BORDEN, J., concurring. I agree with and join the majority opinion, with one exception. I do not agree with the majority's specific approval of the reasonable doubt instruction adopted by the New Jersey Supreme Court in *State* v. *Medina*, 147 N.J. 43, 61, 685 A.2d 1242 (1996), cert. denied, 520 U.S. 1190, 117 S. Ct. 1476, 137 L. Ed. 2d 688 (1997).

First, neither party brought that instruction to the attention of this court in the present case. Thus, the majority has approved that instruction without the parties having briefed it.

Second, and more important, I do not think that this court should, as a general matter and especially in the problematic area of the concept of reasonable doubt, be in the business of drafting specific instructions for trial courts. We do our appellate job better by doing what we ordinarily do, namely, reviewing instructions given by trial courts in the context of specific cases and deciding whether they meet the specific legal challenge presented by the parties. We should not start with language that was never employed, such as that adopted by the New Jersey Supreme Court, and then determine, in a litigation vacuum, that that language ought to be what judges say to jurors.

In this connection, I acknowledge that this court, in an opinion that I authored for the court, did draft specific instruction language in *State* v. *Ledbetter*, 275 Conn. 534, 579–80, 881 A.2d 290 (2005), cert. denied, U.S. , 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2005). In hindsight, I think that this was unwise, and was proven to be so by the fact that, immediately upon the release of that opinion, we were required to issue a replacement page in that opinion amending the previously approved instruction. See id.

For example, consider the language of the New Jersey instruction that a reasonable doubt "is a doubt that a reasonable person hearing the same evidence would have." *State* v. *Medina*, supra, 147 N.J. 61. I can conceive of the state contending that this language is too favorable to the defendant because it could give a juror who votes initially to acquit a basis to say to his or her fellow jurors: "I have this doubt. I am a reasonable person who heard the same evidence as you did. Therefore, according to the judge's instructions, it is a reasonable doubt, and you all have to respect it." End of deliberations.

My point is not that this will happen, or that such an argument by the state will prevail if presented. My point is simply that we ought to wait until some new language is used by a trial court and briefed by the parties on appeal, and then adjudicate its propriety in the context

of the case, rather than approve language without briefing, in a vacuum, and in advance of its use.