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Fifth Amendment--Upholding the Constitutional Merit of Misleading Reasonable Doubt Jury Instructions

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FIFTH AMENDMENT—UPHOLDING THE CONSTITUTIONAL MERIT OF MISLEADING REASONABLE DOUBT JURY INSTRUCTIONS

Victor v. Nebraska and Sandoval v. California, 114 S. Ct. 1239 (1994)

I. INTRODUCTION

The United States Supreme Court denied the defendants' appeals in the consolidated cases of *Victor v. Nebraska* and *Sandoval v. California*.[1] In each case, the petitioner argued that the state trial court's reasonable doubt jury instruction suggested that a lower standard of proof was necessary for conviction than the standard required by constitutional due process.

Writing for the majority, Justice O'Connor admitted that the reasonable doubt instructions contained language that was not entirely clear. However, she explained that, taken in context and viewed as a whole, the instructions adequately conveyed the concept of reasonable doubt.[2] Justice O'Connor's opinion greatly narrowed the scope of the Court's recent per curiam decision in *Cage v. Louisiana*,[3] the case upon which both petitioners had formulated their appeals. Justice O'Connor based her conclusion, as to the meaning of reasonable doubt and the phrases challenged by petitioners, upon a historical analysis of the reasonable doubt concept and upon eighteenth and nineteenth-century case law and texts.[4] Though expressing disapproval of the reasonable doubt instructions at issue in both *Victor* and in *Sandoval*,[5] Justice O'Connor stopped short of setting forth an exemplary jury instruction and thus failed to clear up the confusion as to what sort of instruction the Court would endorse outright.

This Note begins by reviewing the concept of reasonable doubt and its historical development, both in case law and in treatises, placing special emphasis on the Court's relatively recent history of inter-

1 Victor v. Nebraska, 114 S. Ct. 1239 (1994).
2 *Id.* at 1251.
3 498 U.S. 39 (1990).
4 *Victor*, 114 S. Ct. at 1244-45.
5 *Id.* at 1248, 1251.

preting the reasonable doubt standard. Next, this Note finds fault with the Court's holding in both *Sandoval* and *Victor*, arguing that the Court has improperly narrowed the important constitutional safeguards upheld in *Cage* to the facts of *Cage* alone, leaving the states with no valuable guidance as to how to instruct on the concept of reasonable doubt. This Note also contends that the Court lowered the standard of proof necessary to convict a defendant by upholding these two convictions, even though the juries received ambiguous and misleading definitions of reasonable doubt. Finally, this Note explores the Court's motivation for such an about-face with respect to the tenets of *Cage* and discusses the likely ramifications of the Court's holding for the future of criminal jurisprudence.

II. BACKGROUND

A. REASONABLE DOUBT IN THE EIGHTEENTH CENTURY

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State to prove every element of a charged criminal offense beyond a reasonable doubt.[6] The reasonable doubt standard had its first documented beginnings in the eighteenth century in England and America. There are two frequently cited theories regarding the first appearance of the concept of reasonable doubt in English and American case law.

On the one hand, Judge John Wilder May, a nineteenth-century editor and author of numerous treatises, concluded that, as far as he could determine, the reasonable doubt standard was first employed in the Irish treason trials in 1798.[7] During the trial of *Rex v. Finney*[8] in Dublin, the defense counsel stated that it "may . . . be considered a rule of law, that, if the jury entertain a reasonable doubt upon the truth of the testimony of witnesses given upon the issue they are sworn well and truly to try, they are bound" to acquit.[9] Citing this case, Judge May concluded that its use in Ireland predated its use in the United States.

Alternatively, Professor Morano asserted that the English and

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6 *In re* Winship, 397 U.S. 358, 364 (1970).

7 John Wilder May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642, 656 (1876). Both Dean McCormick and Dean Wigmore accepted this theory in their respective treatises on evidence, and the United States Supreme Court mentioned it in Apodaca v. Oregon. *See* CHARLES T. MCCORMICK, LAW OF EVIDENCE § 341, at 799 (2d ed. 1972); 9 WIGMORE § 2497, at 317 (3d ed. 1940); Apodaca v. Oregon, 406 U.S. 404, 412 n.6 (1972); *see generally* Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 508 (1975).

8 26 How. St. Tr. 1019 (Ire. 1798).

9 May, *supra* note 7, at 656-57.

American courts employed the reasonable doubt standard even earlier in the eighteenth century.[10] As an example, Professor Morano cited the language used in the Boston Massacre Trials of 1770. Arguing for the conviction of British soldiers who had fired into a crowd of Boston residents who were protesting British military presence in the colonies, counsel for the British Crown, Robert Treat Paine, stated:

> [I]f therefor in the examination of this Cause the Evidence is not sufficient to Convince you beyond reasonable doubt of the Guilt of all or of any of the Prisoners by the Benignity and Reason of the Law you will acquit them, but if the Evidence be sufficient to convince you of their Guilt beyond reasonable doubt the Justice of the Law will require you to declare them Guilty and the Benignity of the Law will be satisfied in the fairness and impartiality of their Tryal.[11]

B. REASONABLE DOUBT IN THE NINETEENTH CENTURY

Despite the different theories as to the source of the concept, historians agree that the reasonable doubt standard did not become a fixture of American jurisprudence until the mid-nineteenth century.[12] By then, the reasonable doubt standard had become widely accepted as the accurate description of the degree of doubt necessary for acquittal of a criminal defendant.[13] State courts gradually accepted the reasonable doubt standard, each following its own time line in accepting it.[14] Studies of early decisions of the state courts have revealed that many state appellate courts did not require trial courts to use the reasonable doubt standard until after they had already begun to use it.[15] The standard's growing acceptance was concurrent with judicial attempts to explain the meaning of reasonable doubt.[16]

In addition to its growing importance in case law, the reasonable doubt standard appeared frequently in nineteenth-century treatises.

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10 Morano, *supra* note 7, at 508.

11 3 L. KINVIN WROTH AND HILLER B. ZOBEL, LEGAL PAPERS OF JOHN ADAMS 271 (1965).

12 Morano, *supra* note 7, at 519. Morano noted two barriers to the acceptance of the reasonable doubt standard: (1) juries in many states in the early 1800s decided both questions of law and questions of fact, and thus, the jury itself determined the standard of persuasion; and (2) there were inadequate methods of appellate review of challenged convictions, which impeded a uniform standard of persuasion. *Id.* at 524-26.

13 *See, e.g.*, Carlton v. People, 150 Ill. 181, 192 (1894); Morgan v. State, 48 Ohio St. 371, 377 (1891); People v. Strong, 30 Cal. 151, 155 (1866); Commonwealth v. Webster, 59 Mass. 295 (1850).

14 Morano, *supra* note 7, at 519. Morano noted two problems in verifying the early use of the reasonable doubt standard: (1) few trial transcripts survive from the years 1750-1830; and (2) in many criminal cases, trial court proceedings were not recorded. *Id.* at 520. *See also* H. Richard Uviller, *Acquitting the Guilty: Two Case Studies on Jury Misgivings and the Misunderstood Standard of Proof*, 2 CRIM. L.F. 1, 38 (1990).

15 Morano, *supra* note 7, at 519.

16 *Id.*

Dean Wigmore, in his treatise on evidence, stated that "[w]hen the risk of jury-doubt is *exclusively on the prosecution*, their belief must amount to a sense of *being morally certain beyond any reasonable doubt, i.e.* in favor of the prosecutor's contention."[17] Simon Greenleaf also referred to reasonable doubt in describing the amount of proof required in a criminal case, stating that facts are proven by satisfactory evidence which is "that amount of proof . . . which ordinarily satisfies an unprejudiced mind . . . beyond a reasonable doubt."[18]

Through its repeated use in both case law and in legal treatises, reasonable doubt became, by the end of the nineteenth century, the uniformly applied standard for the degree of doubt necessary to acquit a defendant of a charged criminal offense. In addition, courts began to use jury instructions to ensure that jurors paid attention to the law pertinent to the case and did not merely follow popular opinion in deciding the guilt or innocence of the defendant.[19] In 1895, the Supreme Court decreed, in *Sparf v. United States*,[20] that the jury is required, in criminal cases, to follow the trial court's instructions on the law.[21]

C. REASONABLE DOUBT IN THE TWENTIETH CENTURY

Although courts used the reasonable doubt standard extensively by the close of the nineteenth century, the United States Supreme Court did not give it constitutional status until its decision in *In re Winship*.[22] In *Winship*, the Court held that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[23] In reaching its position, the Court found that "[a]lthough virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.'"[24]

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17 WIGMORE, EVIDENCE § 2856, at 502-03 (2d ed. 1935).

18 SIMON GREENLEAF, LAW OF EVIDENCE § 1, at 4 (13th ed. 1876).

19 Prior to the nineteenth century, juries were considered capable of determining the law from community norms, and, thus, judges did not instruct juries as to the applicable law of the case. For a discussion of the early history and development of jury instructions in England and America, see William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 732-37 (1981).

20 156 U.S. 51 (1895).

21 *Id.* at 106.

22 397 U.S. 358 (1970).

23 *Id.* at 364.

24 *Id.* at 361-62 (quoting Duncan v. Louisiana, 391 U.S. 145, 155 (1968)).

The Court in *Winship* posited two purposes of the reasonable doubt standard to support its holding.[25] First, the reasonable doubt standard is a "prime instrument for reducing the risk of convictions resting on factual error" since the standard "provides concrete substance for the presumption of innocence."[26] The standard is necessary because the defendant in a criminal case "has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."[27] Second, the reasonable doubt standard is "indispensable to command the respect and confidence of the community in applications of the criminal law."[28] The reasonable doubt standard instills confidence in the community that the criminal justice system will not convict innocent people.[29]

After the Supreme Court's decision in *Winship* secured constitutional status for the reasonable doubt standard, the Court's involvement in the reasonable doubt standard has largely been to define how and to what extent the reasonable doubt standard needs explaining. While it is well established that courts and juries must apply the reasonable doubt standard when determining the guilt or innocence of a criminal defendant,[30] neither the majority opinion nor the concurrence in *Winship* discussed whether the Constitution requires jury instructions defining the standard.[31] The Court in *Taylor v. Kentucky*[32] held that the trial court's refusal to give the defendant's requested instruction on the presumption of innocence constituted a violation of due process.[33] The Court further noted that if trial courts defined the reasonable doubt standard, the Constitution did not require any particular words to instruct the jury as to the appropriate burden of proof.[34]

In handling constitutional challenges to specific reasonable

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25 *Id.* at 363-64. For a full discussion of these two reasons for the reasonable doubt standard, see Barbara D. Underwood, *Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1306-08 (1977).

26 *Winship*, 397 U.S. at 363.

27 *Id.*

28 *Id.* at 364.

29 *Id.*

30 *Id.*

31 See Henry A. Diamond, *Reasonable Doubt: To Define, or Not to Define*, 90 COLUM. L. REV. 1716, 1717-21 (1990), for a discussion of the federal and state courts that do and do not require that jury instructions include a definition of reasonable doubt. In his article, Diamond contends that defining reasonable doubt is constitutionally required to guarantee that the jury understands the reasonable doubt standard. *Id.* at 1722-29.

32 436 U.S. 478 (1978).

33 *Id.* at 490.

34 *Id.* at 485-86.

doubt instructions, the Court in *Francis v. Franklin*[35] made it clear that it would consider "what a reasonable juror could have understood the charge as meaning."[36]

In its evaluations of the constitutionality of reasonable doubt jury instructions, the Court has only once held that a reasonable doubt jury instruction given by a trial court violated due process. In *Cage v. Louisiana*,[37] the defendant appealed his conviction and death sentence for first-degree murder, arguing that the reasonable doubt jury instruction was unconstitutional. In a per curiam decision, the United States Supreme Court held that the instruction was inimical to the reasonable doubt standard articulated in *Winship*.[38] In reaching its decision that the reasonable doubt instruction was unconstitutional, the Court, following *Francis*, inquired whether a reasonable juror "could have" interpreted the instruction to allow conviction on proof that did not satisfy the reasonable doubt standard which the Due Process Clause requires.[39]

Since the Court's decision in *Cage*, the Court has altered the inquiry for appellate review articulated in *Francis* and followed in *Cage*. Reviewing two California jury instructions used in the penalty phase of a capital murder trial, the Court in *Boyde v. California*[40] determined that the proper inquiry was whether there is a "reasonable likelihood that the jury has applied the challenged instruction" in a way that violates the Constitution.[41] The Court rejected the "could have" test that it used in finding the *Cage* instruction unconstitutional, concluding that the "reasonable likelihood" test "better accommodates the concerns of finality and accuracy."[42] While acknowledging that an inter-

35 471 U.S. 307 (1985). In *Francis*, the Court held that the trial court's jury instruction on intent in the context of the instruction as a whole violated the 14th Amendment. *Id.* at 325. Determining that the deficiency in the instruction was not harmless error, the Court affirmed the issuance of the writ of habeas corpus. *Id.* at 326.

36 *Id.* at 316. The more narrow inquiry in *Francis* was whether a reasonable juror "could have understood [the instruction on intent] as a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts." *Id.*

37 498 U.S. 39 (1990).

38 *Id.* at 40-41.

39 *Id.* at 41.

40 494 U.S. 370 (1990). In *Boyde*, the Court held that two California jury instructions used in the penalty phase of defendant's capital murder trial did not preclude the jury's consideration of relevant mitigating evidence offered by the defendant, and the jury instructions did not violate the Eighth and Fourteenth Amendments. *Boyde*, 494 U.S. at 386.

41 *Id.* at 380. *See also* Estelle v. McGuire, 502 U.S. 62, 72 (1991) (using the "reasonable likelihood" test developed in *Boyde*). In *Estelle*, the Court held that neither the introduction of challenged evidence at defendant's murder trial nor the jury instruction on the use of the challenged evidence violated the Due Process Clause. *Estelle*, 502 U.S. at 75.

42 *Id.*

est in ensuring an "accurate determination of the appropriate sentence" in a criminal case, the Court in *Boyde* stressed that its approval of the "reasonable likelihood" inquiry protected the "equally strong policy" against requiring retrial years after the first trial where the "claimed errors amount to no more than speculation."[43] In *Estelle v. McGuire*,[44] the Court further elaborated on its standard for review of challenged jury instructions and stated that the "instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole."[45]

Most recently, the Court held, in *Sullivan v. Louisiana*,[46] that the giving of a constitutionally deficient reasonable doubt instruction was among those constitutional errors that required an automatic reversal of the conviction.[47] In doing so, the Court rejected the lower court's finding that the erroneous instruction was harmless error.[48]

III. FACTS AND PROCEDURAL HISTORY

A. *SANDOVAL V. CALIFORNIA*

On 14 October 1984, Alfred Arthur Sandoval shot and killed both Gilbert Martinez and Anthony Aceves and wounded Manuel Torres in a gang-related incident in Los Angeles.[49] Seventeen days later, Sandoval entered the home of Ray and Marlene Wells and shot and killed Ray Wells because he had given information to the police concerning the Martinez and Aceves murders.[50] Sandoval then killed Marlene Wells because she had seen Sandoval kill her husband.[51]

At trial, Sandoval argued that he had killed Martinez and Aceves in self-defense, and Sandoval further presented an alibi defense for the Wells murders.[52] The trial court gave the following reasonable

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43 *Id.*

44 502 U.S. 62 (1991).

45 *Estelle*, 502 U.S. at 72 (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). *See also* Holland v. United States, 348 U.S. 121, 140 (1954) (stating that "taken as a whole, the instructions [must] correctly convey[ ] the concept of reasonable doubt to the jury").

46 113 S. Ct. 2078, 2082 (1993). The jury instruction in *Sullivan* included a definition of reasonable doubt nearly identical to that in *Cage*. *Id.* at 2080. See *infra* note 182 for the complete text of the reasonable doubt jury instruction presented in *Cage*.

47 *Id.*

48 *Id.* Justice Scalia found that appellate review of the erroneous reasonable doubt instruction using the harmless error standard articulated in Chapman v. California, 386 U.S. 18 (1967), would be "meaningless" since the appellate court would have to speculate as to what a jury might have done absent the erroneous instruction. *Id.*

49 Brief for Respondent at 1, Sandoval v. California, 114 S. Ct. 1239 (1994) (No. 92-9049).

50 *Id.*

51 Victor v. Nebraska, 114 S. Ct. at 1243.

52 Respondent's Brief at 1, *Sandoval* (No. 92-9049).

doubt instruction to the jury at the end of the guilt phase of the trial:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It 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.[53]

The jury convicted Sandoval of four counts of first degree murder and, in addition, found that Sandoval used a firearm in the commission of each offense and had committed multiple murders.[54] After the penalty phase of the trial, the jury sentenced Sandoval to death for the murder of Marlene Wells and to life in prison without possibility of parole for the murders of Martinez, Aceves, and Ray Wells.[55]

Following Sandoval's convictions and sentences, he was accorded an automatic appeal to the California Supreme Court.[56] On appeal, Sandoval presented ten contentions concerning the guilt phase of the trial proceedings[57] and eight regarding the sentencing phase.[58] As

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53 California Jury Instructions—Criminal 2.90 (1993) [hereinafter CALJIC 2.90]; Victor v. Nebraska, 114 S. Ct. at 1244. The trial court gave the same "reasonable doubt" instruction to the jury during the penalty phase of the trial. Brief for Petitioner at 4, Sandoval v. California, 114 S. Ct. 1239 (1994) (No. 92-9049).

54 *Victor*, 114 S. Ct. at 1243.

55 *Id.* at 1244.

56 People v. Sandoval, 844 P.2d 862, 866 (Cal. 1992).

57 On appeal, Sandoval argued these nine issues in addition to the issue of the reasonable doubt jury instruction: (1) the trial court erred in denying his motion to sever the Martinez and Aceves murders from the Wells murders; (2) the trial court erred in permitting the prosecutor to exercise his peremptory challenges to excuse from the jury those prospective jurors who had expressed concern about the imposition of the death penalty; (3) the trial court erred in admitting evidence of his gang membership as it was irrelevant and prejudicial to his defense; (4) the trial court improperly excluded evidence of third party culpability as to the Wells murders; (5) the trial court erred in ruling that his prior conviction for assault with intent to commit murder would be admissible for impeachment purposes; (6) the trial court's refusal to rule on the scope of permissible cross-examination if he took the witness stand to testify on the Martinez and Aceves murders violated his right to testify on his own behalf; (7) the prosecutor committed prejudicial misconduct in his questioning of the forensic psychiatrist who testified as an expert witness for the defense; (8) the prosecutor committed multiple instances of prejudicial misconduct during the cross-examination of Ralph Ortega who was Sandoval's alibi witness with respect to the Wells murders; and (9) the prosecutor committed additional instances of prejudicial misconduct. *Id.* at 869-78.

58 In the penalty phase, Sandoval argued that: (1) the erroneous admission of his gang affiliation during the guilt phase prejudiced him in the penalty phase since he had to call Richard Rodriguez, a gang consultant with the California Youth Authority, to rebut the evidence of his gang affiliation and the prosecutor improperly cross-examined Rodriguez;

part of his appeal, Sandoval, citing *Cage*, claimed that the jury instruction on reasonable doubt was constitutionally flawed.[59]

Regarding the issues Sandoval raised concerning the guilt phase of the trial, the California Supreme Court found no merit in Sandoval's assignments of error.[60] With respect to Sandoval's argument that the trial court's reasonable doubt jury instruction was unconstitutional, the court stated that "similar challenges" to the instruction had been raised and rejected in *People v. Jennings*[61] and in *People v. Johnson*.[62] In these cases, the court had noted that "despite use of the term 'moral certainty' in CALJIC 2.90, the instruction does not suffer from the flaws condemned in *Cage*."[63] In addition, the court stated that changes in the reasonable doubt instruction needed to come from the California Legislature.[64]

The court also examined each of the assignments of error Sandoval made concerning the penalty phase of the trial.[65] Although the court determined that the biblical references the prosecutor made during his final argument were improper and constituted misconduct, the court found that the misconduct did not require reversal of the penalty imposed upon Sandoval.[66] On 14 December 1992, the court affirmed Sandoval's convictions and sentences.[67]

Following the affirmance of his convictions and sentences, Sandoval filed a petition for rehearing, which the California Supreme Court

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(2) the court improperly allowed the jury to consider his age as a factor in aggravation; (3) the prosecutor violated Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989), by urging the jury to consider characteristics of the victims and the loss suffered by the victims' families; (4) the prosecutor violated his rights to due process, a fair trial, separation of church and state, and freedom from cruel and unusual punishment by quoting biblical authority in his final argument; (5) the trial court coerced the jury's verdict by requiring it to continue deliberating after the jury had declared a deadlock; (6) the trial court erred in requiring the jury to return a separate penalty verdict as to each of the four murder victims since the multiple verdicts prevented the jury from reaching a determination of the appropriate sentence taking into account all the aggravating and mitigating circumstances; (7) the instruction on the standards for determining the penalty verdicts did not inform the jury that a necessary condition for imposition of the death penalty is a finding that aggravation outweighs mitigation rather than merely being "so substantial in comparison"; and (8) the cumulative effect of the errors during the penalty phase of the trial required reversal of the penalty imposed. *Id.* at 880-86.

59 *Id.* at 878. Sandoval filed his contention as to the unconstitutionality of the "reasonable doubt" instruction in a supplemental brief. *Id.*

60 *Id.* at 869-78.

61 807 P.2d 1009 (Cal. 1991).

62 842 P.2d 1 (Cal. 1992).

63 *Sandoval*, 841 P.2d at 878.

64 *Id.*

65 *Id.* at 880-86.

66 *Id.* at 882-84.

67 *Id.* at 886.

denied on 10 February 1993.[68] On 10 June 1993, Sandoval filed for a writ of certiorari with the United States Supreme Court, which the Court granted on 28 September 1993.[69] The Court limited the writ to whether "California's pattern jury instruction on reasonable doubt deprive[d] petitioner of due process and a fair jury trial by inviting his jury to base its verdict on improper 'moral' considerations rather than on an evidentiary evaluation."[70]

B. *VICTOR V. NEBRASKA*

On 26 December 1987, Clarence Victor went to the home of eighty-two-year-old Alice Singleton, a woman for whom he had previously done gardening work.[71] Upon entering her home, Victor hit Singleton with his hand and knocked her down, struck her in the head three times with a pipe, cut her throat with a knife,[72] and then left.[73] The medical examiner determined that Singleton died from the laceration of a branch of the carotid artery with subsequent hemorrhaging; it took approximately three to five minutes for her to bleed to death.[74]

Following the closing arguments of Victor's trial, the court instructed the jury on first degree murder, second degree murder, and manslaughter, and on the material elements of each crime.[75] The court informed the jury that if the State failed to prove beyond a reasonable doubt any of the material elements of a particular crime, then it was the jury's duty to find Victor not guilty of that particular crime.[76] The trial court gave the following jury instruction:

> "Reasonable doubt" is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathmatical 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, provided such probabilities are strong enough to exclude any doubt of his guilt that is

68 Petitioner's Brief at 1, *Sandoval* (No. 92-9049).
69 *Id.*; Sandoval v. California, 114 S. Ct. 40 (1993).
70 Respondent's Brief at 1, *Sandoval* (No. 92-9049).
71 Victor v. Nebraska, 114 S. Ct. 1239, 1249 (1994).
72 *Id.*
73 Petitioner's Brief at 6, *Victor* (No. 92-8894).
74 Respondent's Brief at 5, *Victor* (No. 92-8894).
75 Petitioner's Brief at 8, *Victor* (No. 92-8894).
76 *Id.*

> reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts and circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.[77]

The jury found Victor guilty of first degree murder and use of a weapon to commit a felony.[78] A three-judge panel sentenced Victor to death on 26 August 1988 for the murder conviction and sentenced him to a consecutive sentence of twenty years for the felony weapon offense.[79]

Under Nebraska law, Victor was afforded a mandatory direct appeal of his conviction and sentence to the Nebraska Supreme Court.[80] On appeal, Victor raised six issues.[81] The court reviewed each of Victor's assignments of error and found each one was meritless. Thus, the court affirmed the convictions and sentences.[82]

Following the Nebraska Supreme Court's affirmance of Victor's convictions and sentence, Victor filed a petition for writ of certiorari with the United States Supreme Court on 16 November 1990, which the Court denied on 25 February 1991.[83]

Victor next filed a motion for post-conviction relief with the Ne-

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77 Nebraska Jury Instruction 14.08 [hereinafter NJI 14.08]; *Victor*, 114 S. Ct. at 1249.

78 State v. Victor, 457 N.W.2d 431, 435 (Neb. 1990).

79 State v. Victor, 494 N.W.2d 565, 568 (Neb. 1993).

80 *Id.*

81 Victor raised these issues: (1) the court should have suppressed statements by Victor to the Omaha police department; (2) NEB. REV. STAT. § 29-2523(1)(d) is unconstitutionally vague and allows for arbitrary application in a capital sentencing proceeding; (3) the three-judge sentencing panel improperly considered evidence of his 1964 manslaughter confession in support of its finding that the prosecution proved NEB. REV. STAT. § 29-2523(1)(a) beyond a reasonable doubt; (4) there was insufficient evidence to support a finding that the prosecution proved NEB. REV. STAT. § 29-2523(1)(d) beyond a reasonable doubt; (5) the three-judge sentencing panel erroneously found that he had not proven mitigating circumstance NEB. REV. STAT. § 29-2523(2)(g); and (6) the three-judge sentencing panel erred in finding the sentence of death was not disproportionate or excessive. *Victor*, 235 Neb. at 773. Section 29-2523(1)(d) reads: "[t]he murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standard of morality and intelligence." Section 29-2523(1)(a) allows the existence of an aggravating circumstance where the defendant had been "previously convicted of another murder or a crime involving the use of the threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity." Finally, § 29-2523(2)(g) reads: "At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication."

82 *Id.* at 796.

83 Brief for Respondent at 5, Victor v. Nebraska, 114 S. Ct. 1239 (1994) (No. 92-8894); Victor v. Nebraska, 498 U.S. 1127 (1991). Victor filed a supplement to his petition for a writ of certiorari on 15 January 1991, specifically addressing the issues raised in the Court's decision in *Cage* handed down on 13 November 1990.

braska District Court of Douglas County on 10 May 1991.[84] This motion for post-conviction relief was Victor's first *habeas corpus* proceeding at the trial level under the Nebraska Post-Conviction Act.[85] In this proceeding, Victor raised eight issues, including the contention that the trial court improperly instructed the jury on the law regarding the concept of reasonable doubt.[86] Victor argued that, based on the United States Supreme Court's reasoning in *Cage*,[87] he had been prejudiced by the trial court's reasonable doubt instruction.[88] The district court denied post-conviction relief, finding that the *Cage* decision was not handed down until Victor's conviction and affirmance of the conviction on appeal to the Nebraska Supreme Court.[89] Furthermore, since the United States Supreme Court failed to indicate whether the effect of its decision in *Cage* was retroactive, the district court determined that it should not apply the decision retroactively.[90]

Subsequently, Victor appealed the district court's denial of post-conviction relief to the Nebraska Supreme Court.[91] Victor made four claims in his appeal to the Nebraska Supreme Court, asserting primarily that the Nebraska District Court, in denying his motion for post-conviction relief, erred in failing to apply *Cage* retroactively with regard to the reasonable doubt jury instruction.[92] On 29 January 1993,

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84 Respondent's Brief at 6, *Victor* (No. 92-8894).

85 NEB. REV. STAT. §§ 29-3001 to 29-3004 (1993).

86 State v. Victor, 494 N.W.2d 565, 568 (Neb. 1993). Victor based his petition on alleged violations of the 4th, 5th, 6th, 8th, and 14th Amendments to the United States Constitution and alleged violations of article I, sections 3, 9, and 13 of the Nebraska Constitution. The other seven issues Victor argued were that (1) the reweighing process for aggravating and mitigating circumstances engaged in by the Nebraska Supreme Court was unconstitutional; (2) the Court improperly imposed the death penalty because the aggravating circumstance in NEB. REV. STAT. § 29-2523(1)(d) is vague and results in an arbitrary imposition of capital punishment; (3) the three-judge sentencing panel and the Nebraska Supreme Court erroneously refused to consider defendant's inability to conform his conduct to law because of mental defect or intoxication as required by NEB. REV. STAT. § 29-2523(2)(g); (4) neither the three-judge sentencing panel nor the Nebraska Supreme Court compared the facts of his case with other cases of same or similar circumstances to determine the proportionality of defendant's sentences with other cases; (5) the three-judge sentencing panel erroneously admitted defendant's confession to a 1964 manslaughter as the confession did not conform to Miranda requirements; (6) his confession to the Singleton murder was not voluntary, was a product of an unlawful arrest, and was obtained without a valid waiver of his Miranda rights; and (7) trial and appellate counsel was ineffective in failing to raise or in improperly raising each of the aforementioned issues. *Id.*

87 498 U.S. 39 (1990).

88 Brief for Petitioner at 9, Victor v. Nebraska, 114 S. Ct. 1239 (1994) (No. 92-8894).

89 *Id.*

90 *Id.*

91 Brief for Respondent at 6, Victor v. Nebraska, 114 S. Ct. 1239 (1994) (No. 92-8894).

92 Victor also argued that the court erred in (1) refusing to grant an evidentiary hearing; (2) failing to appoint counsel to represent him for his motion to vacate his sentence

the Nebraska Supreme Court, "finding no merit in the assignments of error properly before this court," affirmed the decision of the district court "in its entirety."[93] The court, relying on its decision in *State v. Morley*, rejected Victor's contention that the trial court's instruction on reasonable doubt suggested a higher degree of doubt than that required under the Fourteenth Amendment.[94] In *Morley*, the court upheld the constitutionality of a nearly identical reasonable doubt instruction.[95] The court held that Victor's assigned error had been decided by the *Morley* opinion and was, thus, meritless.[96] Victor filed a motion for rehearing on 8 February 1993.[97] On 10 March 1993, the Nebraska Supreme Court denied Victor's motion.[98]

Victor again filed a petition for a writ of certiorari to the United States Supreme Court on 1 June 1993, and on 28 September 1993, the Court granted the writ of certiorari with respect to "[w]hether the Nebraska Supreme Court erred in failing to reverse the trial court's refusal to retroactively apply *Cage*."[99]

IV. SUMMARY OF OPINIONS

In its consolidated opinion, the United States Supreme Court affirmed the judgments of the Nebraska Supreme Court in *Victor v. Nebraska* and the California Supreme Court in *Sandoval v. California*.[100]

A. MAJORITY OPINION

Justice O'Connor delivered the opinion of the Court.[101] The Court held that, "taken as a whole," the reasonable doubt instructions

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and convictions; and (3) finding that he had not been denied effective assistance of counsel. *Victor*, 494 N.W.2d at 568. In addition, Victor also sought relief based on the failure of previous counsel to disclose a conflict of interest in representing defendant and in failing to submit evidence in support of the pretrial motion for change of venue. *Id.* at 570.

93 *Id.* at 572.

94 474 N.W.2d 660 (Neb. 1991).

95 *Id.* at 663. In *Morley*, the Nebraska Supreme Court had found the language in the instruction distinguishable from the language found unconstitutional in *Cage*. The court held that the Court's decision in *Cage* did not require reversal of defendants' convictions, since the instruction given in *Morley* did not place the state's burden of proof below the required reasonable doubt standard. *Id.* at 670.

96 *State v. Victor*, 242 Neb. at 311.

97 Brief for Petitioner at 9, Victor v. Nebraska, 112 S. Ct. 1239 (1994) (No. 92-8894).

98 *Id.*

99 Victor v. Nebraska, 114 S. Ct. 39 (1993); Petitioner's Brief at 12, *Victor* (92-8894).

100 Victor v. Nebraska, 114 S. Ct. 1239, 1243 (1994). The Supreme Court consolidated these cases at 114 S. Ct. 40 (1994).

101 Justice O'Connor delivered the opinion for a unanimous Court with respect to Part II, and the opinion of the Court with respect to Parts I, III, and IV, in which Chief Justice Rehnquist and Justices Stevens, Scalia, Kennedy, and Thomas joined, and in which Justice Ginsburg joined with respect to Parts III-B and IV.

in *Victor* and in *Sandoval* properly communicated the idea of reasonable doubt.[102] The Court found no "reasonable likelihood" that the jury interpreted the instructions improperly.[103] Justice O'Connor also examined the attempts made by the California and Nebraska pattern jury instruction committees to define reasonable doubt in their respective jury instructions.[104]

Justice O'Connor first clarified the due process requirements concerning the reasonable doubt standard.[105] According to her analysis, "so long as the court instructs the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt . . . , the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof."[106] Following its precedent, the Court did not prescribe a certain definition of reasonable doubt for jury instructions.

As to the current state of the law, Justice O'Connor noted that, in *Cage*,[107] the Court held that the trial court's definition of reasonable doubt violated the Due Process Clause.[108] Subsequently, the Court in *Estelle v. McGuire*,[109] clarified that the proper inquiry as to whether the jury instruction is unconstitutional is "not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it."[110]

After reviewing the current case law on the constitutionality of jury instructions on reasonable doubt, Justice O'Connor stated that the constitutional question presented by the consolidated cases of *Victor* and *Sandoval* was "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard"[111] of proof beyond a reasonable doubt.[112]

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102 *Victor*, 114 S. Ct. at 1251 (quoting Holland v. United States, 348 U.S. 121, 140 (1954)).

103 *Id.*

104 *Id.* at 1242-51.

105 *Id.* at 1243.

106 *Id.*

107 498 U.S. 39 (1990).

108 *Victor*, 114 S. Ct. at 1243.

109 502 U.S. 62 (1991).

110 *Victor*, 114 S. Ct. at 1243.

111 The *Winship* standard requires the state to prove each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). For discussion of *Winship*, see *infra* notes 22 to 30 and accompanying text.

112 *Victor*, 114 S. Ct. at 1243.

1. Sandoval v. California

Justice O'Connor first looked to the reasonable doubt instruction the trial court gave to the jury in *Sandoval*.[113] According to Justice O'Connor, California's reasonable doubt instruction originated from a jury instruction Chief Justice Shaw of the Massachusetts Supreme Judicial Court gave in *Commonwealth v. Webster*.[114] In 1927 the California legislature adopted the *Webster* definition of reasonable doubt as the statutory definition,[115] and the trial court gave this instruction in *Sandoval*.[116]

Next, Justice O'Connor examined each of Sandoval's objections to the reasonable doubt instruction.[117] In a lengthy exposition of the eighteenth and nineteenth-century legal texts that define the concepts "moral evidence" and "moral certainty," she developed a historical context to evaluate the continuing validity of the phrases.[118] Although Justice O'Connor willingly conceded that the phrase "moral evidence" is "not a mainstay of the modern lexicon," she asserted that she did not think the phrase "means anything different today than it did in the 19th century."[119] Justice O'Connor found support for this conclusion in the fact that three modern dictionaries that define "moral evidence" provide definitions which are consistent with the original meaning.[120]

Finally, Justice O'Connor looked to the instruction given by the trial court in *Sandoval*, which provided that "everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt . . . ."[121] In reference to the phrase, "moral evidence," she stated that "in this sentence, [it] can only mean empirical evidence offered to prove such matters—the proof intro-

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113 *Id.* at 1244.

114 59 Mass. 295 (1850). The definition of reasonable doubt in *Webster* is as follows:

> What is reasonable doubt? . . . It is not mere possible doubt; because every thing relating to human affairs, and depending upon 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 jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty, of the truth of the charge.

Webster, 59 Mass. at 320; *Victor*, 114 S. Ct. at 1244.

115 *Victor*, 114 S. Ct. at 1244-45; CAL. PENAL CODE § 1096a (West 1994).

116 *Victor*, 114 S. Ct. at 1244.

117 *Id.* at 1245.

118 *Id.* at 1245-46.

119 *Id.* at 1246.

120 *Id.* In support of her conclusion, Justice O'Connor cited WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1168 (2d ed. 1979) ("based on general observation of people, etc. rather than on what is demonstrable"); COLLINS ENGLISH DICTIONARY 1014 (3d ed. 1991) (similar); 9 OXFORD ENGLISH DICTIONARY 1070 (2d ed. 1989) (similar).

121 *Victor*, 114 S. Ct. at 1246.

duced at trial."[122] Furthermore, Justice O'Connor found the phrase "unproblematic" in combination with other instructions steering the jurors to the evidence presented at trial.[123] Thus, she concluded that the phrase "moral evidence" would not inappropriately cause the jury to consider the ethics or morality of Sandoval's criminal acts.[124]

Justice O'Connor next addressed Sandoval's objection that the phrase "moral certainty" had changed meaning since the nineteenth century, which allowed the jury to convict on proof that did not meet the reasonable doubt standard.[125] Justice O'Connor readily admitted that, as "[w]ords and phrases can change meaning over time . . . , 'moral certainty,' standing alone, might not be recognized by modern jurors as a synonym for 'proof beyond a reasonable doubt.'"[126] Although Sandoval based his objection on dictionary definitions that defined the phrase in terms of probability,[127] Justice O'Connor determined that the "reasonable doubt standard is itself probabilistic."[128] The concern, Justice O'Connor said, should not be that the jury would take into account probability, but that the jury would understand the phrase to mean "something less than the very high level of probability required by the Constitution in criminal cases."[129]

Sandoval argued further that the phrase "moral certainty" allowed the jury to convict without restricting its consideration to the evidence adduced at trial.[130] Justice O'Connor distinguished the use of the phrase "moral certainty" in the instruction given in *Sandoval* from its use in the instruction the Court deemed unconstitutional in *Cage*. She asserted that in the *Cage* instruction "there was nothing else . . . to lend meaning to the phrase [moral certainty]."[131] In contrast, Justice O'Connor found that the surrounding instructions in *Sandoval* should have sufficiently directed the jury to base its conclusion on the evidence presented at trial.[132]

While holding that the use of the phrase "moral certainty" was constitutional, Justice O'Connor nevertheless stated that the Court

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122 *Id.*
123 *Id.* at 1247.
124 *Id.*
125 *Id.*
126 *Id.*
127 *See, e.g.*, Brief for Petitioner at 18-19, Sandoval v. California, 114 S. Ct. 1239 (1994) (No. 92-9049); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 756 (10th ed. 1993) (defines "moral certainty" as "probable though not proved"); WEBSTER'S NEW WORLD DICTIONARY 882 (3d college ed. 1988) (defines "moral certainty" as "based on strong probability").
128 *Victor*, 114 S. Ct. at 1247.
129 *Id.*
130 *Id.* at 1248.
131 *Id.*
132 *Id.*

did "not condone the use of the phrase."[133] Paying tribute to Sandoval's argument that the meaning of the phrase has changed since the nineteenth century, Justice O'Connor remarked that the common understanding of the phrase "moral certainty" may continue to change until it conflicts with the reasonable doubt standard.[134] Notwithstanding this veiled warning, Justice O'Connor found the phrase "moral certainty" constitutional because, "in the context of the instructions as a whole," the phrase did not make it "reasonably likely" that the jury understood the phrase to allow it to convict on proof lower than the reasonable doubt standard or on factors other than the government's proof.[135]

Justice O'Connor then briefly examined Sandoval's objection to the trial court's jury instruction that a reasonable doubt is "not a mere possible doubt."[136] Justice O'Connor rejected Sandoval's challenge of this phrase, determining that the sentence as a whole made clear that a reasonable doubt was to be based on reason, and that, even though everything "is open to some possible or imaginary doubt," such a doubt would not qualify as a reasonable doubt.[137]

2. Victor v. Nebraska

Justice O'Connor then turned to the jury instruction given by the trial court in *Victor*.[138] As in *Sandoval*, Justice O'Connor first looked to the historical underpinnings of the instruction. She traced the content of the *Victor* instruction both to the instruction given by Chief Justice Shaw in *Commonwealth v. Webster*,[139] and to a series of nineteenth-century Nebraska cases approving the use of reasonable doubt instructions and equating reasonable doubt with an "'actual doubt' that would cause a reasonable person to hesitate to act."[140]

Justice O'Connor examined each of the objections Victor raised to the reasonable doubt instruction.[141] Agreeing that the "substantial doubt" construction was "somewhat problematic," Justice O'Connor contrasted two definitions of "substantial" found in a modern dictionary, stating that, "[o]n the one hand, 'substantial' means 'not seeming or imaginary'; on the other, it means 'that specified to a large de-

133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.* at 1249.
138 *Id.*
139 59 Mass. 295 (1850).
140 *Victor*, 114 S. Ct. at 1249.
141 *Id.* at 1250-51.

gree.'"[142] Justice O'Connor determined that the latter, "'commonly understood'"[143] definition could imply that a greater degree of doubt is necessary for acquittal.[144] However, since the phrase "substantial doubt" was "'distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture,'" it was clear that the instruction did not misstate the reasonable doubt standard.[145] To support her conclusion that "substantial doubt" was acceptable, she noted that, in contrast to the court's instruction in *Victor*, the unconstitutional instruction in *Cage* did not distinguish between a substantial doubt and a fanciful doubt.[146] Additionally, the Court in *Cage* did not hold that the use of the phrase "substantial doubt" made the instruction unconstitutional.[147] Finally, without elucidating the reasoning for her conclusion, Justice O'Connor found that in the context of the court's instruction in *Victor* "substantial" implies an existence of a doubt rather than the magnitude of the doubt.[148] As a result, she found no cause for concern that the instruction possibly overstated the degree of doubt required for acquittal.[149]

Justice O'Connor gave an alternative justification for upholding the constitutionality of the reasonable doubt instruction, even if the equation of a reasonable doubt with a substantial doubt overstated the degree of doubt necessary to acquit.[150] Citing previous opinions by the Court that have approved similar definitions of reasonable doubt, Justice O'Connor found that the instruction's alternative definition of reasonable doubt, "doubt that would cause a reasonable person to hesitate to act," provided a "common-sense benchmark" for what should constitute substantial doubt.[151] Under this analysis, Justice O'Connor concluded that it was not reasonably likely that the jury would have believed the doubt necessary for acquittal to be "anything other than a reasonable one."[152]

Justice O'Connor next examined Victor's objection to the "moral certainty" portion of the instruction.[153] Again, Justice O'Connor de-

142 *Id.* at 1250 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (unabridged 1981)).
143 *Id.* (quoting *Cage*, 498 U.S. at 41).
144 *Id.*
145 *Id.* (quoting Brief for Petitioner at 11, *Victor v. Nebraska*, 114 S. Ct. 1239 (1994) (No. 92-8894) (quoting NJI 14.08)).
146 *Id.*
147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.*
151 *Id.*
152 *Id.*
153 *Id.* at 1250-51.

termined that the context of the phrase "moral certainty"—"such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused,"—increased the chance that the jury would interpret the phrase correctly.[154] Determining that the instructions equated a "doubt sufficient to preclude moral certainty with a doubt that would cause a reasonable person to hesitate to act," she concluded that since a person "morally certain of a fact would not hesitate to rely on it," that fact must have "been proven beyond a reasonable doubt."[155] According to Justice O'Connor, the language of the instruction as a whole ensured that the jury did not interpret the phrase "moral certainty" to mean that it could convict on proof that failed to satisfy the reasonable doubt standard or on factors other than the proof presented by the government at trial.[156] As in her discussion of the instruction given in *Sandoval*, Justice O'Connor discouraged the use of the phrase "moral certainty," but nonetheless asserted that its inclusion in the instruction the court in *Victor* gave did not diminish its constitutionality.[157]

Justice O'Connor summarily disposed of Victor's final objection to the reasonable doubt instruction that the reference to "strong probabilities" reduced the government's burden of proof. Again looking at the context of the phrase, Justice O'Connor found that the entire instruction, qualifying "strong probabilities" as "such probabilities [that] are strong enough to exclude any doubt of his guilt that is reasonable," cured any possible problem with the phrase.[158] To support her reasoning, Justice O'Connor cited the Court's opinion in *Dunbar v. United States*,[159] upholding an instruction that used identical language and decided that the century-old *Dunbar* was still controlling law.[160]

In affirming the judgment of the California Supreme Court in *Sandoval* and the judgment of the Nebraska Supreme Court in *Victor*, Justice O'Connor concluded that as a whole the reasonable doubt instructions "correctly conveyed the concept of reasonable doubt."[161] Thus, there was no reasonable likelihood that the juries in these two cases applied the jury instructions in an unconstitutional manner.[162]

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154 *Id.* at 1250.
155 *Id.* at 1250-51.
156 *Id.* at 1251.
157 *Id.*
158 *Id.*
159 156 U.S. 185 (1895).
160 Victor v. Nebraska, 114 S. Ct. 1239, 1251 (1994).
161 *Id.*
162 *Id.*

B. JUSTICE KENNEDY'S CONCURRENCE

Justice Kennedy concurred in full with the opinion of Justice O'Connor,[163] but wrote separately to express his belief that some of the phrases to which Sandoval and Victor objected "confuse far more than they clarify."[164] Pointing to California's use of the phrase "moral evidence," he stated that its inclusion in the reasonable doubt instruction is "indefensible," and, although the majority provided the derivation of the phrase, it is clear that "for jurors who have not had the benefit of the Court's research, the words will do nothing but baffle."[165] Nevertheless, he agreed with Justice O'Connor's determination that the use of the phrase "moral evidence" does not necessitate finding the California reasonable doubt instruction unconstitutional.[166] Justice Kennedy left open the possibility that the "inclusion of words so malleable, because so obscure, might in other circumstances have put the whole instruction at risk."[167]

C. JUSTICE GINSBURG'S OPINION CONCURRING IN PART AND CONCURRING IN THE JUDGMENT

Justice Ginsburg agreed that the reasonable doubt instructions in *Victor* and *Sandoval* satisfied the Constitution's due process requirement. In addition, the instructions conveyed to the jurors the idea that they should focus only on the evidence presented.[168] In her opinion, Justice Ginsburg addressed the issues raised by the instruction in Victor's appeal.

Apart from agreeing with the majority that the "moral certainty" phrasing "should be avoided as an unhelpful way of explaining what reasonable doubt means," Justice Ginsburg found two other features of the reasonable doubt instruction in *Victor* unhelpful.[169] First, Justice Ginsburg criticized the instruction's definition of reasonable doubt as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon."[170] Using published criticisms of the "hesitate to act" formulation as support,[171] Justice Ginsburg indicated that

163 *Id.* (Kennedy, J., concurring).
164 *Id.* (Kennedy, J., concurring).
165 *Id.* (Kennedy, J., concurring).
166 *Id.* (Kennedy, J., concurring).
167 *Id.* (Kennedy, J., concurring).
168 *Id.* at 1252 (Ginsburg, J., concurring).
169 *Id.* (Ginsburg, J., concurring).
170 *Id.* (Ginsburg, J., concurring).
171 *See* FEDERAL JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS 18-19 (1987) (commentary on instruction 21); Judge Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L.

the instruction's analogy between an individual's decision-making process in his or her personal affairs and a juror's decision-making process in deciding the guilt or innocence of a criminal defendant was inapplicable and ambiguous.[172]

Justice Ginsburg next turned to the instruction which informed the jury that it could "find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable."[173] Justice Ginsburg criticized such an instruction for its "uninstructive circularity."[174] As Justice Ginsburg succinctly stated, "Jury comprehension is scarcely advanced when a court 'defines' reasonable doubt as 'doubt . . . that is reasonable.'"[175]

These criticisms of particular portions of the reasonable doubt instruction in *Victor* led Justice Ginsburg to propose a definition of reasonable doubt, drafted by the Federal Justice Center, that she believed to be workable.[176] While noting that two of the Federal Courts of Appeals have deemed attempts at definition ill-advised, Justice Ginsburg rejected the idea that the trial court should not define reasonable doubt, because "even if definitions of reasonable doubt are necessarily imperfect, the alternative—refusing to define the concept at all—is not obviously preferable."[177]

Despite her criticism of the instructions given in *Victor*, Justice Ginsburg concluded that the instructions given in both *Victor* and *Sandoval* were constitutional.[178] In reaching this conclusion, she stated

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REV. 979 (1993).

172 *Victor*, 114 S. Ct. at 1252 (Ginsburg, J., concurring).

173 *Id.* (quoting NJI 14.08) (Ginsburg, J., concurring).

174 *Id.* (Ginsburg, J., concurring).

175 *Id.* (Ginsburg, J., concurring).

176 *Id.* at 1253 (Ginsburg, J., concurring). The text of the Federal Judicial Center's definition of reasonable doubt is as follows:

> 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.

FEDERAL JUDICIAL CTR., *supra* note 171, at 17-18.

177 *Victor*, 114 S. Ct. at 1252 (Ginsburg, J., concurring). In United States v. Adkins, 937 F.2d 947 (4th Cir. 1991), the court stated that "[t]his circuit has repeatedly warned against giving the jury definitions of reasonable doubt, because definitions tend to impermissibly lessen the burden of proof." Adkins, 937 F.2d at 950. In United States v. Hall, 854 F.2d 1036 (7th Cir. 1988), the court upheld the district court's refusal to provide a definition of reasonable doubt, despite the jury's request, because "at best, definitions of reasonable doubt are unhelpful to a jury . . . . An attempt to define reasonable doubt presents a risk without any real benefit." Hall, 854 F.2d at 1039.

178 Victor v. Nebraska, 114 S. Ct. 1239, 1253-54 (1994) (Ginsburg, J., concurring).

that the test used to evaluate the constitutionality of a reasonable doubt instruction is not whether the instruction is exemplary, but whether there is a reasonable likelihood that the jury correctly understood from the instruction the concept of reasonable doubt.[179]

D. JUSTICE BLACKMUN'S OPINION CONCURRING IN PART AND DISSENTING IN PART

Justice Blackmun concurred in the Court's opinion with respect to *Sandoval*, but dissented with respect to *Victor*.[180]

Discussing only the instruction in *Victor*, Justice Blackmun criticized the majority for its misapplication of the Court's opinion in *Cage*,[181] because he found "no meaningful difference" between the reasonable doubt instruction in *Victor* and the one in *Cage*.[182] Comparing the text of the *Cage* instruction with that of the *Victor* instruction, he found a strong similarity in both instructions' equations of "substantial doubt" with reasonable doubt, and references to "moral certainty" as opposed to "evidentiary certainty."[183] While acknowledging that the *Victor* instruction does not include the phrase "grave uncertainty," found objectionable by the Court in the *Cage* instruction, Justice Blackmun found that the *Victor* instruction "contains language that has an equal potential to mislead."[184]

First, Justice Blackmun criticized Justice O'Connor's opinion for attempting to distinguish the "substantial doubt" language in the *Victor* instruction from that in the *Cage* instruction.[185] Starting with Justice O'Connor's concession that "substantial," as it is commonly un-

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179 *Id.* (Ginsburg, J., concurring).

180 *Id.* at 1259 (Blackmun, J., concurring in part and dissenting in part). Justice Souter joined Justice Blackmun except with respect to Justice Blackmun's support for vacating the death sentences in both cases per his dissent in *Callins v. Collins*, 114 S. Ct. 1127 (1994).

181 498 U.S. 39 (1990).

182 *Victor*, 114 S. Ct. at 1254. The reasonable doubt instruction given in *Cage* is 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 founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such a 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.

Cage, 498 U.S. at 40.

183 *Victor*, 114 S. Ct. at 1259 (Blackmun, J., concurring in part and dissenting in part).

184 *Id.* at 1255-56 (Blackmun, J., concurring in part and dissenting in part).

185 *Id.* (Blackmun, J., concurring in part and dissenting in part).

derstood, means "that specified to a large degree," Justice Blackmun rejected her assertion that the jury would not have interpreted substantial in this manner because, in contrast to its use in *Cage*, the phrase "substantial doubt" was used to distinguish reasonable doubt from mere conjecture.[186] Instead, he asserted that the instruction in *Cage* did use the phrase "substantial doubt" to distinguish reasonable doubt from "mere possible doubt," and that it was not the instruction's failure to provide the "appropriate contrasting language" that doomed the instruction in *Cage*.[187] In Justice Blackmun's view, the Court found the instruction in *Cage* unconstitutional simply because "'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard."[188]

Next, Justice Blackmun attacked the majority's assertion that the instruction in *Cage* was flawed only because of the combined use of the phrases "substantial doubt" and "grave uncertainty."[189] Looking to the Court's language in *Cage*, he dismissed this interpretation of the *Cage* decision, stating that the Court in *Cage* had not been preoccupied with the combined use of these two phrases.[190] Rather, the Court declared the instruction in *Cage* unconstitutional simply because "substantial" suggests a higher degree of doubt.[191] According to Justice Blackmun, the Court in *Cage* "endorsed the universal opinion" of the federal appellate courts that equating "substantial doubt" with reasonable doubt misstates the necessary degree of doubt under the reasonable doubt standard.[192]

Justice Blackmun then rebutted Justice O'Connor's assertion that the instruction in *Victor*, in contrast to the instruction in *Cage*, was saved by providing an alternative definition of reasonable doubt, namely, hesitation to act.[193] While noting his skepticism of the helpfulness of the "hesitate to act" formulation, Justice Blackmun concluded that the "existence of an 'alternative' and accurate definition of reasonable doubt somewhere in the instruction does not render the instruction lawful if it is 'reasonably likely' that the jury would rely

186 *Id.* at 1256 (Blackmun, J., concurring in part and dissenting in part).

187 *Id.* (Blackmun, J., concurring in part and dissenting in part).

188 *Id.* (Blackmun, J., concurring in part and dissenting in part).

189 *Id.* (Blackmun, J., concurring in part and dissenting in part).

190 *Id.* (Blackmun, J., concurring in part and dissenting in part).

191 *Id.* (Blackmun, J., concurring in part and dissenting in part).

192 *Id.* at 1256-57 (Blackmun, J., concurring in part and dissenting in part).

193 *Id.* at 1257 (Blackmun, J., concurring in part and dissenting in part). Justice O'Connor argued that, with this alternative definition, the jury would not have interpreted "substantial doubt" to mean "specified to a large degree." *Id.* at 1250.

on the faulty definition during its deliberations."[194] Justice Blackmun illustrated that "the instruction in *Cage* contained proper statements of the law . . . , but this language could not salvage the instruction since it remained reasonably likely that . . . the jury understood the instruction to require 'a higher degree of doubt than is required for acquittal under the reasonable doubt standard.'"[195]

Turning to the majority's discussion of the "strong probabilities" language in the instruction in *Victor*, Justice Blackmun used Justice O'Connor's own mandate that, "'[t]aken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury,'" to refute her dismissal of the phrase's harmful effects.[196] Justice Blackmun criticized the majority for accepting the "strong probabilities" language since, "[c]onsidering the instruction in its entirety, . . . the 'strong probabilities' language increased the likelihood that the jury understood 'substantial doubt' to mean 'to a large degree.'"[197] Associating the word probability with "likelihood," Justice Blackmun concluded that a jury could have a substantial doubt about a defendant's guilt but still convict on the "strong probabilities" of the case where the jury considered it "likely" that the defendant committed the crimes charged.[198] Justice Blackmun acknowledged that the instruction in *Victor* qualified the "strong probabilities" language with language stating that "strong probabilities" are to be "'strong enough to exclude any doubt of his guilt that is reasonable.'"[199] However, Justice Blackmun found this qualification ineffectual since the succeeding sentence defines a reasonable doubt as a "substantial doubt."[200] In this configuration, the purported clarification of the "strong probabilities" language only adds more confusion.[201]

Finally, Justice Blackmun took issue with the reference to "moral certainty" in the instruction in *Victor*.[202] Turning again to *Cage*, Justice Blackmun noted that the Court condemned the instruction in *Cage* for its reference to "moral certainty," because of a "real possibility that such language would lead jurors reasonably to believe that they could base their decision to convict upon moral standards or emotion in

194 *Id.* at 1257 (Blackmun, J., concurring in part and dissenting in part) (citing Boyde v. California, 494 U.S. 370 (1990)).

195 *Id.* (Blackmun, J., concurring in part and dissenting in part) (citing Cage v. Louisiana, 498 U.S. 39 (1990)).

196 *Id.* at 1257-58 (Blackmun, J., concurring in part and dissenting in part).

197 *Id.* at 1258 (Blackmun, J., concurring in part and dissenting in part).

198 *Id.* (Blackmun, J., concurring in part and dissenting in part).

199 *Id.* (Blackmun, J., concurring in part and dissenting in part).

200 *Id.* (Blackmun, J., concurring in part and dissenting in part).

201 *Id.* (Blackmun, J., concurring in part and dissenting in part).

202 *Id.* at 1258-59 (Blackmun, J., concurring in part and dissenting in part).

addition to or instead of evidentiary standards."[203] In Justice Blackmun's view, the "moral certainty" language in the instruction in *Victor* created the same problems. Indeed, Justice Blackmun found that its use in conjunction with the "strong probabilities" and "substantial doubt" language was "mutually reinforcing, both overstating the degree of doubt necessary to acquit and understating the degree of certainty required to convict."[204]

For these reasons, Justice Blackmun concluded that the Court should have reversed Victor's conviction and remanded it for a new trial.[205]

In keeping with his dissent in *Callins v. Collins*,[206] Justice Blackmun dissented from the affirmance of the judgment of the Supreme Court of California. Although concurring in the majority's opinion with respect to *Sandoval*, he stated that the Court should vacate Sandoval's death sentence.[207] He also stated that the Court should vacate Victor's death sentence regardless of whether the instruction in *Victor* was constitutional.[208]

V. ANALYSIS

The Court incorrectly decided both *Victor* and *Sandoval*. In rejecting Victor's and Sandoval's constitutional challenges of the definition of reasonable doubt in their respective jury instructions, the Court improperly restricted its recent unanimous holding in *Cage* to its facts. In determining that the jury instructions were constitutional, the Court failed to address frankly the merits of these appeals in light of its decision in *Cage*, and in light of a common-sense understanding of reasonable doubt.

The Court relied on eighteenth and nineteenth-century cases and texts to analyze the manner in which a contemporary jury would understand an instruction.[209] Adopting such an approach, the Court gave insufficient weight to the fact that the meanings of the objected-

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203 *Id.* at 1258 (Blackmun, J., concurring in part and dissenting in part).

204 *Id.* at 1258-59 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun argued that it is the combination of these phrases that distinguished the instruction in *Victor* from the instruction in *Sandoval*. In *Sandoval*, although the trial court used the phrases "moral certainty" and "moral evidence," it did not use them in combination with phrases such as "substantial doubt" and "strong probabilities" that overstate the degree of doubt required under the reasonable doubt standard.

205 *Id.* at 1259 (Blackmun, J., concurring in part and dissenting in part).

206 114 S. Ct. 1127 (1994). In his dissent from the denial for a writ of certiorari in *Callins*, Justice Blackmun concluded that the death penalty, as currently administered, was unconstitutional. *Id.*

207 *Victor*, 114 S. Ct. at 1259 (Blackmun, J., concurring in part and dissenting in part).

208 *Id.* (Blackmun, J., concurring in part and dissenting in part).

209 *Id.* at 1245-46, 1251.

to phrases in both instructions have changed over time and that the instructions may not provide twentieth-century jurors with an adequate understanding of the reasonable doubt standard. In fact, as Justice Kennedy hinted, the derivation of a legal phrase is irrelevant to the meaning it suggests in common usage.[210] Furthermore, the Court did not address the possibility that the average juror may have never had a clear understanding of the language of the instructions—even when initially written. Through the obfuscation of a long discussion concerning the history of the instructions, the Court avoided honestly answering whether the instructions uphold the constitutional mandate to allow conviction only where the prosecution has proven guilt beyond a reasonable doubt.

A. *SANDOVAL V. CALIFORNIA*

In evaluating the instruction in *Sandoval*, the Court traced its genesis to the definition by Chief Justice Shaw of the Massachusetts Supreme Judicial Court given in 1850 in *Commonwealth v. Webster*.[211] The Court stressed the repeated approval of the *Webster* definition by nineteenth-century and early twentieth-century courts as evidence of its long-term support,[212] but ignored contemporaneous and subsequent criticism of that definition. In particular, the Court failed to respond to criticism of the definition's reliance on "moral evidence" and "moral certainty." The Court accepted the *Webster* definition without analyzing whether it was sound, as if the definition's repeated use overcomes any of its shortcomings.

As early as 1876, a contemporary of Shaw, Judge John Wilder May, characterized the *Webster* definition as "unsuccessful" and "unfortunate."[213] Asserting that the "rules of law should be stated with unmistakable precision," May decried courts' adoption of the "moral certainty" language found in the *Webster* definition.[214] Tracing the origin of the use of "moral certainty" in legal works to its inclusion by Thomas Starkie in his treatise on evidence,[215] May criticized the use of

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210 *Id.* at 1251 (Kennedy, J., concurring).

211 *Id.* at 1244 (citing Commonwealth v. Webster, 59 Mass. 295 (1850)). The *Webster* definition of reasonable doubt is provided *supra* note 114.

212 *Victor*, 114 S. Ct. at 1244. In the Court's opinion, Justice O'Connor cites Perovich v. United States, 205 U.S. 86, 92 (1907); People v. Paulsell, 115 Cal. 6, 12 (1896); People v. Strong, 30 Cal. 151, 155 (1866).

213 May, *supra* note 7, at 663.

214 *Id.*

215 In his treatise on evidence, Starkie equated moral certainty with proof beyond a reasonable doubt, stating:

> Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact.... Even the most direct evidence can produce nothing more than such a high degree of

the phrase in *Webster*, asking, "why perplex the administration of justice by interjecting this new element of uncertainty . . . [for w]hat possible end can such a heaping up of indefinable terms serve, but to confuse and baffle rather than enlighten and aid the average juror?"[216] Clearly, May considered the instruction to be counterproductive.

Similarly, Wigmore, in his treatise on evidence, criticized the *Webster* definition for its lack of clarity and utility.[217] Though recognizing the repeated use of the definition, Wigmore wrote that "when anything more than a simple caution and a brief definition is given, the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is likely to be rather confusion, or, at the least, a continued incomprehension."[218] Thus, Wigmore believed the definition did not help juries decide the guilt or innocence of a defendant.

The most biting criticism of the *Webster* definition appeared in a 1906 article in which Professor Trickett ridiculed the circularity of the definition. Arguing that the definition did not provide the juror with a comprehensible definition of reasonable doubt, Trickett stated that it "is impossible to see how an ordinary juror is to be aided by being told that if he is morally certain of the prisoner's guilt, to convict him."[219] Here, only fifty years after *Webster*, Trickett deemed "moral certainty" to be a failure in elucidating the meaning of reasonable doubt.

Furthermore, the Supreme Court, in *Hopt v. Utah*,[220] criticized the *Webster* definition. The Court, holding a reasonable doubt jury instruction[221] constitutional, distinguished the instruction at issue from the one in *Commonwealth v. Webster*.[222] The Court in *Hopt* stated,

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probability as amounts to moral certainty.

THOMAS STARKIE, LAW OF EVIDENCE 478 (London, J & W.T. Clarke) (2d ed. 1833).

216 May, *supra* note 7, at 658.

217 9 WIGMORE § 2497, at 405-09 (Chadbourn rev. 1981).

218 *Id.* at 406-08.

219 William Trickett, *Preponderance of Evidence, and Reasonable Doubt*, 10 FORUM 75, 85 (1906).

220 120 U.S. 430 (1887).

221 The reasonable doubt instruction in *Hopt* was as follows:

> The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

Hopt, 120 U.S. at 439.

222 *Id.* at 440.

"[t]he difficulty with [the *Webster*] instruction is, that the words 'to a reasonable and moral certainty' add nothing to the words 'beyond a reasonable doubt;' one may require explanation as much as the other."[223] The Court in *Hopt*, more familiar with nineteenth-century jurors' ability to comprehend definitions of legal terms than the Rehnquist Court, felt that the use of "moral certainty" made the instruction problematic.

Without acknowledging these early criticisms of the *Webster* definition, the Court looked at nineteenth-century sources affirming the *Webster* instruction to support its conclusion that the instruction in *Sandoval* was constitutional. The Court's selective reading of these sources suggests that it was straining to uphold constitutionally suspect convictions.

Nevertheless, the Court acknowledged that the phrases "moral evidence" and "moral certainty" may not be as accessible to the modern juror as these phrases were to jurors in the nineteenth century.[224] Justice O'Connor agreed that: (1) the phrase "moral evidence" is not a "mainstay of the modern lexicon"; (2) "'moral certainty,' standing alone, might not be recognized by modern jurors as a synonym for 'proof beyond a reasonable doubt'"; and (3) "[a]s modern dictionary definitions attest, the common meaning of the phrase [moral certainty] has changed" since the nineteenth century.[225] The Court should not have downplayed these concerns, especially after acknowledging historic ambiguity of the phrase. The Court glossed over the admitted problems with the language in the instruction in *Sandoval*, claiming that the instruction as a whole was acceptable, even though the components of the instruction were not acceptable.

B. *VICTOR V. NEBRASKA*

In reaching its conclusion in *Victor*, the Court focused on differentiating Nebraska's reasonable doubt instruction from the reasonable doubt instruction given in *Cage*. The Court's emphasis on distinguishing *Cage* from *Victor* suggests that the Court wanted to limit the *Cage* decision to its facts, and thus, only the precise wording given in *Cage* itself would prompt the Court to declare an instruction unconstitutional. By limiting *Cage* in this way, the Court has taken on the task of reviewing claims disputing the constitutionality of reasonable doubt jury instructions on a case-by-case basis, instead of providing decisions with precedential value. As in its analysis in *Sandoval*, the

223 *Id.* (quoting Commonwealth v. Webster, 59 Mass. 295, 320 (1850)).
224 Victor v. Nebraska, 114 S. Ct. 1239, 1246-48 (1994).
225 *Id.*

Court again failed to acknowledge the underlying issue: the language in the instruction in *Victor* does not adequately convey the concept of reasonable doubt to the modern juror.

After noting that much of the instruction derived from the *Webster* definition,[226] the Court dismissed Victor's challenge that the equation of reasonable doubt with a substantial doubt overstated the degree of doubt necessary for acquittal.[227] While acknowledging that the "construction is somewhat problematic," the Court minimized the fact that a modern dictionary defines "substantial" as "specified to a large degree."[228] The Court recognized that such a definition could lead a juror to believe that the degree of doubt required for acquittal was greater than that required under the reasonable doubt standard.[229] Nevertheless, the Court, without elucidating its reasoning, merely assumed that jurors would not consider substantial to mean large because the "context [of the definition] makes clear that 'substantial' is used in the sense of existence rather than magnitude of the doubt."[230]

The Court baldly stated that the "moral certainty" language of the instruction in *Victor* did not render the instruction unconstitutional, as was the case in *Cage*, because the "problem in *Cage* was that the rest of the instruction provided insufficient context to lend meaning to the

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226 *See* discussion *infra* notes 211 to 225 and accompanying text.

227 *Victor*, 114 S. Ct. at 1249-50.

228 *Id.* at 1250 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (unabridged 1981)).

229 In United States v. Atkins, 487 F.2d 257 (8th Cir. 1973), the court stated that it did not approve of the equation of reasonable doubt and substantial doubt. *Atkins*, 487 F.2d at 260. In clarifying this point, the court noted that in an earlier state case, defense counsel had illustrated the difference between "substantial" doubt and "reasonable" doubt by pointing out how differently a person would feel if a person questioned the doctor as to the prospects for a successful outcome of a serious operation and the doctor told him there was a reasonable chance of success as opposed to a substantial chance of success. *Id.* at 260 n.2.

230 *Victor*, 114 S. Ct. at 1250. No case prior to *Victor* makes the same distinction between "magnitude of the doubt" and "existence" of the doubt as Justice O'Connor made in concluding that the phrase "substantial doubt" did not overstate the degree of doubt necessary for acquittal. However, since the Court's decision in *Victor*, lower courts have used the Court's reasoning to find reasonable doubt jury instructions with similar language constitutional. In Middleton v. Evatt, 855 F. Supp. 837 (1994), the court denied defendant's habeas corpus petition in which the defendant challenged the trial court's use of the term "substantial doubt" in its reasonable doubt jury instruction. *Middleton*, 855 F. Supp. at 852. Although noting that the Court in *Victor* acknowledged that the construction "substantial doubt" was "somewhat problematic," the court in *Middleton* cited the Court's reasoning in *Victor* and found that, in the context of the sentence in which it was contained and in the context of the entire instruction, the phrase was constitutional. *Id. See also* State v. Smith, 637 So. 2d 398, 406 (La. 1994) (court found reasonable doubt jury instruction constitutional, finding that the phrase "substantial doubt" was used in the "sense of the existence rather than the magnitude or degree of the doubt necessary to acquit").

phrase" and the instruction in *Victor* is not "similarly deficient."[231] The instruction in *Cage* also contained accurate statements of law, but was found unconstitutional, and the Court does not explain how correct statements of law can cure an improper statement of law found in the same instruction. Justice Blackmun soundly argued that such transformation of an instruction's lawfulness cannot occur "if it is 'reasonably likely' that the jury would rely on the faulty definition during its deliberations."[232]

As in its analysis of the language in the instruction in *Sandoval*, the Court used nineteenth-century support to find the instruction in *Victor* constitutional. The Court rejected Victor's challenge to the use of "strong probabilities" in the instruction, basing its decision on its 1895 holding in *Dunbar v. United States*.[233] In *Dunbar*, the Court upheld a reasonable doubt jury instruction that directed the jury to decide the defendant's guilt or innocence "upon the strong probabilities of the case."[234] Notably, however, no state besides Nebraska has consistently used "strong probabilities" in its reasonable doubt jury instruction in the twentieth century, making the Court's use of *Dunbar* as support for its acceptance of the "strong probabilities" language all the more unconvincing.[235]

The reasonable doubt instruction in *Victor* failed to provide the jury with comprehensible statements of the law, thus allowing the jury to convict Victor without an adequate understanding of what constitutes reasonable doubt.

C. REASONABLE DOUBT INSTRUCTIONS IN THE STATE COURTS

The Court did not acknowledge that Nebraska's reasonable doubt jury instruction in *Victor* and California's jury instruction in *Sandoval* are in the minority among states in their use of the phrases "moral certainty" and "moral evidence." Numerous state courts have held that language similar to that found in *Sandoval* and *Victor* may mislead jurors to consider issues of morality in determining a defend-

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231 *Victor*, 114 S. Ct. at 1250.

232 *Id.* at 1257 (Blackmun, J., concurring in part and dissenting in part) (citing Boyde v. California, 494 U.S. 370, 380 (1990)).

233 156 U.S. 185, 199 (1895).

234 *Id.* at 199.

235 Ohio also used the phrase "strong probabilities" in its reasonable doubt jury instructions, but it used the phrase to tell the jury that if it found that "there are only strong probabilities of guilt," then it was to acquit. *See* State v. Theisen, 108 N.E.2d 854 (Ohio Ct. App. 1952); State v. Seneff, 435 N.E.2d 680 (Ohio Ct. App. 1980). Ohio's current instruction does not include "strong probabilities" language. Ohio Jury Instructions, §403.50 Reasonable Doubt (Anderson 1993). The Nebraska reasonable doubt instruction, as revised in 1992, also now omits the "strong probabilities" language objected to in *Victor*. NJI2d Crim. 2.0 Reasonable Doubt (1992).

ant's guilt, not just evidence given at trial.[236] Furthermore, of the forty-four states that have a pattern[237] or a commonly used reasonable doubt instruction,[238] only six use instructions that contain the phrases

236 The North Carolina Supreme Court in *State v. Bryant*, 432 S.E.2d 291 (N.C. 1993), reversed a conviction where the reasonable doubt instruction included "moral certainty" language, finding that "[a] jury instruction which emphasizes what is good or bad—a moral judgment, rather than truth—an evidentiary judgment, is inconsistent" with the proper role of a jury. The court further noted that "moral certainty" language "increases the possibility that a jury may convict [a defendant] because the jury believes he is morally guilty without regard to the sufficiency of the evidence." *Id.* at 297. In *State v. Manning*, 409 S.E.2d 372 (S.C. 1991), the South Carolina Supreme Court reversed a defendant's conviction, holding that the reasonable doubt jury instruction that defined certainty beyond a reasonable doubt and moral certainty as the same, misled the jury "in that it allows a juror to base a finding of guilt upon a subjective feeling rather than upon an evaluation of the evidence." *Id.* at 374. In *Vance v. State*, 416 S.E.2d 516 (Ga. 1992), the Supreme Court of Georgia, holding that a superseded jury instruction that contained "moral certainty" language was not reversible error, stated that such language is "unnecessary." *Id.* at 518 n.5. The court added that "[w]hat is perceived as 'moral' may differ from group to group, from class to class, and from individual to individual. This diversity renders any precise definition of 'moral certainty' elusive, and any uniformity of interpretations by jurors unlikely." *Id.*

237 Pattern jury instructions emerged in the 1930s as a response to the increasingly technical nature of jury instructions given by trial courts which were seeking to avoid reversal. *See* STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM 230 (1994); Schwarzer, *supra* note 19, at 736. "Pattern jury instructions, sometimes known as standard, model, uniform, approved, or recommended jury instructions, are designed to be accurate and impartial statements of the law . . . ." Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 78 n.8 (1988). These pattern instructions are generally drafted by the judges of a state's supreme court, state bar association, judicial council, or, more rarely, an administrative office of a court or by private effort. *Id.* Pattern instructions have several goals: (1) to save the court and counsel time in the preparation of jury instructions; (2) to improve the accuracy of the instructions, and thus, to reduce the number of appeals and reversals based on challenges to jury instructions; (3) to eliminate argumentative instructions prepared by each side's counsel; and (4) to improve jury comprehension. Schwarzer, *supra* note 19, at 737-38. *See also* ROBERT J. NIELAND, PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM 2-3, 13 (1979).

238 Although outside the scope of this note, federal courts also use pattern jury instructions. One frequently cited instruction does not use the phrases "moral certainty" and "moral evidence." It reads:

> A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

HON. EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS—CIVIL AND CRIMINAL, §12.10 Presumption of Innocence, Burden of Proof, and Reasonable Doubt (4th ed. 1992). For other pattern reasonable doubt jury instructions, for the various federal circuits, see, for example, COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS WITHIN THE EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS, 3.11 Reasonable Doubt (1994); COMMITTEE ON MODEL JURY INSTRUCTIONS, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT, 3.03 Reasonable Doubt—Defined (1992); SIXTH CIRCUIT DIST. JUDGES ASS'N PATTERN CRIMINAL JURY INSTRUCTION COMM., PATTERN CRIMINAL JURY INSTRUCTIONS, 1.03 Presumption of Innocence, Burden of Proof, Reasonable Doubt

"moral certainty" or "moral evidence" or both.[239] The six states still consistently using this language include Massachusetts,[240] California,[241] Idaho,[242] North Dakota,[243] Ohio,[244] and Tennessee.[245]

(1991).

239 Nebraska's reasonable doubt jury instruction, NJI 14.08, challenged in *Victor*, was revised in 1992, and the revised reasonable doubt instruction no longer contains the phrase "moral certainty." The reasonable doubt instruction reads as follows:

> A reasonable doubt is one based upon reason and common sense after careful and impartial consideration of all the evidence. Proof beyond a reasonable doubt is proof so convincing that you would rely and act upon it without hesitation in the more serious and important transactions of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

NJI2d Crim. 2.0 Reasonable Doubt (1992). The Comment to the instruction stated that the goal of the revised instruction was to "achieve juror comprehension through instructions stated simply, directly, and in plain language." *Id.*

240 The Massachusetts reasonable doubt jury instruction is a modernized version of the *Webster* definition. It reads as follows:

> What is reasonable doubt? The term is often used and probably pretty well understood, though it is not easily defined. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt, for everything in the lives of human beings is open to some possible or imaginary doubt. A charge is proved beyond a reasonable doubt if, after you have compared and considered all the evidence, you have in your minds an abiding conviction, to a moral certainty, that the charge is true.

Massachusetts Model Jury Instructions 2.05 (1988 ed.).

241 California uses CALJIC 2.90, the reasonable doubt instruction at issue in *Sandoval*. *See supra* note 53 and accompanying text.

242 Idaho's reasonable doubt instruction, currently approved in case law, reads as follows:

> A reasonable doubt is a doubt based upon evidence or lack of evidence and upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs . . . . If after going over in your minds the entire case, you have an abiding conviction, to a moral certainty, of the truth of the charge, then you are convinced beyond a reasonable doubt.

State v. Hoffman, 851 P.2d 934 (1993); State v. Rhoades, 822 P.2d 960 (1991).

243 North Dakota uses the following reasonable doubt instruction:

> The phrase 'reasonable doubt' means what the words imply. It is a doubt based on reason arising from a thorough and impartial consideration of all the evidence in the case. It is that state of mind in which you do not feel an abiding conviction amounting to a moral certainty of the truth of the charge. While you cannot convict the Defendant on mere surmise or conjecture, neither should you go outside the evidence to imagine doubts to justify acquittal. If, after careful deliberation, you are convinced to a moral certainty that the Defendant is guilty of the crime charged, then you are satisfied beyond a reasonable doubt.

State Bar Ass'n of North Dakota, North Dakota Pattern Jury Instruction—Criminal, NDJI-Criminal 2002 (1990).

244 Ohio uses the following reasonable doubt instruction:

> Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the charge. Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

Ohio Jury Instructions, § 403.50 Reasonable Doubt (Anderson 1993).

Though states have increasingly moved away from this language, the Court's decision may reverse that trend.[246] Although the Court expressed concern that some of the phrases in the instructions were "not . . . mainstay[s] of the modern lexicon," and had "lost . . . historical meaning," and were "somewhat problematic," the Court's decision allows state courts to continue using the challenged phrases. State courts may now point to the *Victor* and *Sandoval* decision as an indication that even though the Court may not advocate the use of such phrases, such use will not render the instructions unconstitutional.

D. THE COURT'S MOTIVATION

Even though the Court seemed reticent in its approval of some of the individual phrases contained in the reasonable doubt instructions, the Court stated, in its discussion of the instruction in *Sandoval*, that it was unable to hold the reasonable doubt jury instructions unconstitutional because of its lack of supervisory power over the state courts.[247] The Court failed to acknowledge that in *Cage*, its most recent decision evaluating a reasonable doubt instruction, the Court did exercise its supervisory power over the state courts. When the Court found in *Cage* that there was a possibility that the jurors could have interpreted the reasonable doubt instruction incorrectly and therefore may have convicted Cage on a degree of proof lower than that required under

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[245] Tennessee's reasonable doubt instruction reads as follows:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense.

Committee on Pattern Jury Instructions (Criminal) of the Tennessee Judicial Conference, Tennessee Pattern Jury Instructions—Criminal 2.03 Reasonable Doubt (1992).

[246] Since the Court's decision in *Victor* and *Sandoval*, numerous state courts have used the decision, despite the Court's suggestion that some of the phrases used in the *Victor* and *Sandoval* instructions were troublesome, to support their finding reasonable doubt jury instructions constitutional. In State v. Moseley, 445 S.E.2d 906 (N.C. 1994), the North Carolina Supreme Court affirmed Moseley's death sentence, holding the reasonable doubt instruction constitutional despite its use of phrases such as "moral certainty" and "substantial misgivings." *Moseley*, 445 S.E.2d at 910. In reaching this conclusion, the court overruled its decision in State v. Bryant, 432 S.E.2d 291 (N.C. 1993), in which the court had awarded a new trial for errors in a jury instruction similar to the one given in *Moseley*. *Moseley*, 445 S.E.2d at 910. *See also* Commonwealth v. Gagliardi, 638 N.E.2d 20, 24 (Mass. 1994) (instruction used the phrase "moral certainty" repeatedly); Pettyjohn v. State, 885 S.W.2d 364, 365 (Tenn. Crim. App. 1994) (instruction stated that moral certainty was required); People v. Miller, 33 Cal. Rptr. 2d 663, 666 (1994) (trial court used CALJIC 2.90).

[247] In United States v. Hastings, 461 U.S. 499 (1983), the Court made clear that, through its supervisory powers, the Court "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress . . . [as a means to] preserve judicial integrity." *Id.* at 505.

the reasonable doubt standard, there was no concern that the Court lacked supervisory power over the state courts.

An argument made in the respondent's brief in *Victor* points to another possible motive for these two decisions. The Court may have been concerned that a contrary decision would lead to innumerable appeals by state prisoners seeking retroactive application of the decision.[248] The Court would then have to review numerous convictions or have its contrary decision result in the reversal of numerous convictions by lower courts because of faulty reasonable doubt jury instructions.[249] Since constitutionally deficient reasonable doubt jury instructions cannot be analyzed under the harmless error inquiry, as made clear in *Sullivan*,[250] this result might require relitigating a multitude of cases. To avoid this burden, the Court contented itself with warnings in the hope of spurring revision of questionable reasonable doubt jury instructions.

Furthermore, the prospect of numerous retrials brings with it the potential release of numerous defendants, and this possibility likely weighed heavily in the Court's deliberation of *Victor* and *Sandoval*—especially in light of the particularly brutal facts of these cases. In such cases, the Court might have been particularly hesitant to risk the defendants' retrial and possible release. On balance, however, the prospect of numerous retrials also brings with it the potential release of wrongfully convicted inmates. For this reason, to consider that a contrary decision could lead to the release of numerous defendants would be antithetical to the reasons for the adherence to the reasonable doubt standard cited in *Winship*. The Court in *Winship* highlighted its interest in reducing the risk of wrongful conviction due to factual error, and its interest in upholding community confidence in the criminal justice system, by avoiding the conviction of innocent people. To abide by these necessary interests, consideration of distasteful consequences, such as the reviewing of numerous convictions and the possible release of criminal defendants, cannot take precedence.

E. FUTURE OF REASONABLE DOUBT INSTRUCTIONS

The Court failed to take advantage of an opportunity to solve the

248 Brief for Respondent at 38, Victor v. Nebraska, 114 S. Ct. 1239 (1994) (No. 92-8894).

249 The Government, in its brief in *Sandoval*, argued that a contrary ruling by the Court would "needlessly impose[ ] significant retrial costs upon society, likely will cause the release from custody of many of the worst individuals our criminal justice system has been able to identify and isolate, and thus will ultimately reduce the public safety." Brief for Respondent at 16, Sandoval v. California, 114 S. Ct. 1239 (1994) (No. 92-9049).

250 *See Sullivan*, 113 S. Ct. 2078, 2082 (1993).

confusion as to reasonable doubt jury instructions. By merely relying on nineteenth-century approval of language similar to the instruction in *Sandoval* and by simply distinguishing the arrangement of words in the instruction in *Victor* from that in the instruction in *Cage*, the Court failed to set out an appropriate definition of the reasonable doubt standard. Although it may not be the role of the Supreme Court to dictate the precise definition of reasonable doubt to state court juries, the Supreme Court has rejected the role it so recently assumed in *Cage*, in which the Court explicitly rejected language contained within the instruction.[251] Without guidance from the Court, there is no clear future for reasonable doubt instructions. State courts must independently determine the appropriate reasonable doubt instruction, since the Court has not given them language that unquestionably passes constitutional muster.[252]

Ultimately, the Court's decision in *Victor* and *Sandoval* does not adequately protect the purposes of reasonable doubt standards. The Court's inability to provide a satisfactory explanation of the concept of reasonable doubt to jurors may not ensure that defendants are free from the "risk of convictions resting on factual error" and may reduce "community confidence" in the criminal justice system.[253]

The Court did not provide any support for its conclusion that modern jurors, despite their possible unfamiliarity with the complex terminology employed in jury instructions would understand the legal meaning of those instructions.[254] Although Justice O'Connor looked to modern, non-legal dictionaries in her analysis of the constitutional-

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251 *See* Cage v. Louisiana, 498 U.S. 39, 41 (1990).

252 *See supra* note 246. Federal courts have also used the *Victor* and *Sandoval* decisions to support their finding instructions constitutional despite the Court's hesitant support for certain phrases contained in the *Victor* and *Sandoval* instructions. In Morley v. Stenberg, 25 F.3d 687 (8th Cir. 1994), the Eighth Circuit reversed the District Court for the District of Nebraska, holding that the Court's decision in *Victor* required reversal of the decision of the district court, which had held the Nebraska reasonable doubt jury instruction NJI 14.08 unconstitutional. *Id.* at 690. Nevertheless, the court noted its disapproval with the language of the reasonable doubt jury instruction and found that "[i]t is unwise for a trial court to risk remand and retrial by using a questionable reasonable doubt instruction in the face of clear Supreme Court disfavor for certain phrases and the myriad of appropriate instructions that avoid those phrases." *Id.* at 689-90. *See also* Middleton v. Evatt, 855 F. Supp. 837 (D.S.C. 1994).

253 *Winship*, 397 U.S. 358, 363 (1970).

254 Jerome Frank, critical of the jury system, did not consider jury instructions to be an improvement, stating:

> Time and money and lives are consumed in debating the precise words which the judge may address to the jury, although everyone who stops to see and think knows that these words might as well be spoken in a foreign language—that, indeed, for all the jury's understanding of them, they are spoken in a foreign language.

JEROME FRANK, LAW AND THE MODERN MIND 181 (1930).

ity of the instructions,[255] she did not determine whether jurors' understanding of these terms actually comports with their legal meaning. Social science studies have repeatedly demonstrated that jurors consistently fail to comprehend the concepts explained in jury instructions.[256] Those studies have traced jury confusion to the syntax of instructions, the manner of presentation, and the general unfamiliarity of jurors with legal terminology,[257] as well as to jurors' exposure to the media or other sources of popular culture.[258] The Court concluded that the juries in *Victor* and *Sandoval* understood the instructions, without acknowledging well-documented evidence to the contrary.

Although, in the end, the jury must decide the guilt or innocence of a particular defendant, an appropriate reasonable doubt jury instruction would help ensure that no defendant is found guilty on proof insufficient to meet the demands of due process, or upon factors other than the evidence admitted at trial. Some critics of reasonable doubt jury instructions have recommended that there be no attempt to define reasonable doubt for the jury,[259] but this solution seems inadequate, given jurors' documented lack of understanding of the concept. While still a judge for the Court of Appeals for the D.C. Circuit, Justice Ginsburg noted that "[t]o arm the jury with the information needed for the intelligent performance of its task, the judge might first endeavor to speak the language of the jurors, and avoid the

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255 Victor v. Nebraska, 114 S. Ct. 1239, 1246-47, 1250 (1994).

256 *See* Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REF. 401 (1990) (study of jurors revealed a relatively low rate of comprehension for key concepts in criminal jury instructions, apparent ineffectiveness of instructions to improve comprehension, and negative effect of certain instructions); Laurence J. Severance et al., *Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198 (1984) (results of study demonstrated that jurors without legal training have difficulty comprehending and applying pattern jury instructions); Severance, *supra* note 256, at 200; Steele & Thornburg, *supra* note 237 (empirical studies of jurors revealed that jurors understood less than one half the content of the tested instructions and that the level of comprehension doubled when the instructions were rewritten).

257 William H. Erickson, *Criminal Jury Instruction*, 1993 U. ILL. L. REV. 285, 292 (1993). Erickson stated that the wording of instructions causes the greatest juror confusion because

> [j]urors are lay persons, for the most part untrained in the law's concepts and terms of art, whose sole contact with the law is often through jury instructions . . . . Attorneys and trial judges dealing with familiar concepts frequently forget that the bulk of their vocation is alien to the general public.

Id. at 292. *See also*, Severance, *supra* note 256, at 200.

258 Kramer & Koenig, *supra* note 256, at 429.

259 *See* People v. Brigham, 599 P.2d 100 (Cal. 1979) (Mosk, J., concurring). For an in-depth analysis of the need for defining the concept of reasonable doubt, see Diamond, *supra* note 31.

jargon of the legal profession."[260] Critical of the instructions in *Victor* and *Sandoval*, Justice Ginsburg presented an alternative reasonable doubt instruction drafted by the Federal Judicial Center that she considered to be "clear, straightforward, and accurate . . . in stating the reasonable doubt standard succinctly and comprehensibly."[261]

There may be no clear consensus as to the proper definition of reasonable doubt, but currently the individuals who are responsible for the formulation of jury instructions are, for the most part, lawyers, judges, law academics, and legislators.[262] There needs to be a greater recognition that, although those intimately connected with the legal system understand legal terms, the average juror does not understand them.[263] If jurors must decide the guilt or innocence of criminal defendants and whether capital punishment is the appropriate sentence, then they should have a greater role in deciding what language is

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260 Tavoulareas v. Piro, 817 F.2d 762, 808 (D.C. Cir. 1987) (Ginsburg, J., concurring).

261 Victor v. Nebraska, 114 S. Ct. 1239, 1253 (1994) (Ginsburg, J., concurring). For the text of the Federal Judicial Center's proposed instruction, see *supra* note 176, at 35.

262 In People v. Freeman, 882 P.2d 249 (Cal. 1994), the Supreme Court of California affirmed the defendant's conviction. The trial court had slightly modified CALJIC 2.90 in instructing the jury on the reasonable doubt standard and had informed the jury that the phrase "moral evidence" meant "mortal" evidence or "evidence from people." In rejecting defendant's challenge of the instruction, the court clarified that the Supreme Court had made clear in *Victor* and *Sandoval* that trial courts could delete the phrases "moral certainty" and "moral evidence" from the reasonable doubt jury instruction. The court suggested that the state legislature or the committee responsible for pattern jury instructions examine CALJIC 2.90 as the "clarity and constitutionality of California's instruction on reasonable doubt are too important to simply ignore the high court's warning signals [in *Victor* and *Sandoval*]." *Freeman*, 34 Cal. Rptr. 2d at 589. The court's request to the state legislature to examine the reasonable doubt jury instruction has been made before. In *Brigham*, Judge Mosk, in his concurring opinion, asked the state legislature to reconsider CALJIC 2.90, but as the court made clear in *Sandoval*, 844 P.2d at 878, the state legislature had not responded to Mosk's entreaty to redraft the instruction. It is not yet clear if the state legislature will take up the Supreme Court of California's call for change.

263 Numerous commentators have remarked on the disparity in understanding between the lay person and those involved in the legal arena. *See* United States v. Witt, 648 F.2d 608, 612 (9th Cir. 1981) (Anderson, J., concurring) (noting that "[t]he term[ ] 'beyond a reasonable doubt' . . . may be in common usage by the populace of this nation, but there is no demonstrable or reliable evidence . . . that a reasonably appropriate definition is in common usage or well understood by prospective citizen jurors"); Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163, 165 (1977) ("[l]egal practitioners . . . have developed a traditionally accepted vocabulary with which to express their ideas. Although this legal jargon becomes a common way of expressing precise legal meanings among judges and lawyers, it is often a completely foreign language to the layperson-juror."); Steele & Thornburg, *supra* note 237, at 100 ("As lawyers speaking to each other use certain words, their knowledge of the underlying case law communicates something more to them than a simple dictionary definition of the word would show. This kind of extra communication, however, is restricted to members of the profession who understand the use behind the word. It does not extend to lay people on juries.").

comprehensible.[264] As Justice Kennedy remarked in his concurrence in *Victor* and *Sandoval*, "for jurors who have not had the benefit of the Court's research, the words [contained in the reasonable doubt instructions] will do nothing but baffle."[265] Courts must recognize that jurors, who have been given the responsibility in criminal cases to decide the guilt or innocence of a defendant, and in capital cases to decide whether to sentence a defendant to death, have not received the tools with which to carry out this task successfully.[266]

VI. CONCLUSION

In *Victor* and *Sandoval*, the United States Supreme Court failed to address petitioners' claims adequately in light of its decision in *Cage*. Although the Court disapproved with much of the language in the instructions, the Court upheld the instructions without giving the lower courts a clearer picture of acceptable language to use in the future. In its focus on certain eighteenth and nineteenth-century cases and texts to analyze the constitutionality of the instructions, the Court failed to give satisfactory attention to the common-sense understanding of the instructions. The meaning assigned to such instructions by modern jurors may not comport with the eighteenth and nineteenth-century conception of reasonable doubt.

Most jurors are not well-versed in the law, and reasonable doubt jury instructions are meant to improve juror comprehension, to further the goal of a fair trial. As such, the reasonable doubt jury instructions should be tailored to the average juror. When a jury has based its decision on instructions which include the phrases "moral certainty" and "moral evidence," it may be compelled to look beyond the evidence presented at trial. The Court's decision affirming the convictions and death sentences of Victor and Sandoval signals an erosion of the constitutional safeguards of the Due Process Clause.

State courts and pattern jury instruction committees should rec-

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264 *See* Steele & Thornburg, *supra* note 237, at 106 (suggesting that committees responsible for drafting pattern jury instructions should include laypersons); Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37, 75-77 (1993) (recommending that judges explain to jurors that they can ask questions about the jury instructions and that pattern jury instruction committees should document the questions jurors ask).

265 Victor v. Nebraska, 114 S. Ct. 1239, 1251 (1994) (Kennedy, J., concurring).

266 For a discussion of ways to reform jury instructions to increase juror comprehension, see AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982); Robert P. and Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Edward J. Imwinkelried & Lloyd R. Schwed, *Guidelines for Drafting Understandable Jury Instructions: An Introduction to the Use of Psycholinguistics*, 23 CRIM. L. BULL. 135 (1987); Schwarzer, *supra* note 19, at 743-59; Steele & Thornburg, *supra* note 237, at 108-09; Tiersma, *supra* note 264, at 48-51.

ognize that, despite the Court's decision upholding the reasonable doubt jury instructions, the Court did express concern that the phrases "moral certainty" and "moral evidence" were problematic. Those responsible for reforming jury instructions should recognize the shortcomings of such reasonable doubt jury instructions. To that end, jurors' understanding of these instructions must receive the utmost attention to protect the constitutional guarantees afforded criminal defendants.

SHELAGH KENNEY