SUPREME COURT OF THE UNITED STATES

Nos. 92–8894 AND 92–9049

CLARENCE VICTOR, PETITIONER

92–8894 *v.*

NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

ALFRED ARTHUR SANDOVAL, PETITIONER

92–9049 *v.*

CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

[March 22, 1994]

JUSTICE GINSBURG, concurring in part and concurring in the judgment.

I agree with the Court that the reasonable doubt instructions given in these cases, read as a whole, satisfy the Constitution's due process requirement. As the Court observes, the instructions adequately conveyed to the jurors that they should focus exclusively upon the evidence, see *ante*, at 10, 13, 19, and that they should convict only if they had an "abiding conviction" of the defendant's guilt, see *ante*, at 11, 18. I agree, further, with the Court's suggestion that the term "moral certainty," while not in itself so misleading as to render the instructions unconstitutional, should be avoided as an unhelpful way of explaining what reasonable doubt means. See *ante*, at 13, 19.

Similarly unhelpful, in my view, are two other features of the instruction given in Victor's case. That

instruction begins by defining 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." App. in No. 92–8894, p. 11. A committee of distinguished federal judges, reporting to the Judicial Conference of the United States, has criticized this "hesitate to act" formulation

> "because the analogy it uses seems misplaced. In the decisions people make in the most important of their own affairs, resolution of conflicts about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives—choosing a spouse, a job, a place to live, and the like—generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike the decisions jurors ought to make in criminal cases." Federal Judicial Center, Pattern Criminal Jury Instructions 18–19 (1987) (commentary on instruction 21).

More recently, Second Circuit Chief Judge Jon O. Newman observed:

> "Although, as a district judge, I dutifully repeated [the "hesitate to act" standard] to juries in scores of criminal trials, I was always bemused by its ambiguity. If the jurors encounter a doubt that would cause them to `hesitate to act in a matter of importance,' what are they to do then? Should they decline to convict because they have reached a point of hesitation, or should they simply hesitate, then ask themselves whether, in their own private matters, they would resolve the doubt in favor of action, and, if so, continue on to convict?" Newman, Beyond "Reasonable Doubt," 68 N.Y.U. L. Rev. ___ (1994) (forthcoming) (James Madison Lecture, delivered at New York University

Law School, November 9, 1993).

Even less enlightening than the "hesitate to act" formulation is the passage of the *Victor* instruction counseling: "[The jury] 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 reasonable*." App. in No. 92–8894, p. 11. If the italicized words save this part of the instruction from understating the prosecution's burden of proof, see *ante*, at 19, they do so with uninstructive circularity. Jury comprehension is scarcely advanced when a court "defines" reasonable doubt as "doubt . . . that is reasonable."

These and similar difficulties have led some courts to question the efficacy of any reasonable doubt instruction. At least two of the Federal Courts of Appeals have admonished their District Judges not to attempt a definition.[1] This Court, too, has suggested on occasion that prevailing definitions of "reasonable doubt" afford no real aid. See, *e.g.*, *Holland* v. *United States*, 348 U. S. 121, 140 (1954) ("`[a]ttempts to explain the term "reasonable doubt" do not usually result in making it any clearer to the minds of the jury'"), quoting *Miles* v. *United States*, 103 U. S. 304, 312 (1881); *Hopt* v. *Utah*, 120 U. S. 430, 440–441

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[1]See, *e.g.*, *United States* v. *Adkins*, 937 F. 2d 947, 950 (CA4 1991) ("This circuit has repeatedly warned against giving the jury definitions of reasonable doubt, because definitions tend to impermissibly lessen the burden of proof. . . . The only exception to our categorical disdain for definition is when the jury specifically requests it."); *United States* v. *Hall*, 854 F. 2d 1036, 1039 (CA7 1988) (upholding district court's refusal to provide definition, despite 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.").

(1887) ("The rule may be, and often is, rendered obscure by attempts at definition, which serve to create doubts instead of removing them."). But we have never held that the concept of reasonable doubt is undefinable, or that trial courts should not, as a matter of course, provide a definition. Nor, contrary to the Court's suggestion, see *ante*, at 1, have we ever held that the Constitution does not require trial courts to define reasonable doubt.

Because the trial judges in fact defined reasonable doubt in both jury charges we review, we need not decide whether the Constitution required them to do so. Whether or not the Constitution so requires, however, the argument for defining the concept is strong. While judges and lawyers are familiar with the reasonable doubt standard, the words "beyond a reasonable doubt" are not self-defining for jurors. Several studies of jury behavior have concluded that "jurors are often confused about the meaning of reasonable doubt," when that term is left undefined. See Note, Defining Reasonable Doubt, 90 Colum. L. Rev. 1716, 1723 (1990) (citing studies). Thus, even if definitions of reasonable doubt are necessarily imperfect, the alternative—refusing to define the concept at all—is not obviously preferable. Cf. Newman, *supra*, at ___ ("I find it rather unsettling that we are using a formulation that we believe will become less clear the more we explain it.").

Fortunately, the choice need not be one between two kinds of potential juror confusion—on one hand, the confusion that may be caused by leaving "reasonable doubt" undefined, and on the other, the confusion that might be induced by the anachronism of "moral certainty," the misplaced analogy of "hesitation to act," or the circularity of "doubt that is reasonable." The Federal Judicial Center has proposed a definition of reasonable doubt that is clear, straightforward, and accurate. That instruction reads:

> "[T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.
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> "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 Center, Pattern Criminal Jury Instructions 17–18 (1987) (instruction 21).

This instruction plainly informs the jurors that the prosecution must prove its case by more than a mere preponderance of the evidence, yet not necessarily to an absolute certainty. The "firmly convinced" standard for conviction, repeated for emphasis, is further enhanced by the juxtaposed prescription that the jury must acquit if there is a "real possibility" that the defendant is innocent. This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly.

I recognize, however, that this Court has no supervisory powers over the state courts, see *ante*, at 13–14, and that the test we properly apply in evaluating the constitutionality of a reasonable doubt instruction is not whether we find it exemplary; instead, we inquire only whether there is a "reasonable likelihood that

the jury understood the instructio[n] to allow conviction based on proof insufficient to meet" the reasonable doubt standard. See *ante*, at 3. On that understanding, I join Parts II, III–B, and IV of the Court's opinion and concur in its judgment.