instruction would violate Miss Anthony's right to due process under Article I, Section 9 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution and Miss Anthony's right to be free from cruel and unusual punishment under Article I, Section 17 of the Florida Constitution and

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<sup>1</sup> Miss Anthony's objection to the reasonable doubt language in Standard Jury Instruction in Criminal Cases 7.11 does not concede that Florida's death penalty statute would be constitutional under *Ring v. Arizona*, 536 U.S. 584 (2002), if this Court were to correct the instruction as requested. Miss Anthony argues that Florida's death penalty statute is unconstitutional under *Ring* in a separate motion. See Def.'s Motion to Declare Fla. Stat. 921.141 Unconstitutional Under *Ring v. Arizona*.

<sup>2</sup> The relevant part of instruction 7.11 reads as follows:

The State has the burden to prove each aggravating circumstance beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to disregard an aggravating circumstance if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating circumstance exists, or if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the aggravating circumstance has not been proved beyond every reasonable doubt and you must not consider it in rendering an advisory sentence to the court.

*Give only to the jury that found the defendant guilty.*

It is to the evidence introduced during the guilt phase of this trial and in this proceeding, and to it alone, that you are to look for that proof.

*Give only to a new penalty phase jury.*

It is to the evidence introduced during this proceeding, and to it alone, that you are to look for that proof.

A reasonable doubt as to the existence of an aggravating circumstance may arise from the evidence, conflicts in the evidence, or the lack of evidence. If you have a reasonable doubt as to the existence of an aggravating circumstance, you should find that it does not exist. However, if you have no reasonable doubt, you should find that the aggravating circumstance does exist and give it whatever weight you determine it should receive.

the Eighth and Fourteenth Amendments to the United States Constitution. Miss Anthony proposes an alternative instruction, provided in Exhibits A and B,<sup>3</sup> which clearly and correctly describes reasonable doubt and thereby ensures that Miss Anthony's constitutional rights are protected.

## ARGUMENT

### **I. This Court Must Ensure That the Jury Instructions on Reasonable Doubt Are Correct.**

The Constitution requires proof beyond a reasonable doubt of the defendant's guilt in criminal cases. *See In re Winship*, 397 U.S. 358, 364 (1970). The reasonable doubt standard is "indispensable" because it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *Winship*, 397 U.S. at 364 (quoting Dorsen & Reznick, *In Re Gault and the Future of Juvenile Law*, 1 Fam. L. Q., No. 4, 1, 26 (1967)). Both the United States and Florida Supreme Courts have recognized the importance of requiring that the prosecution prove a defendant's guilt beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (noting that the Sixth and Fourteenth Amendments—"constitutional protections of surpassing importance"—"entitle a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.") (internal quotation marks omitted); *State v. Cohen*, 568 So. 2d 49, 51 (Fla. 1990) ("Indeed, the requirement of proof beyond a reasonable doubt is 'basic in our law and rightly one of the boasts of a free society.' Without question, the principles announced by the *Winship* Court have long been incorporated in Florida constitutional law. . . .") (citation omitted).

This requirement also applies to the determination of aggravating factors necessary to sentence a defendant to death. As the United States Supreme Court stated in *Ring v. Arizona*, "If

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<sup>3</sup> Exhibit B is a version of the definition of reasonable doubt provided in Exhibit A that has been modified to fit the sentencing context.

a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact-no matter how the State labels it-must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. 584, 602 (2002); *see also Ring*, 536 U.S. at 610 (Scalia, J., concurring) ("all facts essential to imposition of the level of punishment that the defendant receives-whether the statute calls them elements of the offense, sentencing factors, or Mary Jane-must be found by the jury beyond a reasonable doubt").

In criminal cases, the trial court must instruct the jury "on the necessity that the defendant's guilt be proved beyond a reasonable doubt." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). As the Supreme Court has noted, "[j]urors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." *Carter v. Kentucky*, 450 U.S. 288, 302 (1981). "[I]t is the responsibility of the trial judge to ensure that in a criminal case, the jury is fully and correctly instructed as to the applicable law." *Caldwell v. State*, 920 So. 2d 727, 731 (Fla. 5th Dist. Ct. App. 2006).

Jury instructions that incorrectly define reasonable doubt infringe a defendant's constitutional rights. For example, in *Cage v. Louisiana*, a unanimous Supreme Court reversed a first degree murder conviction and death sentence where the trial court defined reasonable doubt for the jury as follows:

If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can

seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

498 U.S. 39, 40 (1990) (emphasis supplied by Supreme Court). Although the instructions in *Cage* stated that guilt must be found beyond a reasonable doubt, they impermissibly “equated a reasonable doubt with a ‘grave uncertainty’ and an ‘actual substantial doubt,’ and stated that what was required was a ‘moral certainty’ that the defendant was guilty.” *Id.* at 41. The terms “substantial” and “grave” “suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard.” *Id.* Furthermore, “[w]hen those statements are then considered with the reference to ‘moral certainty,’ rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.” *Id.*<sup>4</sup>

## **II. It Is Especially Important for This Court to Provide an Accurate Instruction on Reasonable Doubt Because This Is a Capital Case Based on Weak Evidence.**

Properly instructing the jury on reasonable doubt is especially important in cases in which the prosecution is seeking the death penalty. As the United States Supreme Court has noted:

[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action.

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<sup>4</sup> The Supreme Court has since clarified the standard of review for jury instructions. In *Estelle v. McGuire*, 502 U.S. 62, 73 (1991), the Court endorsed a standard of review in which the reviewing court determines “‘whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the Constitution.” (citing *Boyd v. California*, 494 U.S. 370, 380 (1990)). The *Estelle* Court “acknowledge[d] that language in the later cases of *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), and *Yates v. Evatt*, 500 U.S. 391, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991), might be read as endorsing a different standard of review for jury instructions” but “disapprove[d] the standard of review language in *Cage* and *Yates*, and reaffirm[ed] the standard set out in *Boyd*.” *Id.* at 72 n.4. Even after this clarification in *Estelle*, the Court has continued to rely on the *Cage* holding in determining whether a given reasonable doubt instruction violates due process. See *Victor*, 511 U.S. at 21 (distinguishing *Cage* in deciding that the instructions at issue did not violate due process).

*Gardner v. Florida*, 430 U.S. 349, 357-58 (1979) (opinion of Stevens, J.) (citations omitted). In light of these considerations, the Supreme Court has recognized that the Eighth Amendment requires heightened reliability in both the sentencing and guilt determinations in capital cases. *See Beck v. Alabama*, 447 U.S. 625, 638 (1980). Using an instruction that effectively reduces the prosecution's burden of proof with respect to both the guilt and sentencing determinations enhances the risk of an unwarranted conviction and sentence and thereby undermines the Eighth Amendment.

Furthermore, the prosecution's case is based on purely circumstantial and speculative evidence. Although Miss Anthony is being tried for capital murder, there is no way to determine if Caylee Anthony's death was accidental, natural, or the result of an intentional or negligent homicide, nor is there any evidence to substantiate that Miss Anthony had a premeditated design to kill Caylee Anthony. *See* Def.'s Motion to Dismiss Counts I and II of the Indictment, *filed* Sept. 30, 2009; Def.'s Motion to Preclude the Death Penalty Procedures, *filed* Sept. 30, 2009. Issuing an instruction that results in the jury using a lower standard of proof in these circumstances would create a dangerous risk of conviction or capital sentencing based on insufficient evidence.

### **III. Florida's Standard Jury Instruction on Reasonable Doubt Is Unconstitutionally Defective.**

Florida's standard jury instruction on reasonable doubt suffers from problems similar to those at issue in *Cage*. The ambiguous and confusing way in which the instruction is written makes it reasonably likely that jurors will believe that a higher degree of doubt is necessary to acquit the defendant or disregard an aggravating circumstance than is constitutionally permitted. This Court cannot rely on other parts of the standard instruction, the jury's common sense, or defense counsel's argument to cure this defect. Rather, it must use a different instruction, such

as the one that Miss Anthony proposes, to ensure that the jury is properly instructed regarding the reasonable doubt standard.

**A. Florida's Standard Jury Instruction Suggests a Higher Degree of Doubt Is Needed to Acquit or Disregard an Aggravating Circumstance Than Is Permitted under the Reasonable Doubt Standard.**

**1. Florida's Standard Instruction Suggests That Not All Reasonable Doubts Warrant the Jury Acquitting the Defendant or Disregarding an Aggravating Circumstance.**

The first two sentences of instruction 3.7 indicate to jurors that something more than reasonable doubt is required to acquit the defendant. The instruction begins: "A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt." Although there are three different doubts listed in the first sentence: "a reasonable doubt," "a mere possible doubt," and "a speculative, imaginary or forced doubt," the instruction does not indicate whether "such a doubt" in the second sentence refers to the first, second, or third of these doubts in the first sentence. The confusion that such ambiguity creates runs counter to the whole purpose of jury instructions. *See Lakeside v. Oregon*, 435 U.S. 333, 340 (1978) ("The very purpose of a jury charge is to flag the jurors' attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof.").

With nothing more than the instruction to guide them, jurors would likely reason that "[s]uch a doubt" is in the singular form and so must refer to only one of the three doubts listed in the first sentence. Thus, it would likely appear to the jurors that "such a doubt" is meant to refer to the doubt that is distinct from the other two. Since "a mere possible doubt" and "a speculative, imaginary or forced doubt" are both the objects of the first sentence and what a reasonable doubt is not, they are in a different category than "a reasonable doubt," the subject of

the first sentence. As such, there is a strong possibility that a jury will understand “such a doubt” in the second sentence as referring not to “a mere possible doubt” or “a speculative, imaginary or forced doubt” but rather to “a reasonable doubt” in the first sentence.

Therefore, a juror is likely to understand the second sentence to mean: “A reasonable doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt.” This sentence indicates to jurors that there are some circumstances in which even a reasonable doubt should not prevent them from returning a guilty verdict. This poor grammatical construction will likely confuse the jury<sup>5</sup> and suggest that a higher degree of doubt is required for acquittal than is constitutionally permitted, thereby creating the same problem that the United States Supreme Court condemned in *Cage*. Instruction 7.11, which defines reasonable doubt in the penalty phase, suffers from this problem as well, further compounding the effect of this flaw.

## **2. Florida’s Standard Instruction Impermissibly Restricts What Is Considered a “Reasonable Doubt.”**

The standard instruction’s statement that “[a] reasonable doubt is not *a mere possible doubt . . .*” (emphasis added) adds to this problem. Any doubt—including a reasonable doubt—is by its nature possible. The lack of certainty that characterizes possibility is what makes something a doubt.<sup>6</sup> However, by including this phrase, the standard instruction suggests to

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<sup>5</sup> Research indicates that jurors’ failure to adequately comprehend the instructions given to them is a serious problem. See, e.g., Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 Psychol. Pub. Pol’y & L. 788, 788 (2000) (noting that over the last quarter century, “there has been a steady accumulation of research showing that jurors do not remember, understand, or apply the judge’s instructions correctly”). Such findings underscore the danger of using confusing instructions, such as Florida’s standard instruction on reasonable doubt.

<sup>6</sup> See, e.g., *The Random House Dictionary of the English Language* 588 (2nd ed. unabridged 1987) (defining doubt as “a feeling of *uncertainty* about the truth, reality, or nature of something”) (emphasis added); *Merriam-Webster’s Collegiate Dictionary* 375 (11th ed. 2003) (defining doubt as “*uncertainty* of belief or opinion that often interferes with decision-making”) (emphasis added); *The American Heritage Dictionary of the English Language* 540 (4th ed. 2006) (defining doubt as “[a] *lack of certainty* that often leads to irresolution”) (emphasis added); *The New Oxford American Dictionary* 511 (2001) (defining doubt as “a feeling of *uncertainty* or lack of conviction”) (emphasis added).

jurors that their doubts must be not just possible but rather probable or even certain to warrant acquitting the defendant or disregarding an aggravating circumstance. Given this instruction, jurors could have reasonable doubts about the defendant's guilt or an aggravating circumstance but still find the defendant guilty or find that the aggravating circumstance exists if those doubts are merely possible but not certain. By requiring a higher degree of certainty as to their doubts than is constitutionally permissible, Florida's standard instruction suffers from issues like those in *Cage*. See *Cage*, 498 U.S. at 41 ("It is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard.").

Neither the rest of the sentence nor the rest of the instruction solves this problem. The sentence as a whole reads: "A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt." Instead of simply stating that "a reasonable doubt is not a mere possible, speculative, imaginary, or forced doubt," the instruction separates "a mere possible doubt" from the rest of the list. This unusual phrasing, which separates "possible" from the terms "speculative," "imaginary," and "forced," suggests that "a mere possible doubt" is a different type of doubt than "a speculative, imaginary or forced doubt." Thus, there is a reasonable likelihood that the jury would believe that if a doubt is either possible *or* speculative, imaginary or forced, it should not be considered reasonable and therefore should not prompt the jury to acquit or disregard an aggravating circumstance. This would cause a jury to believe that an unconstitutionally high level of doubt is needed to acquit or disregard an aggravating circumstance, thereby violating Miss Anthony's due process rights.

Furthermore, unlike constitutionally permissible instructions, the standard instruction does not otherwise clarify the phrase "not a mere possible doubt" so as to correctly convey the

reasonable doubt standard. For example, in contrast to Florida's standard instruction, the instruction in *Victor* illustrates how the phrase "not a mere possible doubt" can be used to adequately convey what is considered a reasonable doubt. The *Victor* Court dismissed the defendant's objection to a part of the reasonable doubt instruction that stated that a reasonable doubt is "not a mere possible doubt." See *Victor*, 511 U.S. at 17. However, unlike Florida's standard instruction, the final sentence of the instruction at issue in *Victor* gave meaning to the "not a mere possible doubt" phrase. See *id.* ("That this is the sense in which the instruction uses 'possible' is made clear from the final phrase of the sentence, which notes that everything 'is open to some possible or imaginary doubt.'"). In contrast, Florida's standard instruction does not similarly explain the sense in which it uses the term "possible," thereby making it reasonably likely that jurors would misapply the reasonable doubt standard if given this instruction.

**B. This Court Cannot Rely on Other Statements in the Standard Instruction, the Jurors' Common Sense, or Defense Counsel's Argument to Cure the Defective Instruction.**

Although a given jury instruction must be analyzed as a whole in determining its permissibility, see *Cage*, 498 U.S. at 41, the larger context of Florida's standard instruction does not cure the aforementioned defects. It is not sufficient to simply state elsewhere in the instruction that the jury should vote not guilty or find that an aggravating circumstance does not exist if it has a reasonable doubt. See *id.* at 40-41 (finding that a reasonable doubt instruction violated due process even though the instruction began: "If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty."). This contradicts the other part of the instruction that suggests that a reasonable doubt should *not* warrant acquitting the defendant or disregarding an aggravator if the jury has an abiding conviction of the defendant's guilt or the

existence of the aggravator. Such a contradiction is likely to create confusion and misunderstanding among jurors, which runs counter to the purpose of jury instructions. *See Lakeside*, 435 U.S. at 340. Furthermore, even if the jury were to ignore the part of the instruction that suggests that a reasonable doubt does not always warrant acquitting the defendant or disregarding an aggravating circumstance, stating that the jury must acquit or disregard an aggravating circumstance if it has a reasonable doubt does nothing to clarify the otherwise confusing and improper definition of reasonable doubt itself.

The problems with the standard instruction cannot be discounted as simple grammatical errors. To assume that jurors would correctly grasp the reasonable doubt standard from this instruction despite these errors would require these jurors to have a background understanding of reasonable doubt that would prompt them to discount their common sense interpretation of the instruction.<sup>7</sup> However, “[w]hile judges and lawyers are familiar with the reasonable doubt standard, the words ‘beyond a reasonable doubt’ are not self-defining for jurors.” *Victor*, 511 U.S. at 26 (Ginsburg, J., concurring). Forcing jurors to interpret this confusing instruction would undermine the point of instructing the jury on reasonable doubt in the first place.

Finally, defense counsel cannot ensure that the jury understands the reasonable doubt standard. *See Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978) (“arguments of counsel cannot substitute for instructions by the court”). Rather, the trial judge has the responsibility to properly instruct the jury. *See id.* at 489 (“It was the duty of the court to safeguard petitioner’s rights, a duty only it could have performed reliably.”).

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<sup>7</sup> As discussed in Part III.A.1, common sense would lead a juror to interpret the instruction as suggesting that a reasonable doubt should *not* influence the juror to vote for acquittal or disregard an aggravating circumstance in some circumstances (i.e., where the juror has an abiding conviction of guilt or the existence of an aggravating circumstance). Furthermore, as discussed in Part III.A.2, a common sense interpretation of the first sentence of the instruction suggests that a doubt that is possible, but not certain, does not warrant acquitting the defendant or disregarding an aggravating circumstance.

**C. This Court Should Not Simply Rely on Prior Florida Cases That Approve of the Standard Jury Instruction on Reasonable Doubt.**

Although opinions by Florida courts have approved Florida's standard jury instruction on reasonable doubt, *see, e.g., Esty v. State*, 642 So. 2d 1074, 1080 (Fla. 1994); *Brown v. State*, 565 So. 2d 304, 307 (Fla. 1990), *abrogated on other grounds, Jackson v. State*, 648 So. 2d 85 (Fla.1994); *Ferreira v. State*, 692 So. 2d 264, 265 (Fla. 5th Dist. Ct. App. 1997), they are not dispositive here. Much of the case law approving the standard instruction originates with *In re Standard Jury Instructions (Criminal)*, 431 So. 2d 594 (Fla.1981),<sup>8</sup> in which the Florida Supreme Court explicitly stated:

[N]o approval of these instructions by the Court could relieve the trial judge of his responsibility under the law to charge the jury properly and correctly in each case as it comes before him. This order is not to be construed as any intrusion on that responsibility of the trial judges.

*Id.* at 598. Were this Court to reject Miss Anthony's proposed instruction by simply relying on these prior opinions, it would be abrogating its responsibility to ensure that the jury is properly instructed, thereby ignoring the important disclaimer the Florida Supreme Court made in endorsing the standard jury instructions in criminal cases.<sup>9</sup> Such a responsibility is especially important in a case such as Miss Anthony's, where the prosecution's theory relies entirely upon circumstantial evidence and possibly compromised forensics. *See* Def.'s Motion to Dismiss Counts I and II of the Indictment, *filed* Sept. 30, 2009; Def.'s Motion to Dismiss Due to Spoliation of Evidence, *filed* Sept. 16, 2009.

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<sup>8</sup> Although some of the Florida opinions approving of the standard instruction on reasonable doubt cite numerous cases as having approved the instruction, many of these cited cases either cite *In re Standard Jury Instructions (Criminal)*, 431 So. 2d 594 (Fla.1981), cite other cases that address issues that are only tangentially related to the reasonable doubt instruction, or merely reject the defendant's argument without providing a rationale. Thus, the opinions that reject defendants' claims regarding the standard instruction on reasonable doubt do not address the arguments made here or explain why the standard instructions are proper.

<sup>9</sup> *State v. Dominguez*, 509 So. 2d 917 (Fla. 1987), underscores the importance of not assuming that standard jury instructions are adequate. In that case, the Florida Supreme Court found that the standard jury instruction on cocaine trafficking failed to sufficiently instruct the jury and thus approved the order of the district court remanding the case for a new trial. *Dominguez*, 509 So. 2d at 918.

Furthermore, when it originally adopted Florida's standard instruction on reasonable doubt in 1981,<sup>10</sup> the Florida Supreme Court did not have the benefit of the myriad studies about confusing jury instructions that have since been made available. *See, e.g.*, Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 *Brook. L. Rev.* 1081, 1084-85 (2001) (noting that "[r]esearch confirms that jury instructions are hard for the average juror to understand" and citing seven articles in the paragraph supporting that proposition, only two of which were published before 1981). Since it originally adopted the standard instruction on reasonable doubt, even the Florida Supreme Court has acknowledged the potentially confusing nature of the instruction. *See Standard Jury Instructions-Criminal Cases (2000-1)*, 795 So.2d 50, 51 (Fla. 2001) ("We agree with the Committee that certain language in the current instruction may be viewed as confusing or archaic, and that the grammatical structure of the instruction is arguably awkward.").

#### **IV. The Instruction Miss Anthony Proposes Is Clear and Correct.**

Miss Anthony proposes that this Court use the Federal Judicial Center's Pattern Criminal Jury Instruction,<sup>11</sup> which contains a clear and correct statement of the law on reasonable doubt. For one, Miss Anthony's proposed instruction states unequivocally that the prosecution must prove the defendant's guilt and the existence of aggravating circumstances beyond a reasonable doubt. Unlike Florida's standard instruction, the proposed instruction does not confusingly suggest that jurors should return a guilty verdict or find an aggravator in some circumstances where the jurors have reasonable doubts. Furthermore, Miss Anthony's proposed instruction properly uses "possible doubt" to indicate the limits of what is considered reasonable. The

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<sup>10</sup> The court has been willing to make only slight modifications to the instruction since the 1981 opinion was published. *See Standard Jury Instructions in Criminal Cases (97-1)*, 697 So.2d 84 (Fla. 1997).

<sup>11</sup> Miss Anthony proposes that a modified version of the Federal Judicial Center instruction be used to replace the relevant parts of instruction 7.11.

proposed instruction states that “the law does not require proof that overcomes *every* possible doubt” (emphasis added). This phrasing clearly conveys the sense in which the term “possible” is being used, thereby ensuring that jurors understand that there are limits to what doubts are considered reasonable without improperly suggesting that a doubt must be certain to acquit the defendant or disregard an aggravating circumstance.

Although trial courts are not required to use specific language when instructing juries on reasonable doubt, *Victor*, 511 U.S. at 5, Justice Ginsburg endorsed Miss Anthony’s proposed instruction in her concurring opinion in *Victor*. *Id.* at 26-27 (Ginsburg, J., concurring) (“The Federal Judicial Center has proposed a definition of reasonable doubt that is clear, straightforward, and accurate. . . . This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly.”). Others have similarly endorsed the instruction that Miss Anthony proposes. See Jon O. Newman, *Beyond “Reasonable Doubt,”* 68 N.Y.U. L. Rev. 979, 991 (1993) (noting that the Federal Judicial Center instruction on reasonable doubt “contains very useful language”); Molly Armour, Comment, *Dazed and Confused: The Need for a Legislative Solution to the Constitutional Problem of Juror Incomprehension*, 17 Temp. Pol. & Civ. Rts. L. Rev. 641, 663 (2008) (“The [Federal Judicial Center] instructions are exemplary because the drafters paid heed to juror comprehension research and endeavored to simplify the language. The Federal Judicial Center also synthesized important vocabulary, syntax, and comprehension lessons for future drafters to bear in mind when fashioning instructions.”) (footnotes omitted).

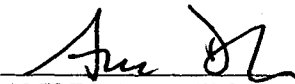
## CONCLUSION

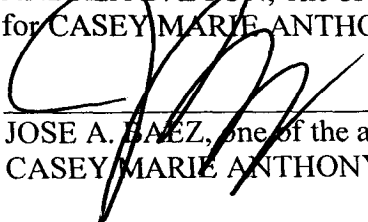
Miss Anthony’s right to due process under Article I, Section 9 of the Florida Constitution and the Fourteenth Amendment to the United States Constitution and Miss Anthony’s right to be

free from cruel and unusual punishment under Article I, Section 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution require that the jury in this case be properly instructed regarding the reasonable doubt standard. Florida's Standard Jury Instruction in Criminal Cases 3.7 is fatally flawed because it suggests that a higher degree of doubt is needed to acquit than the reasonable doubt standard requires. Florida's Standard Jury Instruction in Criminal Cases 7.11 is likewise flawed to the extent it uses the same definition of reasonable doubt in the penalty phase. Only by using a substitute instruction that properly defines "reasonable doubt" can this Court cure the flaw. Miss Anthony's proffered instruction is a preferable substitute because it clearly and correctly defines "reasonable doubt."

WHEREFORE, Miss Anthony objects to use of Florida's standard jury instruction on "reasonable doubt" and requests that this Court use her proposed instruction in its place. Miss Anthony also respectfully requests that this Honorable Court order the prosecution to file a written response and memorandum of law within thirty days of the filing of this Objection and accompanying memorandum of law; allow the defense ten business days from the prosecution's filing of its response and memorandum of law to file a reply and memorandum of law; and set a hearing date, at which time this Honorable Court may hear arguments relating to this Objection.

Respectfully submitted,

  
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for CASEY MARIE ANTHONY.

  
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Dated: 11/25, 2009

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, 415 North Orange Avenue, Orlando, Florida 32801; via facsimile and /or U.S. Mail on this 26 day of October, 2009.



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# **EXHIBIT A**

**Proposed Instruction on Reasonable Doubt for Guilt Phase  
Federal Judicial Center, Pattern Criminal Jury Instructions, Instruction 21**

As I have said many times, the government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

# **EXHIBIT B**

**Proposed Instruction on Reasonable Doubt for Sentencing Phase**

As I have said many times, the government has the burden of proving each aggravating circumstance beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced that an aggravating circumstance exists. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the aggravating circumstance exists, you must find that it exists and give it whatever weight you determine it should receive. If on the other hand, you think there is a real possibility that the aggravating circumstance does not exist, you must give the defendant the benefit of the doubt and find that it does not exist.