

**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 BLACKMUN, with whom JUSTICE SOUTER joins in all but Part II, concurring in part and dissenting in part.

In *Cage v. Louisiana*, 498 U. S. 39 (1990), this Court, by a *per curiam* opinion, found a jury instruction defining reasonable doubt so obviously flawed that the resulting state-court judgment deserved summary reversal. The majority today purports to uphold and follow *Cage*, but plainly falters in its application of that case. There is no meaningful difference between the jury instruction delivered at Victor's trial and the jury instruction issued in *Cage*, save the fact that the jury instruction in Victor's case did not contain the two words "grave uncertainty." But the mere absence of these two words can be of no help to the State, since there is other language in the instruction that is equally

VICTOR v. NEBRASKA

offensive to due process. I therefore dissent from the Court's opinion and judgment in No. 92-8894, *Victor v. Nebraska*.

Our democracy rests in no small part on our faith in the ability of the criminal justice system to separate those who are guilty from those who are not. This is a faith which springs fundamentally from the requirement that unless guilt is established beyond all reasonable doubt, the accused shall go free. It was not until 1970, however, in *In re Winship*, 397 U. S. 358, that the Court finally and explicitly 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.” *Id.*, at 364. In *Winship*, the Court recounted the long history of the reasonable doubt standard, noting that it “dates at least from our early years as a Nation.” *Id.*, at 361. The Court explained that any “society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is a reasonable doubt about his guilt.” *Id.*, at 363-364.

Despite the inherent appeal of the reasonable-doubt standard, it provides protection to the innocent only to the extent that the standard, in reality, is an enforceable rule of law. To be a meaningful safeguard, the reasonable-doubt standard must have a tangible meaning that is capable of being understood by those who are required to apply it. It must be stated accurately and with the precision owed to those whose liberty or life is at risk. Because of the extraordinarily high stakes in criminal trials, “[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.” *Id.*, at 364.

VICTOR v. NEBRASKA

When reviewing a jury instruction that defines “reasonable doubt,” it is necessary to consider the instruction as a whole and to give the words their common and ordinary meaning. *Estelle v. McGuire*, 501 U. S. __, __ (1991). It is not sufficient for the jury instruction merely to be susceptible to an interpretation that is technically correct. The important question is whether there is a “reasonable likelihood” that the jury was misled or confused by the instruction, and therefore applied it in a way that violated the Constitution. *Boyde v. California*, 494 U. S. 370, 380 (1990). Any jury instruction defining “reasonable doubt” that suggests an improperly high degree of doubt for acquittal or an improperly low degree of certainty for conviction, offends due process. Either misstatement of the reasonable-doubt standard is prejudicial to the defendant, as it “vitiates all of the jury's findings,” see *Sullivan v. Louisiana*, __ U. S. __, __ (1993), and removes the only constitutionally appropriate predicate for the jury's verdict.

In a Louisiana trial court, Tommy Cage was convicted of first-degree murder and sentenced to death. On appeal to the Supreme Court of Louisiana, he argued, among other things, that the reasonable-doubt instruction used in the guilt phase of his trial violated the Due Process Clause of the Fourteenth Amendment. See *State v. Cage*, 554 So. 2d 39 (1989). The instruction in relevant part provided:

“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

VICTOR v. NEBRASKA

reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such 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*." (Second emphasis added; first and third emphases in original.) *Id.*, at 41.

The Louisiana Supreme Court affirmed Cage's conviction, reasoning that, although some of the language "might overstate the requisite degree of uncertainty and confuse the jury," the charge as a whole was understandable to "reasonable persons of ordinary intelligence," and therefore constitutional. *Ibid.*

We granted certiorari and summarily reversed. 498 U. S. 39 (1990). The Court noted that some of the language in the instruction was adequate, but ruled that the phrases "actual substantial doubt" and "grave uncertainty" suggested a "higher degree of doubt than is required for acquittal under the reasonable doubt standard," and that those phrases taken together with the reference to "moral certainty," rather than "evidentiary certainty," rendered the instruction as a whole constitutionally defective. *Id.*, at 41.

Clarence Victor, petitioner in No. 92-8894, also was convicted of first-degree murder and sentenced to death. The instruction in his case reads as follows:

"`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

VICTOR v. NEBRASKA

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 mathematical certainty is not required. *You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of the case*, provided such probabilities are strong enough to exclude any doubt that is reasonable. A reasonable doubt is an *actual and substantial doubt* reasonably arising from the evidence, from the facts or 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” (emphases added). App. 11.

The majority's attempt to distinguish this instruction from the one employed in *Cage* is wholly unpersuasive. Both instructions equate “substantial doubt” with reasonable doubt, and refer to “moral certainty” rather than “evidentiary certainty.” And although Victor's instruction does not contain the phrase “grave uncertainty,” the instruction contains language that has an equal potential to mislead, including the invitation to the jury to convict based on the “strong probabilities” of the case and the overt effort to dissuade jurors from acquitting when they are “fully aware that possibly they may be mistaken.” Nonetheless, the majority argues that “substantial doubt” has a meaning in Victor's instruction different from that in *Cage*'s instruction, and that the “moral certainty” language is sanitized by its context. The majority's approach seems to me to fail under its own logic.

VICTOR v. NEBRASKA

First, the majority concedes, as it must, that equating reasonable doubt with substantial doubt is “somewhat problematic” since one of the common definitions of “substantial” is “that specified to a large degree.” *Ante*, at 16. But the majority insists that the jury did not likely interpret the word “substantial” in this manner because Victor's instruction, unlike *Cage*'s instruction, used the phrase “substantial doubt” as a means of distinguishing reasonable doubt from mere conjecture. According to the majority, “[t]his explicit distinction between a substantial doubt and a fanciful conjecture was not present in the *Cage* instruction,” and thus, read in context, the use of “substantial doubt” in Victor's instruction is less problematic. *Ante*, at 17.

A casual reading of the *Cage* instruction reveals the majority's false premise. The *Cage* instruction plainly states that a reasonable doubt is a doubt “founded upon a real tangible substantial basis and not upon mere caprice and conjecture.” See 498 U. S., at 40. The *Cage* instruction also used the “substantial doubt” language to distinguish a reasonable doubt from “a mere possible doubt.” *Ibid.* (“A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt*”). Thus, the reason the Court condemned the “substantial doubt” language in *Cage* had nothing to do with the absence of appropriate contrasting language; rather, the Court condemned the language for precisely the reason it gave: “[T]he words ‘substantial’ and ‘grave’, as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard.” *Id.*, at 41. In short, the majority's speculation that the jury in Victor's case interpreted “substantial” to mean something other than “that specified to a large degree” simply because the word “substantial” is used at one point to distinguish mere conjecture, is unfounded and is foreclosed by *Cage* itself.

VICTOR v. NEBRASKA

The majority further attempts to minimize the obvious hazards of equating “substantial doubt” with reasonable doubt by suggesting that, in *Cage*, it was the combined use of “substantial doubt” and “grave uncertainty,” “in parallel,” that rendered the use of the phrase “substantial doubt” unconstitutional. *Ante*, at 17. This claim does not withstand scrutiny. The Court in *Cage* explained that *both* “substantial doubt” and “grave uncertainty” overstated the degree of doubt necessary to convict, and found that it was the use of those words in conjunction with the misleading phrase “moral certainty” that violated due process. The Court's exact words were:

“It is plain to us that the words ‘substantial’ and ‘grave,’ as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When these statements are then considered with the reference to ‘moral certainty,’ rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.” *Id.*, at 41.

Clearly, the Court was not preoccupied with the relationship between “substantial doubt” and “grave uncertainty.” The Court instead endorsed the universal opinion of the Courts of Appeals that equating reasonable doubt with “substantial doubt” is improper and potentially misleading in that it overstates the degree of doubt required for acquittal under the reasonable doubt standard. See, e.g., *Smith v. Bordenkircher*, 718 F.2d 1273, 1276 (CA4 1983) (noting agreement with the “uniformly disapproving” view of the appellate courts regarding the use of the “substantial doubt” language), cert. denied, 466 U.S. 976 (1984); See also *Taylor v. Kentucky*, 436 U.S. 478, 488 (1978) (“[Equating

VICTOR v. NEBRASKA

`sub-stantial doubt' with reasonable doubt], though perhaps not in itself reversible error, often has been criticized as confusing").¹

In a final effort to distinguish the use of the phrase "substantial doubt" in this case from its use in *Cage*, the majority states: "In any event, the instruction provided an alternative definition of reasonable doubt: a doubt that would cause a reasonable person to hesitate to act." *Ante*, at 17. The Court reasons that since this formulation has been upheld in other contexts, see *Holland v. United States*, 348 U. S. 121, 140 (1954), this "alternative" statement makes it unlikely that the jury would interpret "substantial" to mean "to a large degree."

To begin with, I note my general agreement with JUSTICE GINSBURG's observation that the "hesitate to act" language is far from helpful, and may in fact make matters worse by analogizing the decision whether to convict or acquit a defendant to the frequently high-risk personal decisions people must make in their daily lives. See *ante*, at 1-2. But even assuming this "hesitate to act" language is in some way helpful to a jury in understanding the meaning of reasonable doubt, the existence of an "alternative" and accurate definition of reasonable doubt somewhere in the instruction does not render the

¹Despite the overwhelming disapproval of the use of the phrase "substantial doubt" by appellate courts, some state trial courts continue to employ the language when instructing jurors. See *Bordenkircher*, 718 F. 2d, at 1279 (dissenting opinion) ("As the majority has forthrightly pointed out, a `good and substantial doubt' instruction has evoked a `uniformly disapproving' response from appellate courts. Evidently the slight slaps on the wrist followed by affirmance of the convictions have not served the hoped for end of correction of the error *in futuro*").

VICTOR v. NEBRASKA

instruction lawful if it is “reasonably likely” that the jury would rely on the faulty definition during its deliberations. *Boyde*, 494 U. S., at 380. *Cage* itself contained proper statements of the law with respect to what is required to convict or acquit a defendant, but this language could not salvage the instruction since it remained reasonably likely that, despite the proper statements of law, the jury understood the instruction to require “a higher degree of doubt than is required for acquittal under the reasonable doubt standard.” *Cage*, 498 U. S., at 41.

In my view, the predominance of potentially misleading language in Victor's instruction made it likely that the jury interpreted the phrase “substantial doubt” to mean that a “large” doubt, as opposed to a merely reasonable doubt, is required to acquit a defendant. It seems that a central purpose of the instruction is to minimize the jury's sense of responsibility for the conviction of those who may be innocent. The instruction goes out of its way to assure jurors that “[y]ou may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken”; and then, after acquainting jurors with the possibility that their consciences will be unsettled after convicting the defendant, the instruction states that the jurors should feel free to convict based on the “strong probabilities of the case.” Viewed as a whole, the instruction is geared toward assuring jurors that although they may be mistaken, they are to make their decision on those “strong probabilities,” and only a “substantial doubt” of a defendant's guilt should deter them from convicting.

The majority dismisses the potentially harmful effects of the “strong probabilities” language on the grounds that a “nearly identical instruction” was upheld by the Court a century ago. See *ante*, at 19, citing *Dunbar v. United States*, 156 U. S. 185, 199 (1895). But the instruction in *Dunbar* did not equate

VICTOR v. NEBRASKA

reasonable doubt with “substantial doubt,” nor did it contain the phrase “moral certainty.” As the majority appreciates elsewhere in its opinion, challenged jury instructions must be considered in their entirety. *Ante*, at 2, quoting *Holland*, 348 U. S., at 140 (“[T]aken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury”). Rather than examining the jury instruction as a whole, the majority parses it, ignoring the relationship between the challenged phrases as well as their cumulative effect.

Considering the instruction in its entirety, it seems fairly obvious to me that the “strong probabilities” language increased the likelihood that the jury understood “substantial doubt” to mean “to a large degree.” Indeed, the jury could have a reasonable doubt about a defendant's guilt but still find that the “strong probabilities” are in favor of conviction. Only when a reasonable doubt is understood to be a doubt “to a large degree” does the “strong probabilities” language begin to make sense. A Nebraska Federal District Court recently observed: “The word ‘probability’ brings to mind terms such as ‘chance,’ ‘possibility,’ ‘likelihood’ and ‘plausibility’—none of which appear to suggest the high level of certainty which is required to be convinced of a defendant's guilt ‘beyond a reasonable doubt.’” *Morley v. Stenberg*, 828 F. Supp. 1413, 1422 (1993). All of these terms, however, are consistent with the interpretation of “substantial doubt” as a doubt “to a large degree.” A jury could have a large and reasonable doubt about a defendant's guilt but still find the defendant guilty on “the strong probabilities of the case,” believing it “likely” that the defendant committed the crime for which he was charged.

To be sure, the instruction does qualify the “strong probabilities” language by noting that “the strong probabilities of the case” should be “strong enough to exclude any doubt of his guilt that is reasonable.”

VICTOR v. NEBRASKA

But this qualification is useless since a “doubt of his guilt that is reasonable” is immediately defined, in the very next sentence, as a “substantial doubt.” Thus, the supposed clarification only compounds the confusion, by referring the jury to the “substantial doubt” phrase as a means of defining the “strong probabilities” language.

Finally, the instruction issued in Victor's case states that a reasonable doubt “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.” In *Cage*, the Court disapproved of the use of the phrase “moral certainty,” because of the 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 addition to or instead of evidentiary standards. The risk that jurors would understand “moral certainty” to authorize convictions based in part on value judgments regarding the defendant's behavior is particularly high in cases where the defendant is alleged to have committed a repugnant or brutal crime. In *Cage*, we therefore contrasted “moral certainty” with “evidentiary certainty,” and held that where “moral certainty” is used in conjunction with “substantial doubt” and “grave uncertainty,” the Due Process Clause is violated. 498 U. S., at 41.

Just as in *Cage*, the “moral certainty” phrase in Victor's instruction is particularly dangerous because it is used in conjunction with language that overstates the degree of doubt necessary to convict. This relationship between the “moral certainty” language, which potentially understates the degree of certainty required to convict, and the “substantial doubt,” “strong probabilities,” and “possibly you may be mistaken” language which, especially when taken together, overstates the degree of doubt necessary to acquit, also distinguishes Victor's instruction from

VICTOR v. NEBRASKA

the one challenged in No. 92-9049, *Sandoval v. California*. See *ante*, at 4. The jury instruction defining reasonable doubt in *Sandoval* used the phrases “moral certainty” and “moral evidence,” but the phrases were not used in conjunction with language of the type at issue here — language that easily may be interpreted as overstating the degree of doubt required to acquit. In other words, in Victor's instruction, unlike *Sandoval's*, all of the misleading language is mutually reinforcing, both overstating the degree of doubt necessary to acquit and understating the degree of certainty required to convict.

This confusing and misleading state of affairs leads me ineluctably to the conclusion that, in Victor's case, there exists a reasonable likelihood that the jury believed that a lesser burden of proof rested with the prosecution; and, moreover, it prevents me from distinguishing the jury instruction challenged in Victor's case from the one issued in *Cage*. As with the *Cage* instruction, it simply cannot be said that Victor's instruction accurately informed the jury as to the degree of certainty required for conviction and the degree of doubt required for acquittal. Where, as here, a jury instruction attempts but fails to convey with clarity and accuracy the meaning of reasonable doubt, the reviewing court should reverse the conviction and remand for a new trial. See *Sullivan v. Louisiana*, ___ U. S., at ___. I would vacate the judgment of the Supreme Court of Nevada and remand the case.

Although I concur in the Court's opinion in No. 92-9049, *Sandoval v. California*, I dissent from the Court's affirmance of the judgment in that case. Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins v. Collins*, 510

92-8894 & 92-9049—CONCUR/DISSENT

VICTOR v. NEBRASKA

U. S. ___, ___ (1994), I would vacate the sentence of death in *Sandoval*. And, in view of my dissent in *Callins*, I also

92-8894 & 92-9049—CONCUR/DISSENT

VICTOR v. NEBRASKA

would vacate the sentence of death in No. 92-8894, *Victor v. Nebraska*, even if I believed that the underlying conviction withstood constitutional scrutiny.