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Whether one is a supporter or an opponent of the death penalty, one of the issues discussed by Justice Dando must be of paramount concern: the possibility of executing an innocent person. Indeed, supporters might well be even more concerned about this problem than opponents since, if even a few demonstrably innocent people are executed, public opinion is likely to turn against the death penalty as an acceptable criminal sanction.[1]

One study has found that, between 1900 and 1991, 416 people were wrongly convicted of capital or "(potentially) capital" cases.[2] While this figure has been criticized,[3] no one would disagree that, if we are to have a death penalty, all reasonable steps should be taken to guard against the execution of the innocent.[4] It is to that end that this Article is directed.

Currently, in order to render a defendant eligible for the death penalty, a jury must find, beyond a reasonable doubt, that he committed all of the elements of the crime of murder.[5] Then, in a separate proceeding, the jury or judge must

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1. Even the comparative injustice of executing the non-shooter in a felony murder, while sparing the shooter because he was a juvenile, "unleashed a firestorm of criticism against the death penalty in England." That, along with cases in which an innocent man and an apparently guilty woman were executed, contributed to the abolition of the death penalty in 1957. Joseph L. Hoffmann, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 246 (1989).

2. MICHAEL L. RADELET, ET AL., IN SPITE OF INNOCENCE at ix-x (1992). The study originally appeared as Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

3. The Bedau-Radelet study is criticized in Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988). Markman and Cassell make the important point that convicting someone of a "potentially capital" crime in a jurisdiction that does not have a death penalty is hardly the same thing as an erroneous death sentence since the jury was never asked to render the additional "death" verdict. *Id.* at 123-24. Their second argument, that erroneously convicted defendants are often spared prior to execution, *id.* at 125, is less telling in light of the movement of the Supreme Court toward speedier executions. See, *e.g.*, Herrera v. Collins, 506 U.S. 390 (1993), which held that a claim of actual innocence based on newly discovered evidence is not grounds for habeas corpus relief, although the Court left open the question of whether a *convincing* claim of actual innocence might be grounds for such relief.

4. "Nothing could be more contrary to contemporary standards of decency or shocking to the conscience than to execute a person who is actually innocent." *Herrera*, 506 U.S. at 430 (Blackmun, J., dissenting) (citations omitted).

5. It is not clear whether any crime other than murder can be subject to the death penalty. In Coker v. Georgia, 433 U.S. 584 (1977), the Court struck down the death penalty for the "rape of an adult woman." *Id.* at 592. However, it has not been decided whether rape of a child, aircraft hijacking, or treason could be subject to the death penalty even though no one was killed. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES

conclude that a statutory "aggravating circumstance" was also present, beyond a reasonable doubt.[6]

In those states that inform jurors as to the meaning of reasonable doubt,[7] the instruction usually is along the lines set forth in the 1850 Massachusetts case of *Commonwealth v. Webster*:[8]

> Reasonable doubt . . . is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.[9]

While this might be thought to foreclose any misgivings whatsoever by jurors as to the accuracy of their verdict, the Supreme Court, in *Lockhart v. McCree*, recognized that jurors who vote to convict may nevertheless entertain "residual doubts" about the defendant's guilt that would "bend them to decide against the death penalty."[10] In fact, such residual doubt is specifically contemplated in the jury instruction approved by the Court in *Victor v. Nebraska*: "[A]bsolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the *strong probabilities of the case* . . . ."[11] However, as Justice Marshall pointed out, dissenting in *Lockhart*, the Court had consistently denied certiorari to defendants complaining that they had been forbidden to raise this issue with the jury.[12]

Nevertheless, in states which do allow an appeal to "residual" or "lingering" doubt as a means of escaping the death penalty, some courts have found it to be deficient representation for the defense counsel not to make such an argument to the jury.[13] Obviously, then, an appeal to residual doubt is not a mere formality,

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532 (6th ed. 1995).

6. Examples of aggravating circumstances would include the fact that the crime involved multiple victims, or that the crime was the murder of a policeman on duty.

7. "[Some] courts have thought that the words themselves are sufficiently clear not to require any embellishment." WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.8, at 80 (1986) (footnotes omitted).

8. 59 Mass. (5 Cush.) 295 (1850).

9. This instruction, used in California, was recently approved by the Supreme Court in Victor v. Nebraska, 114 S. Ct. 1239 (1994) (case consolidated with Sandoval v. California) (emphasis omitted).

10. 476 U.S. 162, 181 (1986) (quoting Grigsby v. Mabry, 758 F.2d 226, 248 (8th Cir. 1985) (Gibson, J., dissenting)).

11. *Victor*, 114 S. Ct. at 1249 (emphasis in original).

12. *Lockhart*, 476 U.S. at 206 (Marshall, J., dissenting).

13. As the Supreme Court has observed, "where 'States are willing . . . to allow defendants to capitalize on "residual doubts,"' such doubts will inure to the defendant's benefit." Franklin v. Lynaugh, 487 U.S. 164, 173 (1988) (quoting *Lockhart*, 476 U.S. at 181) (emphasis omitted); *see also* Magill v. Dugger, 824 F.2d 879, 889 (11th Cir. 1987) (vacating death sentence); *Grigsby*, 758 F.2d at 247-48 (Gibson, J., dissenting); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (reversing death sentence), *cert. denied*, 471 U.S. 1016 (1985); Daniel v. Thigpen, 742 F. Supp. 1535, 1560 (M.D. Ala. 1990) (granting new trial).

but an argument that may, under the standards for ineffective assistance of counsel, be "outcome determinative."[14]

Some defendants have attempted to extend such holdings. In *Franklin v. Lynaugh*, the defendant argued that, in view of *Lockhart*'s recognition of residual doubt as a potentially helpful factor, he was entitled to an instruction "telling the jury to revisit the question of his identity as the murderer as a basis for mitigation" at the death phase of the trial.[15] The Court, while conceding, as it had in *Lockhart*, that such an argument might be helpful to the defendant, concluded that the Eighth Amendment right to present mitigating evidence did not extend to a right to an instruction on residual doubt.[16]

I would go further than the defendant's argument in *Franklin*. In my view, the jury should be instructed that, unless they unanimously agreed that they had *no* doubt about the defendant's identity as the murderer, they should not sentence him to death. To put it another way, if any juror retained any lingering doubt about the defendant's guilt, the death sentence should not be imposed. This is stronger than what the defendant sought in *Franklin*, in that it does not merely *permit* the jury to take lingering doubt into account as a (or as one of several) mitigating circumstance(s), but *requires* them to unanimously conclude that there is no lingering doubt before even proceeding to the death penalty phase.

However, I would limit this requirement to defenses which would render the defendant *completely innocent* of the crime. Thus, no heightened standard should generally be applied to such matters as mens rea at the trial stage[17] or aggravating factors, including prior convictions, at the penalty stage. The only issue that should be subject to this heightened standard is a claim such as alibi, or mistaken identity, that, if accepted, would negate any criminal connection to the death or the crime that caused it. Therefore, a defendant who admitted participating in a felony when death occurred, as in *Tison v. Arizona*, should not be entitled to this heightened standard on the issues of whether he was a "major participa[nt] in the felony committed, combined with reckless indifference to human life."[18] However, a claim of total non-participation, or total non-awareness that his participation was criminal, should be subject to the heightened standard.[19]

It follows that the usual "reasonable doubt" standard would appropriately be applied to a defendant who claimed that he was a getaway driver who arrived late and had nothing to do with the killing or to a defendant who claimed that, though

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14. These standards are set out in Strickland v. Washington, 466 U.S. 668, 693-95 (1984).

15. *Franklin*, 487 U.S. at 172-73.

16. *Id.* at 173. The main opinion was a plurality opinion joined by four Justices. However, Justice O'Connor, joined by Justice Blackmun, concurring in the result, concluded that, although in her view, petitioner was deprived of an opportunity to argue residual doubt as a mitigating factor, it did not matter since there was no right to such an argument. *Id.* at 187-89 (O'Connor, J., concurring). Thus six Justices agreed that there was no constitutional right to a jury instruction on residual doubt.

17. Unless the defendant claimed the absence of any culpable state of mind. *See infra* text accompanying notes 19-20.

18. Tison v. Arizona, 481 U.S. 137, 158 (1987). This is the standard to be met if the death penalty is to be imposed on a defendant who was not the actual agent of death.

19. Since a claim of insanity is, in effect, a claim of innocence, that too should be subject to the "no residual doubt" standard.

he shot at the victim, he missed, and someone else's bullet actually caused the death. Neither of these defendants is claiming complete innocence. However, an alleged "getaway driver" who claimed that he picked up a bank robber who was hitchhiking, with no knowledge that a criminal act had occurred, would be entitled to the instruction.

A difficult case is presented by a defendant who admits, for example, that he shot the victim, but claims that the shooting was an accident. In order to convict this defendant of capital murder in the first place, the government would have to prove a mens rea of at least reckless indifference to human life. If the defense was that this was a non-negligent accident, the defendant would be further entitled to the "residual doubt" instruction proposed here since acceptance of the defendant's claim would render him completely innocent of any wrongdoing. If the defendant claimed that he was merely negligent, he would arguably not be making a claim of "complete innocence." However, it would not be inappropriate to allow defendants who claim that they were merely negligent to also be entitled to the residual doubt instruction.

Another defendant might claim that he drove robbers to a store knowing that they planned to shoplift, but with no knowledge that they had weapons or planned a robbery. Since this defendant is not claiming that he is innocent of any wrongdoing, but rather admits participation in the series of criminal events that led to a death, the traditional "beyond a reasonable doubt" standard will suffice to determine if he could be executed under the *Tison v. Arizona* standard (which, if his claim is given any credence at all, he could not). The possibility of wrongly executing this defendant is simply not as disturbing as the possibility of executing a complete innocent.

It may seem fatuous to require a jury to distinguish between guilt "beyond a reasonable doubt" and guilt "with no lingering doubts." However, as a former prosecutor in Washington, D.C., I know that many guilty verdicts are not really "beyond a reasonable doubt" as that term is defined above.[20] The most common armed robbery case involves a stickup of a convenience store. Assuming that the clerk could make a convincing lineup identification of the defendant, and the defendant matched the general description of the robber initially given to the police, my office would have prosecuted the case, and would generally have convicted, even if there were no other eyewitnesses and little more corroborating evidence. But, aware as I was of the fallibility of eyewitness identification, I, and perhaps some of the jurors, could not honestly say that there were no doubts at all about guilt, despite being reasonably confident that the defendant was the true culprit.

Many capital cases involve a similar fact situation, with the added problem that the best witness, the victim, is "not available." My own impression of the "reasonable doubt" standard at work is that it represents about ninety-five to ninety-six percent certainty. If this is so, then there is plenty of room for a further requirement of "no residual doubt" for the death penalty. Moreover, the fact that, after the jury has decided guilt "beyond a reasonable doubt," it is instructed to apply an even higher "no residual doubts" standard to the facts would clearly

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20. *See supra* text accompanying note 9.

signal to them that a different and more demanding standard was being used, and would cause them to rethink their view of the evidence.[21]

Giving this issue to the original jury after the finding of guilt avoids the problem raised by the plurality in *Franklin*:

> Finding a constitutional right to rely on a guilt-phase jury's "residual doubts" about innocence when the defense presents its mitigating case in the penalty phase is arguably inconsistent with the common practice of allowing penalty-only trials on remand of cases where a death sentence—but not the underlying conviction—is struck down on appeal.[22]

Since my proposal is not to treat "residual doubt" as a mitigating circumstance, but rather to insist that the absence of it is a prerequisite to moving on to the penalty phase, residual doubt can and should be determined by the original guilt-phase jury. If, however, a defendant were to successfully appeal on this issue—such as, on the trial judge's failure to instruct on residual doubt—there would be no need to retry the guilt phase. Rather, as in current practice, a new jury would have to be formed, apprised of the evidence at the guilt phase, and asked to decide only the "no residual doubt" issue. Assuming that the penalty phase had originally been conducted properly, the appropriateness of the death penalty should not be revisited if no residual doubt is found.

Waiting to instruct the jury about residual doubt until after a guilty verdict as to the underlying crime also avoids another problem. If the jury were to receive the residual doubt instruction along with all the other instructions, defendants would argue that this might lead jurors to compromise by finding them guilty, but with lingering doubts precluding death, where the defendant would otherwise have been acquitted due to those doubts. Obviously, if the jury is unaware of the possibility that residual doubts might preclude the application of the death penalty, that could have no effect on their determination of guilt.

Accordingly I propose that, where the trial judge concludes that the defendant's defense,[23] if believed, would render him *completely innocent* as to the death of the victim or the crime that led to it, the judge, following a guilty verdict to a capital crime, should further instruct the jury on residual doubt. The instruction will vary according to the nature of the defendant's claim. Here is a sample instruction in a case where the defendant claims to have been outside the store at the time the victim was shot and to have had no connection to the robbery:

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21. Successful use of this standard by the defense will immediately give rise to a further claim that "the jury has said that it is not really certain that this defendant committed the crime; therefore, he should not be languishing in prison." To this claim I would respond that he has been found guilty beyond a reasonable doubt and that has always been sufficient. The mere fact that a higher standard has been imposed for the extreme and irrevocable sanction of execution does not mean that the issue of guilt must be revisited.

22. Franklin v. Lynaugh, 487 U.S. 164, 173 n.6 (1988).

23. I use the term "defense" broadly. I would not require the defendant to testify or his attorney to specifically claim a certain named defense. Rather, the judge should examine the overall thrust of the defense arguments. Such an instruction should only be given if the defendant makes a colorable claim of complete innocence.

> Although you have convicted the defendant of capital murder[24] beyond a reasonable doubt, we recognize that some jurors may continue to entertain lingering or residual doubts as to guilt. In order to ensure, as best we can, that no innocent person is executed, the law requires that, before the defendant is eligible for the death penalty, the original jury must unanimously conclude that they have no lingering or residual doubts that John Jones was one of the participants in the robbery of Mom and Pop's Store, and that he was at least reckless as to the death of the victim.[25]

It is likely that *Franklin* would preclude such an instruction being recognized as a federal constitutional right. Despite the absence of a majority opinion in that case, Justice O'Connor is clear in her concurrence that "the Eighth Amendment does not require" an instruction as to residual doubt.[26] Thus, this paper urges such a change on states, either through judicial interpretation of the state constitution or by statute. While it is not clear how many Americans agree with Blackstone's maxim that "[i]t is better that ten guilty persons escape, than that one innocent suffer,"[27] it is unquestionably right that it is better that ten guilty defendants escape execution (but be imprisoned for life) than that one innocent be hanged. It is toward that end that this paper is aimed.

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24. In order to convict the defendant of capital murder, the jury had to conclude, beyond a reasonable doubt, that the defendant was a *major* participant. Tison v. Arizona, 481 U.S. 137, 158 (1987). This issue, which has no bearing on "complete innocence," should not be subject to the residual doubt instruction.

25. This instruction assumes that the state had concluded that a claim of negligence is to be equated with "innocence," as discussed *supra* text accompanying note 20.

26. *Franklin*, 487 U.S. at 187 (O'Connor, J., concurring). Since, as Justice O'Connor points out, defendants have no right to present residual doubt claims as a mitigating circumstance, it is unlikely that the Court would hold that the absence of such doubts is a prerequisite to a death penalty verdict in some cases.

27. THE QUOTABLE LAWYER (David S. Shrager & Elizabeth Frost eds., 1986) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769)).