Defining Proof Beyond a Reasonable Doubt for the Criminal Jury: The Third Circuit Accepts an Invitation to Tolerate Constitutionally Inadequate Phraseology

Melissa Corwin
DEFINING "PROOF BEYOND A REASONABLE DOUBT" FOR THE CRIMINAL JURY: THE THIRD CIRCUIT ACCEPTS AN INVITATION TO TOLERATE CONSTITUTIONALLY INADEQUATE PHRASEOLOGY

"The legal system is often a mystery, and we, its priests, preside over rituals baffling to everyday citizens." 1

I. INTRODUCTION

The "reasonable doubt" standard is the most fundamental part of our criminal justice system. 2 This standard represents society's belief that it is better that ten guilty persons escape conviction than one innocent person suffer. 3 The standard of "proof beyond a reasonable doubt" was created to ensure that no person should be convicted of a crime unless the factfinder is virtually certain of that person's guilt. 4

1. LAWYER'S WIT AND WISDOM: QUOTATIONS ON THE LEGAL PROFESSION, IN BRIEF 182 (Bruce Nash et al. eds., 1995) (quoting Henry G. Miller, President, New York State Bar Association).

2. See In re Winship, 397 U.S. 358, 363 (1970) ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure."). In Winship, the Supreme Court constitutionalized the standard of reasonable doubt, finding that "the standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" Id. (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)). The requirement of proof beyond a reasonable doubt has this vital role in American criminal procedure for compelling reasons. See id. (reasoning that during criminal prosecution, accused has interests of great importance at stake, both because of possibility he may lose his liberty upon conviction and because of certainty he would be stigmatized by conviction); see also United States v. Pine, 609 F.2d 106, 107 (3d Cir. 1979) (noting that convicting person of crime when reasonable doubt remained as to person's guilt would "seriously undermine the moral force and integrity of our criminal law"); Jessica N. Cohen, The Reasonable Doubt Jury Instruction: Giving Meaning to a Critical Concept, 22 Am. J. CRIM. L. 677, 678 (1995) (recognizing reasonable doubt standard as "critical to American jurisprudence"); Robert C. Power, Reasonable and Other Doubts: The Problem of Jury Instructions, 67 Tenn. L. Rev. 45, 46 (1999) (stating that reasonable doubt is "central feature of our criminal justice system"); Note, Reasonable Doubt: An Argument Against Definition, 108 Harv. L. Rev. 1955, 1955 (1995) (noting that reasonable doubt is "central to every criminal trial").

3. See Power, supra note 2, at 52 (discussing Supreme Court's reliance on William Blackstone's statement that "the law holds that it is better that ten guilty escape than that one innocent suffer" (quoting Coffin, 156 U.S. at 456)); cf. Winship, 397 U.S. at 372 (Harlan, J., concurring) (stating that "the requirement of proof beyond a reasonable doubt [is] bottomed on [the] fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free").

4. See Winship, 397 U.S. at 364 (analyzing meaning of reasonable doubt and declaring that standard prevents government from finding person guilty "without convincing a proper factfinder . . . with utmost certainty" (emphasis added)); Jackson v. Virginia, 443 U.S. 307, 315 (1979) (acknowledging that "by impressing upon
Although this fundamental standard does not appear in the text of the Constitution, the United States Supreme Court has found that the due process guarantees of the Fifth and Fourteenth Amendments "protect the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." The interaction between the defendant's right to acquittal on evidence that leaves a reasonable doubt of guilt, and the defendant's right to a trial by jury, necessitates that jurors comprehend and apply the reasonable doubt standard fairly and properly.

See Power, supra note 2, at 46-47 (identifying intermingling of right to acquittal on evidence which leaves reasonable doubt of guilt, and right to trial by jury). The merger of these two rights makes proper definition of the standard essential. See id. at 47 (noting that jury learns of reasonable doubt standard through instructions from trial judge). Proper definition becomes even more important when one looks at evidence indicating that jurors do not comprehend the standard and furthermore do not apply it fairly. See Irwin A. Horowitz & Laird C. Kirkpatrick, A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts, 20 L. & HUM. BEHAV. 655, 666-69 (1996) (conducting study where subject jurors were given reasonable doubt instructions that led them to exhibit probabilities of guilt that would be constitutionally unacceptable); Bradley Saxton, How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming, 33 LAND & WATER L. REV. 59, 97 (1998) (finding that even after given instruction on reasonable doubt, almost one-third of jurors mistakenly believed that it becomes defendant's responsibility to persuade jury of his innocence once state has come forward with evidence of guilt); see also John Clark, The Social Psychology of Jury Nullification, 24 L. & PSYCHOL. REV. 39, 39-46 (2000) (examining research indicating jurors have power to nullify law based on extra-legal factors such as physical attractiveness, attitudes, social categorization and judicial biases). For a more thorough discussion of jury nullification, see Nancy J. King, The American Criminal Jury, 62 L. & CONTEMP. PROBS. 41, 50-53 (1999). For a further discussion of jurors' inability to comprehend reasonable doubt instructions, see infra notes 142-46 and accompanying text.
Despite the vital role this standard plays in the American scheme of criminal procedure, the Supreme Court has provided little guidance regarding the propriety of instructing the jury on the meaning of the term reasonable doubt.\textsuperscript{7} Due to this lack of guidance, the United States Courts of Appeals and the highest state courts remain divided in their approaches to defining the standard.\textsuperscript{8}

\textsuperscript{7} See Power, supra note 2, at 62 (recognizing that Supreme Court has been "remarkably tentative in its oversight of what theoretically is a uniform minimum standard"). The Court has explicitly stated that the Constitution is silent as to whether trial courts must define the standard. See Victor v. Nebraska, 511 U.S. 1, 9 (1994) (stating that "Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course"). \textit{But cf. id. at 26} (Ginsburg, J., concurring) (asserting that "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"). Justice Ginsburg also noted that "contrary to the Court's suggestion . . . we [have] [n]ever held that the Constitution does not require trial courts to define reasonable doubt." \textit{Id.} (Ginsburg, J., concurring).

\textsuperscript{8} The main reason the Court has provided little guidance on the propriety of instructing juries on the meaning of reasonable doubt is that the Court may only conduct plenary review of instructions. See David O. Stewart, \textit{Uncertainty About Reasonable Doubt}, ABA J., June 1994, at 38 (acknowledging that Supreme Court's only power over state courts is to decide specific cases appealed to them). Therefore, the Court does not have the power to order state courts to use a specific instruction. See \textit{id.} (recognizing that because state jury instructions in \textit{Victor} did not violate due process, Court could not order California and Nebraska courts to use instruction it thought was superior).

For discussion of approaches taken by the United States Courts of Appeals, see \textit{infra} notes 55-85 and accompanying text. The approaches taken by the highest state courts vary widely. Several states require that trial courts must provide a definition. See, e.g., State v. Aubert, 421 A.2d 124, 127 (N.H. 1980) (holding that despite difficulty inherent in task of defining reasonable doubt, jury must be given some assistance in understanding concept); Commonwealth v. Young, 317 A.2d 258, 262-63 (Pa. 1972) ("Our cases require that the jury be given a positive instruction fully and accurately defining reasonable doubt . . . in the absence of a proper reasonable doubt charge, an accused is denied his right to a fair trial."); State v. Desrosiers, 559 A.2d 641, 645 (R.I. 1989) ("In charging the jury, a trial justice must explain the definition of proof beyond a reasonable doubt."); State v. Coe, 684 P.2d 668, 677 (Wash. 1984) (stressing that Washington law requires court to define standard of reasonable doubt by specific instruction).

Other states do not require trial courts to define the standard, but nonetheless favor definition over silence. See, e.g., McKinley v. State, 579 N.E.2d 968, 969 (Ind. 1978) (stating that trial courts should consider patterned criminal instructions that are available to all courts); State v. Uffelman, 626 A.2d 340, 342 (Me. 1993) (affirming previously stated preference toward definition); State v. Olkon, 299 N.W.2d 89, 105 (Minn. 1980) (asserting that defining reasonable doubt instruction is "tendered").

Furthermore, there are some states that have refused to define the standard altogether. See, e.g., Chase v. State, 645 So. 2d 829, 850 (Miss. 1994) (maintaining that "reasonable doubt defines itself and needs no further definition by the court"); State v. Johnson, 445 S.E.2d 637, 637 (S.C. 1994) (upholding trial court's refusal to define reasonable doubt and commenting that expression "without an explanation of its legal significance is much more favorable to a defendant"); State v. McMahon, 603 A.2d 1128, 1129 (Vt. 1992) ("We have never held that a defendant is entitled to an explanation of 'reasonable doubt' . . . ").
In 1932, the United States Court of Appeals for the Third Circuit became the first circuit court to require that the reasonable doubt standard be defined for the criminal jury. The Third Circuit has since struggled in determining what terminology is sufficient to ensure that jurors do not apply a subjective standard of proof below that required by due process. The inconsistent decisions on this subject, handed down by the Supreme Court over the past ten years, have not made their task any less challenging.

This Casebrief focuses on the development of the reasonable doubt standard in the Third Circuit. Part II begins with an overview of the United States Supreme Court decisions that have analyzed the constitutional adequacy of reasonable doubt jury instructions. This Section further discusses the effect of the Supreme Court’s rulings on cases in the United States Courts of Appeals. Part III focuses specifically on the Third Circuit’s approach to the standard of reasonable doubt, examining different definitions that have been provided in an attempt to clarify the standard. This Section further foreshadows the fate of particular phraseology within the Third Circuit. Finally, Part IV considers the practical application of the Third Circuit’s approach, how it may present problems for criminal defendants challenging the constitutionality of such instructions, and what trial judges can do to ensure that the instructions they provide are constitutionally adequate.

9. See Blatt v. United States, 60 F.2d 481, 481 (3d Cir. 1932) (holding that trial court’s failure to provide instruction upon meaning of reasonable doubt was error prejudicial to defendant); see also Cohen, supra note 2, at 682 (acknowledging that Third Circuit was first to require definition, followed next by Tenth Circuit in 1954).

10. For further discussion of the Third Circuit’s struggle in deciding what phraseology is constitutionally sufficient, see infra notes 86-134 and accompanying text.


12. For further discussion of the relevant Supreme Court decisions, see infra notes 17-85 and accompanying text.

13. For further discussion of the circuit courts’ application of reasonable doubt definitions, see infra notes 55-85 and accompanying text.

14. For further discussion of the Third Circuit’s approach to defining reasonable doubt, see infra notes 86-134 and accompanying text.

15. For further discussion of the future of specific definitions within the Third Circuit, see infra notes 97-134 and accompanying text.

16. For further discussion of the practical application of the reasonable doubt standard in the Third Circuit, see infra notes 135-49 and accompanying text.
II. HISTORICAL BACKGROUND: THE DEVELOPMENT OF AN UNWORKABLE STANDARD

A. The Supreme Court Renders "Reasonable Doubt" Standardless

United States courts have applied the reasonable doubt standard since at least the 1700s. The mid-nineteenth century brought a wide acceptance of the standard as the accurate description of the degree of doubt necessary for an acquittal. Nevertheless, the United States Supreme Court refrained from granting the standard constitutional status until 1970 when it decided In re Winship. In Winship, the Court held that the Due Process Clause of the Fifth and Fourteenth Amendments protects a defendant from conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Since Winship, however, the Court has not mandated that trial courts employ any particular set of words to convey the concept of reasonable doubt to jurors. The Court has held only that constitutionally deficient jury instructions on reasonable doubt demand an automatic reversal of

17. See Robert H. Cochran, State v. Jackson: Defining "Beyond a Reasonable Doubt," 20 AM. J. TRIAL ADVOC. 435, 435 (1997) (acknowledging that states have had to show proof beyond reasonable doubt from earliest years of nation); Henry A. Diamond, Reasonable Doubt: To Define, or Not to Define, 90 COLUM. L. REV. 1716, 1716-17 (1990) (supporting theory that standard existed since at least late 1700s); Thomas L. Mulrine, Reasonable Doubt: How in the World Is it Defined?, 12 AM. U. J. INT'L L. & POL'Y 195, 199-200 (1997) (noting there are two primary accounts as to precise origin and development of reasonable doubt). One theory claims that the standard originated in the Irish Treason Trials in 1798. See id. at 200 (discussing theory outlined by Judge John Wilder May in 1876 article). The other theory contends that American courts used the phrase earlier in the eighteenth century. See id. (distinguishing theory that claims 1770 Boston Massacre Trials was first use of reasonable doubt).


19. 397 U.S. 358 (1970). Prior to Winship, the Court upheld a variety of instructions on reasonable doubt, but failed to provide any extensive analysis. See Power, supra note 2, at 56-58 (analyzing Court's acceptance of moral certainty and hesitate to act approaches). Power notes that the Court upheld a moral certainty instruction in 1914. See id. at 56-57 n.54 (citing Wilson v. United States, 292 U.S. 563, 569-70 (1914)). Power further identifies several cases in which the Court sustained hesitate to act instructions. See id. at 56-58 (discussing commonly cited opinions of Hopt v. Utah, 120 U.S. 430 (1887) and Holland v. United States, 348 U.S. 121 (1854)).

20. Winship, 397 U.S. at 364. For a further discussion of the Court's analysis in Winship, see supra notes 2-5.

21. See Victor v. Nebraska, 511 U.S. 1, 5 (1994) (stressing that "so long as the court instructs the jury on the necessity that the defendant's guilt be proved 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" (citation omitted)); see also Timothy F. O'Neill, Instructing Illinois Juries on the Definition of "Reasonable Doubt": The Need for Reform, 27 LOY. U. CHI. L.J. 921, 925-26
In the 1990s, the Court considered a series of cases which immersed it in the analysis of the constitutional sufficiency of different reasonable doubt definitions. Taken together, these decisions make the application of the standard among lower courts problematic, by drawing illogical lines and producing inconsistent precedent.

1. The Cage v. Louisiana Decision

In 1990 the United States Supreme Court decided *Cage v. Louisiana*, and held for the first time that a state court's reasonable doubt definition violated the Due Process Clause. In the unanimous decision, the Court set out the language of the erroneous instruction, emphasizing three of the lower court’s statements: (1) "[t]he doubt must be such doubt as would give rise to a grave uncertainty," (2) "[i]t is an actual and substantial doubt," and (3) "[w]hat is required is . . . a moral certainty." The Court declared the instruction unconstitutional because it suggested a "higher degree of doubt than is required for acquittal under the reasonable doubt stan-

(1996) (averring that Court has refused to require trial courts to define fundamental standard of reasonable doubt).

22. See Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) (holding that denial of right to verdict of guilt beyond reasonable doubt is type of structural error that defies analysis by "harmless error" standard).

23. For further discussion of Supreme Court cases analyzing the constitutional sufficiency of certain instructions in the 1990s, see *infra* notes 25-54 and accompanying text.

24. See Stephen J. Fortunato, Jr., *Instructing on Reasonable Doubt After Victor v. Nebraska: A Trial Judge's Certain Thoughts on Certainty*, 41 Vill. L. Rev. 365, 382 (1996) (arguing that decisions in *Cage* and *Victor* taken together show how fluid and standardless Court's methodology has become); see also Kenney, *supra* note 18, at 113 (contending that Court erred in deciding *Victor* because it restricted unanimous holding in *Cage* to its facts).


26. See *id.* at 41 (holding that reasonable juror could have interpreted instruction to allow finding of guilt based on degree of proof below that required by Due Process Clause); see also O'Neill, *supra* note 21, at 926 (noting that *Cage* was first decision in which Court found jury instruction defining reasonable doubt to be violation of due process).

27. *Cage*, 498 U.S. at 41. The *Cage* instruction, in pertinent part, stated: This doubt, however, must be a 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.

On remand, however, the Louisiana Supreme Court held the error harmless under the harmless error doctrine. This deceptively straightforward decision has been attacked for its undue focus on the technical aspects of the definition and its failure to clarify whether the unconstitutionality of a jury instruction depends upon the presence of all three critical phrases (substantial doubt, grave uncertainty, and moral certainty). The variation of lower courts' application of these three phrases is illustrative of the confusion stemming from the Cage decision.  

2. The Sullivan v. Louisiana Decision

The United States Supreme Court's decision in Sullivan v. Louisiana further accelerated the mass of challenges that the Cage decision produced. The jury instruction struck down in Sullivan was virtually identical to the charge given in Cage, using all three terms (substantial doubt, grave uncertainty and moral certainty).

28. Cage, 498 U.S. at 41. The Court stated that:

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 those 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.

29. See Cage, 583 So. 2d at 1127-29 (holding that because erroneous instruction was trial error, and not structural defect, it was subject to harmless error analysis).


31. Compare Coral v. State, 628 So. 2d 954, 984 (Ala. Crim. App. 1992) ("Obviously, it was not the use of any one of the terms used in Cage, but rather the combination of all three that rendered the charge in Cage unconstitutional."); with Morley v. Stenberg, 828 F. Supp. 1413, 1419 (D. Neb. 1993) (concluding that phrases "actual and substantial doubt," "moral certainty" and "strong probabilities," when used either together or separately, are unconstitutional because they lessen level of guilt needed to be established by government), rev'd, 25 F.3d 687 (8th Cir. 1994).


33. See Power, supra note 2, at 59 (recognizing that Cage opened door to "raft of challenges"); see also Note, Reasonable Doubt: An Argument Against Definition, supra note 2, at 1955 (maintaining that Court's ruling in Cage, which held that constitutionally deficient reasonable doubt instructions demand automatic reversal, has made need to determine appropriate content of such instructions especially significant).

34. See O'Neill, supra note 21, at 928 (stating that trial court in Sullivan gave reasonable doubt instruction very similar to one given in Cage). The instruction in Sullivan, in pertinent part, states:
The *Sullivan* decision then went further than *Cage* and considered whether harmless error analysis applies to such unconstitutional instructions. Finding that the *Sullivan* charge violated not only the defendant's due process rights, but also his right to a jury finding of guilt, the Court held that such an error is a basic structural defect in the underlying criminal case and therefore cannot be deemed harmless. Thus, under the holding of *Sullivan*, the giving of a constitutionally deficient reasonable doubt instruction is among those constitutional errors that require an automatic reversal of conviction.

3. *The Victor v. Nebraska Decision*

Less than a year after *Sullivan*, the United States Supreme Court retreated in substance and produced inconsistent precedent when it upheld two reasonable doubt instructions in *Victor v. Nebraska*. In this harshly criticized decision, the Court confronted two consolidated cases, one from California and the other from Nebraska. The California instruction used the moral certainty language. The Nebraska instruction used the moral certainty language as well as the substantial doubt phrase.

This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction of a moral certainty of the defendant's guilt. A reasonable doubt is not a mere possible doubt. It should be an actual or substantial doubt.

35. See *Sullivan*, 508 U.S. at 279-82 (conducting analysis of constitutional errors that have and have not been held amenable to harmless-error analysis).
36. See id. at 281-82 (holding that such error is basic structural defect in underlying case and therefore cannot be deemed harmless because burden of proof instruction permitting conviction on less than proof beyond reasonable doubt denies constitutional right to jury trial).
37. See id. at 281 (distinguishing structural errors from trial errors and stating that structural errors require automatic reversal of conviction).
39. For further discussion of criticisms of the decision in *Victor*, see infra notes 52-54 and accompanying text.
40. See Kenney, *supra* note 18, at 996 (laying out instruction trial court gave to jury at end of guilt phase). In pertinent part, the California instruction states: 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.

*Id.*
41. See id. at 998-99 (reiterating instruction given by Nebraska trial court to jury at close of trial). The Nebraska court gave the following instruction:
Justice O'Connor, writing for the majority, analyzed each defect separately. Her moral certainty analysis traced the history and meaning of the phrase, ultimately concluding that it retained enough of its original meaning not to understate the prosecution's burden of proof. After analyzing its use in conjunction with the term "abiding conviction," the Court concluded that the moral certainty language was consistent with due process, but that its further use would not be "condoned" by the Court.

The United States Supreme Court then tried to distinguish Cage from Victor by noting that in Estelle v. McGuire the Court 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." The Court further distinguished Cage by maintaining that the context in which the substantial doubt language was used in Victor was

"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 mathematical certainty is not required . . . . 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.

Id.

42. See generally Victor, 511 U.S. at 1 (separately analyzing each alleged defect with special emphasis on history of moral certainty language and context of substantial doubt).

43. See id. at 10-17 (recognizing that moral certainty phrase is not "mainstay of the modern lexicon," but maintaining that it does not mean anything different today than it did in nineteenth century).

44. See id. at 14 (defending use of "moral certainty" in Victor because simultaneous use of "abiding conviction" in Sandoval's case lends content to phrase). The Court seems to have ignored the fact that the instruction upheld in Sullivan also paired the moral certainty phrase with the abiding conviction language. See State v. Sullivan, 596 So. 2d 177, 186 n.3 (La. 1992) (reproducing trial court's original charge, which stated that doubt must be "one that would make you feel that you had not an abiding conviction to a moral certainty of the defendant's guilt" (first emphasis added)).


46. Victor, 511 U.S. at 6 (quoting Estelle, 502 U.S. at 72 n.4). The Court does not mention, however, that two years after Estelle the Court struck down an instruction identical, in pertinent part, to the one in Cage. See Sullivan v. Louisiana, 508 U.S. 275, 277 (1993) (finding Sullivan instruction "essentially identical" to instruction in Cage and therefore unconstitutional). Furthermore, the Court refused to consider the State's argument that the standard of review in Cage was contradicted by Estelle. See id. at 278.
different from that in *Cage*. The Court emphasized that in *Victor*, the trial court used the phrase as a reference to a doubt's existence (rather than to its size) by comparing substantial to "mere possibility," "bare imagination" and "fanciful conjecture." The *Victor* majority also gave an alternative justification for upholding the constitutionality of the reasonable doubt instruction in Nebraska, conceding that the equation of a reasonable doubt with a substantial doubt may have overstated the degree of doubt necessary to acquit. Justice O'Connor found that the instruction's additional definition of reasonable doubt as a "doubt that would cause a reasonable person to hesitate to act," provided a "common-sense benchmark" that overcame the otherwise deficient terminology in the charge. The majority concluded that, as a whole, both the California and Nebraska reasonable doubt instructions "correctly conveyed the concept of reasonable doubt," and, therefore, there was no reasonable likelihood that the juries in the two cases applied the instructions in an unconstitutional manner.

Critics have challenged many aspects of the *Victor* opinion. Commentators have harshly criticized the Court's attempt to distinguish *Cage* on the substantial doubt issue. Scholars have also questioned the Court's tolerance of the moral certainty language in *Victor*. The opinion is seen

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47. See *Victor*, 511 U.S. at 20 (arguing that concern in *Cage* is not present because *Victor* instruction makes clear that "substantial" is used in sense of existence, rather than magnitude, of doubt).

48. See id. ("Any ambiguity, however, is removed by reading the phrase in the context of the sentence in which it appears: 'A reasonable doubt is an actual and substantial doubt . . . as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.'" (emphasis in original)). The *Cage* instruction, however, used almost identical language: "[I]t is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture." State v. *Cage*, 554 So. 2d 39, 41 (La. 1989), rev'd sub nom. *Cage v. Louisiana*, 498 U.S. 39 (1990). Similarly, the instruction in *Sullivan* stated that a reasonable doubt is "one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture." State v. *Sullivan*, 596 So. 2d 177, 185 n.3 (La. 1992) (quoting trial transcript at 566-68).

49. See *Victor*, 511 U.S. at 20-21 (stating that "to the extent the word 'substantial' denotes the quantum of doubt necessary for acquittal, the hesitate to act standard gives a commonsense benchmark for just how substantial such a doubt must be"). But see id. at 23-28 (Ginsburg, J., concurring) (arguing that hesitate to act terminology is inapplicable and ambiguous).

50. See id. 20-21 (maintaining that it was reasonably likely that jury interpreted instruction to indicate that doubt must not be anything other than reasonable).

51. See id. at 22 (holding there is no reasonable likelihood that jurors who determined petitioners' guilt applied instructions in way that violated Constitution).

52. See, e.g., Fortunato, supra note 24, at 383 (finding no "articulable and principled" bases for distinction); Kenney, supra note 18, at 1017 & n.230 (noting that Court assumes juries will understand distinction drawn by Court).

53. See, e.g., Kenney, supra note 18, at 1013-14 (asserting that insufficient weight was given to change in meaning of moral certainty phrase over time); Mulrine, supra note 17, at 207-08 & n.91 (arguing that although legally acceptable, such instructions "may be incomprehensible to the average juror").
as an unwarranted narrowing of the unanimous Cage decision because it inadequately distinguishes itself from Cage and fails to recognize that legally correct instructions may be incomprehensible to the average juror.54

B. Lower Federal Courts Take Advantage of an Erroneously Fluid Standard

In Victor, the Supreme Court failed to take an opportunity to solve the confusion as to reasonable doubt jury instructions.55 By noting that the Constitution does not speak as to whether trial courts must define reasonable doubt, and by upholding phrases that the Court finds “somewhat problematic” (and will not “condone”), lower federal courts are left with the power to adopt a variety of positions.56

1. Broad Discretion in Defining Reasonable Doubt

Organizing the United States Courts of Appeals into rigid categories of definition is difficult because each circuit, at some point, has waivered on its position as to what constitutes an adequate reasonable doubt definition.57 The circuit courts can, however, be separated into three categories concerning their choice of whether to give a definition at all: (1) courts requiring a definition, (2) courts prohibiting a definition, and (3) courts leaving the decision to the discretion of the trial court.58

The United States Courts of Appeals for the Third, Eighth, Tenth and District of Columbia Circuits hold that it is error for a judge to refuse to give a jury an instruction defining reasonable doubt.59 These circuits base this requirement on the importance of the reasonable doubt standard and

54. See Victor, 511 U.S. at 28 (Blackmun, J., concurring in part, dissenting in part) (finding no meaningful difference between Victor and Cage); see also Power, supra note 2, at 61 (stating that Victor opinion is “unconvincing on its own terms” and “inadequately distinguished from Cage”).

55. See Fortunato, supra note 24, at 367 (noticing that Court “scuttled” chance to provide trial judges with clear direction regarding standard).

56. For further discussion of the variety of positions adopted by the lower courts, see infra notes 57-85 and accompanying text.


58. For further discussion of how the circuit courts fall into these categories, see infra notes 59-66 and accompanying text.

59. See, e.g., United States v. Taylor, 997 F.2d 1551, 1557 (D.C. Cir. 1993) (acknowledging that giving definition remains practice in District of Columbia Circuit); United States v. Pepe, 501 F.2d 1142, 1143 (10th Cir. 1974) (establishing defendant's right to have meaning of reasonable doubt explained to jury); Friedman v. United States, 381 F.2d 155, 160 (8th Cir. 1967) (“In the first place, it was the court's duty to instruct on the meaning of 'reasonable doubt' and failure to do so upon request would constitute error.”); Blatt v. United States, 60 F.2d 481, 481 (3d Cir. 1932) (holding that failure to define constituted reversible error).
the realization that the term reasonable doubt is not so commonplace, simple and clear that its meaning is self-evident to jurors.60

The United States Courts of Appeals for the Fourth and Seventh Circuits historically have warned against defining reasonable doubt.61 Even in the face of a jury request for a definition, the Fourth and Seventh Circuits maintain that any possible definition would only make the instructions more complicated and confusing.62 Nevertheless, these courts have acknowledged that they cannot reverse a trial court that correctly defines the term.63

Most appellate courts have left the decision whether or not to define reasonable doubt to the discretion of the trial court.64 These circuits will then provide review under an abuse of discretion or totality of the circumstances test.65 The United States Courts of Appeals for the First, Second, Fifth, Sixth, Ninth and Eleventh Circuits have recognized the arguments on both sides of the issue and have left the choice among acceptable linguistic alternatives to the trial judge.66

2. Parsing Out Definitions After Victor

Regardless of the path an appellate court has chosen to follow, they nonetheless have all reviewed the constitutional adequacy of reasonable doubt to the discretion of the trial court.67 These circuits will then provide review under an abuse of discretion or totality of the circumstances test.68 The United States Courts of Appeals for the First, Second, Fifth, Sixth, Ninth and Eleventh Circuits have recognized the arguments on both sides of the issue and have left the choice among acceptable linguistic alternatives to the trial judge.69

60. See United States v. Hernandez, 176 F.3d 719, 728 (3d Cir. 1999) (stressing that reasonable doubt is not easy concept for jurors to grasp); see also Diamond, supra note 17, at 1719 (reciting several reasons why courts choose to define reasonable doubt); Reasonable Doubt: An Argument Against Definition, supra note 2, at 1958-59 (stating reasons why courts feel term is capable of definition).

61. See, e.g., United States v. Walton, 207 F.3d 694, 699 (4th Cir. 2000) (upholding trial court's refusal to define standard); United States v. Clancy, 175 F.3d 1021 (7th Cir. 1999) (unpublished opinion) (affirming it is "well established" in Seventh Circuit that trial courts should not attempt to define standard of reasonable doubt).

62. See Solan, supra note 4, at 115-16 (analyzing Fourth and Seventh Circuits' beliefs that definition is impossible, that phrase is self-evident, and that every attempt to explain renders explanation of that explanation necessary).

63. See, e.g., United States v. Hall, 854 F.2d 1036, 1038 (7th Cir. 1988) (holding that definition is reversible error only if misleading or confusing); United States v. Love, 767 F.2d 1052, 1060 (4th Cir. 1985) ("In no way were the instructions 'misleading or confusing,' and, viewed in the context of the charge as a whole, 'correctly conveyed the concept of reasonable doubt'").

64. For further discussion of circuit courts that leave discretion to the trial judge, see infra notes 65-66 and accompanying text.


66. See, e.g., United States v. Daniels, 986 F.2d 451, 456-57 (11th Cir. 1993) (recognizing broad discretion of trial judge in formulating instruction); United States v. Nolasco, 926 F.2d 869, 872 (9th Cir. 1991) (en banc) (designating decision to define reasonable doubt to sound discretion of trial court); United States v. Littlefield, 840 F.2d 143, 147 (1st Cir. 1988) (emphasizing that "we do not wish to be interpreted as prescribing a preferred approach").
doubt instructions. Since the decision in Victor, the circuit courts have reviewed a variety of definitions, most of which were found to correctly convey the concept of reasonable doubt when analyzed as a whole. Not surprisingly, the definitions struck down in Cage and Sullivan, and later revived in Victor, are making a comeback in American courts despite the Supreme Court’s recognition that such phrases are problematic.

Ten of the twelve circuits that hear criminal appeals have reviewed and ultimately upheld instructions using the moral certainty phraseology despite their (and the Supreme Court’s) unwillingness to “condone” the definition. The Second Circuit is the only circuit to strike down a moral certainty instruction since Victor. The same court, however, has also upheld an instruction containing this phraseology. The Second Circuit distinguished its cases through the language contained in the remainder of each of the instructions.

Six of the twelve circuits that hear criminal appeals have reviewed and upheld instructions equating reasonable doubt with substantial doubt despite the Supreme Court’s determination that the term is “somewhat problematic.” Again, the Second Circuit is the only circuit to strike down an instruction containing the substantial doubt language since the Victor decision.

67. For further discussion of the circuit courts’ review of reasonable doubt instructions, see infra notes 68-85 and accompanying text.


71. See Gaines v. Kelly, 202 F.3d 598, 609-10 (2d Cir. 2000) (striking down instruction with moral certainty phrase because cumulative effect was too uncertain).

72. See Langert, 1997 U.S. App. LEXIS 34172, at *3 (holding that instruction, as whole, was proper).

73. See id. at *3 (maintaining that “[w]e have previously noted that every unhelpful, unwise, or even erroneous formulation of the concept of reasonable doubt does not render a charge improper”).

74. See, e.g., West v. Vaughn, 204 F.3d 53, 64 (3d Cir. 2000) (upholding instruction with substantial doubt language); Tillman v. Cook, 215 F.3d 1116, 1126 (10th Cir. 2000) (same); Ramirez v. Hatcher, 136 F.3d 1209, 1215 (9th Cir. 1998) (same); Truesdale, 142 F.3d at 757 (same); Harvell v. Nagle, 58 F.3d 1541, 1544 (11th Cir. 1995) (same); Bias v. Ieyoub, 36 F.3d 479, 481 (5th Cir. 1994) (same).
All six circuits have, however, noted their reservations as to the use of the term.\textsuperscript{75} Since \textit{Victor}, the Fifth Circuit is the only circuit that has reviewed an instruction containing the grave uncertainty language.\textsuperscript{76} In \textit{Morris v. Cain},\textsuperscript{77} the United States Court of Appeals for the Fifth Circuit struck down a charge almost identical to the ones in \textit{Cage} and \textit{Sullivan}, which contained the grave uncertainty, substantial doubt and moral certainty language.\textsuperscript{79} The Fifth Circuit noted how \textit{Victor} "muddied the water surrounding the constitutionality of reasonable doubt instructions" by creating the "slipperiest of slopes."\textsuperscript{80}

The most acceptable form of instruction among the circuit courts is that a reasonable doubt is a doubt that would cause a person to hesitate before acting in matters of importance to themselves.\textsuperscript{81} Since Justice O'Connor's commendation of the phrase in \textit{Victor}, seven of the twelve circuits, including the Third Circuit, have upheld instructions with this phrasing.\textsuperscript{82} Nonetheless, this terminology is not without its critics—one of the strongest being Supreme Court Justice Ginsburg.\textsuperscript{83}

Overall, the post-\textit{Victor} decisions among the circuit courts, including the Third Circuit, reveal an eager acceptance of the Supreme Court's invitation to uphold reasonable doubt charges that contain otherwise consti-

\textsuperscript{75} See United States v. Birbal, 62 F.3d 456, 460-61 (2d Cir. 1995) (declaring instruction with substantial doubt language unconstitutional).
\textsuperscript{76} See, e.g., \textit{Tillman}, 215 F.3d at 1126 (noting that substantial doubt language is far from exemplary).
\textsuperscript{77} See \textit{Thompson v. Cain}, 161 F.3d 802, 811-12 (5th Cir. 1998) (upholding instruction equating reasonable doubt with "grave uncertainty").
\textsuperscript{78} 186 F.3d 581 (5th Cir. 1999).
\textsuperscript{79} See id. at 586 (finding reasonable likelihood that jurors were led down unconstitutional path).
\textsuperscript{80} See id.
\textsuperscript{81} See Jon O. Newman, \textit{Beyond "Reasonable Doubt,"} 68 N.Y.U. L. Rev. 979, 982 (1993) (describing "hesitate to act" as most widely used explanation).
\textsuperscript{83} See Victor v. Nebraska, 511 U.S. 1, 24-26 (1994) (Ginsburg, J., concurring) (agreeing with strong criticisms by Federal Judicial Center and Second Circuit Chief Judge Jon O. Newman whom express concern about comparison of decisions in private matters to decision in criminal trial). In discussing the hesitate to act terminology, Chief Judge Newman notes that "[a]lthough, as a district judge, I dutifully repeated that bit of 'guidance' to juries in scores of criminal trials, I was always bemused by its ambiguity." Newman, supra note 81, at 982-83.
titionally impermissible phrases and concepts.\textsuperscript{84} So long as the instruction contains one or more acceptable statements of the government's burden, positioned close enough to cast a saving glow, the instruction will be sustained.\textsuperscript{85}

III. ANALYSIS OF "PROOF BEYOND A REASONABLE DOUBT" IN THE THIRD CIRCUIT

A. Defining Reasonable Doubt in the Third Circuit Prior to Victor v. Nebraska

The United States Court of Appeals for the Third Circuit has considered the constitutionality of reasonable doubt instructions since at least 1914.\textsuperscript{86} In 1932, in Blatt v. United States,\textsuperscript{87} the United States Court of Appeals for the Third Circuit became the first circuit to hold that it is prejudicial error if a trial court does not define the standard of reasonable doubt to jurors.\textsuperscript{88} The Third Circuit recognized that a defendant is entitled to a "clear and unequivocal charge by the court" that the guilt of the defendant must be proved beyond a reasonable doubt.\textsuperscript{89} Trial courts' def-
initions that can be understood as diluting or impairing the constitutional requirement of proof beyond a reasonable doubt thus demand an automatic reversal. 90

Despite its recognition of the fundamental nature of the standard, the Third Circuit historically has held that a trial judge need not follow some “ritual” or use the precise words found in other decisions when defining reasonable doubt. 91 As a result, nearly all reasonable doubt instructions challenged in the Third Circuit prior to (and after) Victor were found to be constitutionally adequate. 92 Such instructions include the moral certainty, substantial doubt and hesitate to act language. 93
Prior to Victor, the Third Circuit found reversible error in only three cases—two of which were based on mere technicalities. The third case involved a challenge to a charge called the two-inference instruction, which directs the jury to acquit when the evidence is as consistent with innocence as it is with guilt. Following in the footsteps of the Supreme Court, the Third Circuit has made challenges to reasonable doubt instructions futile by upholding definitions that it would not necessarily "condone."

B. Fate of Linguistic Alternatives After Victor

Constitutional challenges to reasonable doubt instructions within the Third Circuit have become more difficult to establish since Victor. The Third Circuit has considered five different instructions since the Supreme Court’s last word on the subject, three of which have been presented to the Third Circuit in the past four years. Only one of these instructions was found to be prejudicial to the defendant. Taken together, these decisions illustrate an important trend within the Third Circuit: the broad acceptance of the hesitate to act language as terminology that can overcome otherwise improper language within a charge.

94. See Crescent-Kelvan Co., 164 F.2d at 588 (finding reversible error where trial judge mistakenly stated "that is the preponderance of the evidence" at end of reasonable doubt charge); Augustine, 189 F.2d at 591 (noting that trial judge should have used "you must acquit" instead of "you may acquit" at end of charge).

95. See Link, 202 F.2d at 594 (finding that instruction stating, "if you find the evidence as to this defendant equally balanced, that is, that it is as consistent with innocence as it is with guilt, you must acquit," was confusing to jury thus creating reversible error).

96. See, e.g., Polan, 970 F.2d at 1286 (holding reasonable doubt instruction constitutional despite fact that court would not "recommend" future use of challenged terms). For a discussion of the Supreme Court’s failure to reverse decisions in cases where they express disapproval of the language used in the jury charges, see supra note 44 and accompanying text.

97. See, e.g., Jacobs, 44 F.3d at 1226 (acknowledging inability to strike down instruction in light of Victor, and therefore strongly emphasizing that instruction should no longer be used).

98. See West v. Vaughn, 204 F.3d 53, 63-64 (3d Cir. 2000) (upholding instruction with substantial doubt and hesitate to act language); United States v. Hernandez, 176 F.3d 719, 729-33 (3d Cir. 1999) (striking down instruction defining reasonable doubt as "what you feel inside"); United States v. Isaac, 134 F.3d 199, 203-04 (3d Cir. 1998) (upholding instruction with hesitate to act language); Jacobs, 44 F.3d at 1226 (upholding instruction using "moral certainty," "hesitate to act" and two-inference instruction); Flamer v. Delaware, 68 F.3d 736, 757 (3d Cir. 1995) (holding that "hesitate to act" is not necessary to make instruction constitutionally adequate).

99. See Hernandez, 176 F.3d at 731-33 (finding instruction unconstitutional because it permitted jurors to convict based on "gut feeling").

100. For further discussion of this trend, see infra notes 101-34 and accompanying text.

In United States v. Jacobs,\(^{101}\) the United States Court of Appeals for the Third Circuit upheld an instruction using the moral certainty and hesitate to act terminology.\(^{102}\) Relying on Victor, the Third Circuit found the instruction constitutionally sufficient when viewed as a whole, reasoning that the hesitate to act language overcame the other deficient language in the charge.\(^{103}\) The Third Circuit stated, however, that moral certainty was an antiquated phrase that "should no longer be given" in light of the Supreme Court's criticism.\(^{104}\)

Despite the Third Circuit's admonition against trial courts' further use of the definition, it is difficult to imagine the court reversing a trial court decision using the moral certainty phraseology, even without the hesitate to act language.\(^{105}\) Even though there has been a long-term decline in the use of the moral certainty language since the Supreme Court's decision in Cage, the Third Circuit has repeatedly upheld such language.\(^{106}\) When coupled with language such as "hesitate to act" or "abiding conviction," the moral certainty phrase will likely survive appellate review.\(^{107}\)

2. United States v. Isaac: Two-Inference Instruction Revived

In United States v. Isaac,\(^{108}\) the United States Court of Appeals for the Third Circuit upheld a two-inference charge that instructed the jury to

\(^{101}\) 44 F.3d 1219 (3d Cir. 1995).

\(^{102}\) See id. at 1226 (finding no due process violation). The instruction in Jacobs charged, in pertinent part:

Proof beyond a reasonable doubt must, therefore, be of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. A reasonable doubt exists whenever, after a careful and impartial consideration of all of the evidence in this case or lack of it, you do not feel convinced to a moral certainty that the defendant is guilty of the charge.

\(^{103}\) Id. at 1225. The charge in Jacobs also used a two-inference instruction:

So if you view the evidence in this case as reasonably permitting either of two conclusions, one of innocence and the other of guilt, you should adopt the conclusion of innocence and return a verdict of not guilty, because a defendant is never to be convicted on mere suspicion or conjecture.

\(^{104}\) Id. at 1226 & n.8.

\(^{105}\) Cf. Flamer v. Delaware, 68 F.3d at 736, 757 (3d Cir. 1995) (establishing that hesitate to act language is not necessary to overcome language in instruction that had previously been found to be problematic).

\(^{106}\) See, e.g., Jacobs, 44 F.3d at 1226 (upholding instruction using moral certainty language).

\(^{107}\) See id. (permitting use of instruction pairing "hesitate to act" with "moral certainty"); Berkowitz v. United States, 5 F.2d at 967, 967 (3d Cir. 1925) (approving use of instruction pairing "abiding conviction" with "moral certainty").

\(^{108}\) 134 F.3d 199 (3d Cir. 1998).
acquit if the evidence reasonably permitted either of two conclusions—one of innocence and the other of guilt.\textsuperscript{109} Prior to \textit{Victor}, the only reasonable doubt instruction which the Supreme Court reversed for prejudicial error on substantive grounds contained precisely the same language.\textsuperscript{110} Furthermore, the Third Circuit has recognized the harsh criticism of the two-inference instruction by the Second Circuit and has cautioned trial courts against its further use.\textsuperscript{111}

Nevertheless, the Third Circuit upheld the instruction in \textit{Isaac}, stating that "although we disapproved of the 'two-inference' instruction in \textit{Jacobs}, we did not hold that the instruction was so constitutionally deficient \textit{per se} that it infected the entire instruction on reasonable doubt."\textsuperscript{112} The Third Circuit found that the hesitate to act language counterbalanced the defect caused by the two-inference charge.\textsuperscript{113}

After \textit{Isaac}, it is clear that despite the Third Circuit's criticism of the charge, a two-inference instruction will survive when coupled with the hesitate to act language.\textsuperscript{114} Furthermore, it is likely that such an instruction will survive in the Third Circuit without the help of the hesitate to act language, so long as the court can point to a portion of the charge that will counteract the defect.\textsuperscript{115}


In its most recent ruling on this issue, \textit{West v. Vaughn},\textsuperscript{116} the Third Circuit upheld an instruction using the problematic substantial doubt language.\textsuperscript{117} The charge defined reasonable doubt as the type of "substantial..."
doubt that makes people pause before they plunge into action." Relying on its decision in *Flamer v. Delaware,* and the Supreme Court’s decision in *Victor,* the Third Circuit held that the substantial doubt phraseology did not rise to the level of constitutional error because it was used in an otherwise unobjectionable charge.

The Third Circuit further adhered to *Victor* by concluding that the hesitate to act terminology used in the instruction was not likely to mislead a jury because it “gives a common sense benchmark for just how substantial such a doubt must be.” The West opinion is thus another Third Circuit decision that illustrates the expansive adoption of “hesitate to act” as the saving grace for otherwise disfavored reasonable doubt instructions. The decisions in *Flamer* and *West* confirm that the substantial doubt phrase will likely be upheld in the Third Circuit when accompanied by hesitate to act language, and even when not.


Despite the United States Court of Appeals for the Third Circuit’s wide acceptance of the hesitate to act language, as overcoming common deficiencies in reasonable doubt instructions, the court drew the line in 1999 when it decided *United States v. Hernandez.* In *Hernandez,* the Third Circuit struck down a reasonable doubt instruction for the first time since 1953. The jury in *Hernandez* was given several instructions during the

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118. *Id.* at 56.
119. 68 F.3d 736 (3d Cir. 1995). The instruction in *Flamer* stated that: Reasonable doubt does not mean a vague, speculative or whimsical doubt, nor a mere possible doubt, but a substantial doubt and such a doubt as intelligent, reasonable and impartial men and women may honestly entertain after a careful and conscientious consideration of the evidence in the case.
119. *Id.* at 757.
120. See *West,* 204 F.3d at 64 (holding that although sentence equating reasonable doubt with "substantial doubt" was problematic, phraseology does not render instruction constitutionally suspect, as whole, when charge is otherwise unobjectionable).
121. *Id.* (quoting Justice O’Connor’s majority opinion in *Victor v. Nebraska,* 511 U.S. 1, 20-21 (1994)).
122. Compare *West,* 204 F.3d at 64 (finding that hesitate to act language overcame suspect substantial doubt phrase), with *Flamer,* 68 F.3d at 757 (maintaining that hesitate to act language is not needed to uphold instruction using substantial doubt phraseology).
123. 176 F.3d 719 (3d Cir. 1999).
124. See *United States v. Link,* 202 F.2d 592, 594 (3d Cir. 1953) (striking down reasonable doubt instruction).
Before the jury heard any evidence, they were told that a reasonable doubt is "what you in your own heart and your own soul and your own spirit and your own judgment determine [it] is . . ." At the end of the trial, the judge gave a traditional "hesitate to act" charge and instructed the jury that all the instructions they were given throughout the trial should receive equal weight.

In Hernandez, the Third Circuit ruled that "when an erroneous instruction is given, a subsequent clarification must be sufficiently clear and compelling" to conclude that the initial inaccuracy did not affect the jury's deliberations. The Third Circuit found that a reasonable likelihood existed that the jurors utilized the improper definition and convicted the defendant based on a "gut feeling." Although the jurors eventually heard a proper definition, the Third Circuit noted that at that point "they had been forewarned that the definition they were hearing was less helpful than the prior erroneous explanation . . ."
The hesitate to act language, sometimes termed the “analogy approach,” is the most widely used definition amongst the state (and lower federal) courts. The Third Circuit approves of it as a “comprehensible benchmark.” Although the phrase may counterbalance the terminology struck down in *Cage* and *Sullivan* (and later upheld in *Victor*), it cannot compensate for instructions so faulty as to influence a jury to apply a standard lower than that required by due process. Furthermore, practitioners should note that the hesitate to act language has been criticized by both Supreme Court Justice Ginsburg and the United States Courts of Appeals for the First and Second Circuits.

IV. PRACTICAL APPLICATION: DEFENDANTS FIGHT AN UPHILL BATTLE IN ESTABLISHING A DUE PROCESS VIOLATION

A. Difficulty in Proving Unconstitutionality of Reasonable Doubt Instructions

The test for establishing a due process violation requires a finding that there exists a reasonable likelihood the jury understood the burden of proof instruction to allow conviction based on lesser degree of certainty than that embodied in the reasonable doubt standard. After *Victor*, it is clear that the Supreme Court will not lead an effort to generate its own constitutionally adequate instruction. Therefore, almost any reasonable doubt instruction that does not wildly misstate the standard may be deemed sufficient for conviction.

Furthermore, practitioners should note that jury charges may be rendered “virtually impregnable to defense attack on appeal because any ‘misdescription’ of the standard is ‘neutralized’ by such bland and nondescriptive declarations as ‘the state’s burden is to prove its case beyond a reasonable doubt,’ ‘the burden is a high one and never shifts to the

131. See Newman, supra note 81, at 982 (describing “hesitate to act” as most widely used explanation).

132. See United States v. Isaac, 134 F.3d 199, 204 (3d Cir. 1998) (“By analogizing the standard of proof to the level of certainty an individual would require before unhesitatingly acting in important personal affairs, the court provided jurors with a comprehensible benchmark.” (emphasis added)).

133. See Hernandez, 176 F.3d at 733 (holding that instruction using “hesitate to act,” when taken as whole, was not enough to “unring the bell”).

134. For further discussion of this criticism, see supra notes 52-80.

135. See Victor v. Nebraska, 511 U.S. 1, 6 (1994) (reiterating holding in *Estelle*, Court stated, “In a subsequent case, we made clear that the proper inquiry 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” (citing *Estelle v. McGuire*, 502 U.S. 62, 72 & n.4 (1991))).

136. See Stewart, supra note 7, at 38 (stating that *Victor* holding makes clear that “Court will not lead an effort to rewrite reasonable doubt instructions, nor will the due process clause serve as a tool for prodding such an effort”).

137. See, e.g., Hernandez, 176 F.3d at 731 (finding instruction unconstitutional because it permitted jurors to convict based on "gut feeling").
defendant' and 'the defendant is presumed innocent.' There is, however, a small glimmer of hope found in the *Hernandez* decision, which suggests that one line in a lengthy instruction can be enough to render the whole instruction unconstitutional.

**B. Trial Judges' Responsibility in Making Jury Instructions Comprehensible**

Trial judges have effectively been given permission to use confusing and misleading instructions because a charge that contains language previously labeled as "confusing" or "problematic" can be saved by the reviewing court's determination that the charge, taken as a whole, could not reasonably have misled the jurors. Because a standard of general application has not yet been (and may never be) adopted, and because appellate review assesses only the legal sufficiency of instructions, trial judges may want to entertain policy considerations when drafting their instructions. Most importantly, juror miscomprehension seems to be a fundamental factor in the misapplication of the reasonable doubt standard.

Although reasonable doubt instructions may pass constitutional muster, they can have decision effects that conflict with the standard's purpose. Substantial empirical data shows that jurors do not comprehend the standard on its face. Furthermore, jurors are unable to understand

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138. Fortunato, supra note 24, at 396; see also Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) (stating that "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings"); Adams v. Aiken, 41 F.3d 175, 182 (4th Cir. 1994) ("Victor explains that the offending words can be neutralized by words or phrases that preclude the jury from requiring more than a reasonable doubt to acquit.").

139. See Hernandez, 176 F.3d at 737 (Sloviter, J., dissenting) (finding that majority relied on one sentence in eight page instruction to find due process violation).

140. See Darryl K. Brown, *Regulating Decision Effects of Legally Sufficient Jury Instructions*, 73 S. CAL. L. REV. 1105, 1106 (2000) (maintaining that judges choose among alternative instructions with regard solely to whether instruction meets standard of minimum accuracy, rather than to whether jurors are more likely to understand and correctly apply it).

141. See Kenney, supra note 18, at 1022-23 (noting that Supreme Court has failed to help clarify standard by not giving approved definition); Power, supra note 2, at 48 (discussing casual interest in misapplication of standard and lack of leadership by Supreme Court).

142. See Solan, supra note 4, at 132 (analyzing empirical data as indicating that misunderstanding of term "proof beyond a reasonable doubt" ensures that convictions occur even when jury does not have "highest degree of certitude"). But see Power, supra note 2, at 103 (stating that jury misapplication is result of other factors besides linguistic flaws, including jury education, training of trial attorneys and lack of firm consensus by legal profession as to meaning of reasonable doubt).

143. See Brown, supra note 140, at 1109-10 (discussing research that shows reasonable doubt instructions conflict with purpose of standard "by mislead[ing] jurors into expecting defendant to present evidence raising articulable doubt about guilt").

144. See, e.g., Horowitz & Kirkpatrick, supra note 6, at 668 (finding that subject group not given definition exhibited probabilities of guilt that would be constitu-
the legal terminology in poorly written and overly complex instructions. Therefore, in order to guard against unjust convictions, trial courts must develop constitutionally adequate instructions that are comprehensible to the layperson.


146. See generally Laurence J. Severance et al., Toward Criminal Jury Instructions That Jurors Can Understand, 75 J. CRIM. L. & CRIMINOLOGY 198 (1984) (proposing revised pattern instruction in light of study results); Severance & Loftus, supra note 145 (conducting three separate studies and proposing improved methods for instructing jurors); see also Solan, supra note 4, at 125 (discussing study that showed jurors are less likely to convict when definitions focus on government’s burden as opposed to defendant’s ability to establish doubt). Judges might want to take note of the fact that several courts are now using a fairly comprehensible definition issued by the Federal Judicial Center and strongly supported by Supreme Court Justice Ginsburg in her dissent in Victor. See Federal Judicial Ctr., Pattern Criminal Jury Instructions No. 21, at 29 (1998), stating that:

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, your 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.

Id. (emphasis added). Justice Ginsburg asserts that this model "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." Victor v. Nebraska, 511 U.S. 1, 27 (1994) (Ginsburg, J., concurring) (noting fur-
V. CONCLUSION

In the wake of the Third Circuit's recent rulings on the constitutionality of reasonable doubt instructions, it seems that nearly any sensible phraseology defining reasonable doubt will be sufficient. Even terminology historically categorized as problematic will withstand appellate review. So long as a trial court does not outrageously err in its definition, criminal defendants will have an extremely difficult time establishing due process violations.

Melissa Corwin