OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CLARENCE VICTOR, Petitioner, v. NEBRASKA and ALFRED ARTHUR SANDOVAL, Petitioner, v. CALIFORNIA

CASE NO: 92-8894 and 92-9049

PLACE: Washington, D.C.

DATE: Tuesday, January 18, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

CLARENCE VICTOR,
Petitioner,
v. : No. 92-8894
NEBRASKA;
and
ALFRED ARTHUR SANDOVAL,
Petitioner,
v. : No. 92-9049
CALIFORNIA

The above-captioned matter came on for oral argument before the Supreme Court of the United States on Tuesday, January 18, 1994.

APPEARANCES:

MARK A. WEBER, ESQ., Omaha, Nebraska; on behalf of the Petitioner Clarence Victor.

ERIC S. MULTHAUP, ESQ., San Francisco, California; on behalf of the Petitioner Alfred Arthur Sandoval.

DONALD R. STENBERG, ESQ., Attorney General of Nebraska, Lincoln, Nebraska; on behalf of the Respondent Nebraska.

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Angeles, California; on behalf of the Respondent California.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 92-8894, Clarence Victor v. Nebraska, Number 92-9049, Alfred Arthur Sandoval v. California, Consolidated.

Mr. Weber.

ORAL ARGUMENT OF MARK A. WEBER

ON BEHALF OF THE PETITIONER CLARENCE VICTOR

MR. WEBER: Thank you, Mr. Justice -- Mr. Chief Justice, and may it please the Court:

The issue presented in this case is whether the Nebraska supreme court failed to properly apply the constitutional principles set forth in Cage v. Louisiana to a jury instruction in Nebraska containing virtually identical language.

The facts of this case specific to the issue of the reasonable doubt instruction are whether or not the defendant, Clarence Victor, the petitioner, was properly convicted of first degree murder, and whether or not it was proven beyond a reasonable doubt that Mr. Victor killed purposely and with deliberate and premeditated malice. The responsibility for the death of the victim in this case is not at issue.

With respect to the specific instruction, I feel

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it is most simple to break it down into two basic parts. The instruction given in Mr. Victor's trial, NJI 14.08, is found at the Joint Appendix at page 11. As I see it --

QUESTION: Mr. -- why -- ordinarily we say instructions should be considered as a whole. Why do you feel you should break this down into two parts?

MR. WEBER: Well, I do believe the prior decisions of this Court do warrant looking at the instruction as a whole, but I think the plain meaning of the instruction, also consistent with the prior decisions of this Court, would be to see two basic parts, one being the burden for conviction, the other being the burden for acquittal, and in this particular instruction I see those two parts coming out in the plain meaning given to it.

With respect to that instruction, I would draw a line after the sentence, "You may find the 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," and I believe the following sentence to the end of that instruction is the burden in order to acquit, and as I've said, I believe the burden to convict in this case similar to in Cage is too low, and the burden to acquit too high.

In this particular instance, with this instruction, a conviction is allowed on the strong

probabilities of the case and to a moral certainty, as determined by prior decisions of this Court, of strong probabilities, and I believe the plain meaning of the instruction, that initial part with respect to conviction, the strong probability as read with the other portions of the conviction-related portion of the instruction, allow conviction on something that is tantamount to a civil preponderance of the evidence standard.

QUESTION: You say you do agree that this instruction should be read as a whole.

MR. WEBER: Yes, I do.

QUESTION: And do you think that our decision in Holland v. United States lays down the same standard as was laid down in Cage?

MR. WEBER: Well, as recognized, the standard has changed somewhat, and specifically with respect to Boyde --

QUESTION: Well, but I mean the standard as to the context of the instruction. Maybe you can't separate them, but Boyde dealt with reasonable understandings.

MR. WEBER: Yes.

QUESTION: And other than that, do you think that Holland and Cage lay down the same test?

MR. WEBER: I believe so, in the sense that as recognized I believe in Estelle, if not also in --

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recognized previously in Franklin, there might be a new test when it comes to interpretation of jury instructions and particularly in this case with respect to reasonable doubt.

QUESTION: Why would there be a new test in interpreting an instruction on reasonable doubt?

MR. WEBER: Well, as you found in -- taking Winship in conjunction with Sullivan, just decided by the Court last year,the concept of reasonable doubt and the burden of the Government to prove reasonable doubt, to prove conviction beyond a reasonable doubt, is so fundamental that I believe it would be a recognized exception to basic rules of interpretation.

QUESTION: What authority do you have for that proposition?

MR. WEBER: Well, again I refer only to Sullivan in the sense that it's such a fundamental guarantee with respect to due process, the fundamental right of trial by jury, and relieving the State of its burden. I believe you recognized in Sandstrom and in Franklin that relief of the State's burden is a fundamental violation of due process.

QUESTION: Yes, but why does it follow from that that a different standard should be applied to judging a jury instruction on that subject than a jury instruction

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on some other subject. Have we ever suggested that?

MR. WEBER: No, I don't believe so, and I spoke in error with respect to interpretation of other instructions. I believe that if there is a standard it is the plain meaning standard which would be equally applicable to all instructions. We do have the strong --

QUESTION: Mr. Weber, is this instruction routinely used in the courts in Nebraska?

MR. WEBER: It is not, Your Honor. Following the decision in Cage, the -- specifically with my own experience the Douglas County District Court in Omaha, Nebraska, that county ceased using the instruction for the most part.

There were subsequent decisions by certain courts, specifically the supreme court of the State of Nebraska, distinguishing the objectionable instruction from that given in Cage, and I can note in all candor that some district judges then did recommence using the instructions, the instruction that is objectionable here.

I think it is fairly safe to say that because of the state of the uncertainty with respect to the United States District Court for the District of Nebraska holding the distinction by the Nebraska supreme court invalid that most, if not all of the courts in the State of Nebraska no longer use the defective instruction and rather use the

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instruction that is referred to as -- it's contained within the appendix to counsel for Sandoval's brief at page B-23, NJI second criminal instruction 2.0, which was passed in 1992.

QUESTION: Was the instruction in this case routinely given before our decision in Cage?

MR. WEBER: Yes, I think it would be safe to say it was. However, there is some authority from the Eighth Circuit specifically with respect to using strong probabilities language up to approximately 20 years ago questioning that language.

I understand that the strong probabilities of the case language has been approved in and of itself in other decisions -- I believe in Dunbar. However, it is not my argument that this instruction is to be looked at under a microscope.

In looking at Poison Pills I understand that is not the test, but with respect to the instruction taken as a whole in allowing conviction in this case based upon the strong probabilities of the case, that is basically allowing a jury to convict on a possibility of guilt, which of course is not proof beyond a reasonable doubt, I think taking again the entire portion of the instruction that I believe relates to conviction in context, it reaffirms the jury's ability to find guilt on a civil --

what is more akin to a civil preponderance standard.

And that specifically is the sentence that follows, "Excuse me, " but precedes the strong probabilities language, and that, and I quote, "You may find an accused guilty" -- excuse me. "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."

In my mind, that reaffirms -- in the plain meaning reaffirms a jury's ability to convict on a civil preponderance standard. You take that hand-in-hand with the moral certainty language contained in Cage, it even allows the worst possible of scenarios that a jury can convict, in this case find first degree murder, in spite of or on evidence other than that presented at trial.

The respondent adheres to the distinction drawn by the Nebraska supreme court. It adheres to a rationale that I believe the Federal Court for the District of Nebraska indicated called for an exercise in mental gymnastics. It belies logic that a juror reading this instruction would not be reasonably likely to misapply constitutional principles and allow conviction on something more akin to the civil preponderance standard.

With respect to the second portion of the instruction, acquittal is not permitted and perhaps this is the most heinous violation of the instruction, unless

reasonable doubt is equivalent to a substantial doubt, and I submit that very first sentence of what I have carved out to be the second portion, or the acquittal portion of the instruction, defines is the only real and true definition of reasonable doubt.

QUESTION: Well, counsel, that would, if it stood alone, certainly come pretty close to Cage, but the balance of the sentence explains that the reasonable doubt has to be as distinguished from a doubt arising from a mere possibility, bare imagination, or fanciful conjecture, and viewed with that, perhaps it isn't a misstatement.

MR. WEBER: I understand what you're saying, Justice O'Connor, with respect to reading the entire sentence, but I think what we're looking at here is a continuum, with mere possibility or fanciful conjecture at one end, and we can't ignore the language that I believe you omitted in your question, and that is the substantial doubt. The substantial doubt, as you noted, is concededly violative of Cage. We have mere possibility at one end, substantial doubt on the other --

QUESTION: Well, I'm not sure it is. It was included in Cage, but it isn't clear to me that that standing alone would have been found to be a violation of Cage.

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MR. WEBER: I tend to agree with you. I don't think we look at these in a vacuum, and we do not look at these standing alone, much as the Respondent has attempted to do, as well as the amici in this case, looking at each particular term, but when you take all the terms standing as a whole, the graver and more important transactions of life, the moral certainty language, the strong probabilities of the case language, and the actual and substantial doubt, I don't think there's any question that it was reasonably likely that the jury in this particular case misapplied constitutional principles and deprived the petitioner of due process.

I had anticipated your question to be that perhaps the fact that the substantial doubt language refers to the evidence that that somehow salvages this instruction. Indeed, that's what the Respondent would have you believe.

The simple response is that it's irrelevant whether or not the basis is the evidence or, as moral certainty would suggest, something other than the evidence and independent of the evidence. If the doubt is too high to acquit a particular defendant, it is still unconstitutional.

I believe, again with respect to the substantial doubt language, you take in conjunction the sentence that

allows the jury to consider the fact that they can convict and still be aware that they're possibly mistaken reaffirms in the jury's mind that the standard is not as high, they may convict on a strong probability and not on a reasonable doubt.

I feel it necessary, because it was addressed within the briefs, to respond to allegations made with respect to procedural bar and retroactivity in this case. Indeed, the issue of retroactivity was presented in the issue that certiorari was granted.

With respect to procedural bar, I think there are several reasons why we are properly before this Court. The merits were indeed addressed by the Nebraska supreme court, and under Michigan v. Long I believe were properly before this Court.

Also, with respect to a distinction found in Teague with respect to Harris v. Reid, I don't believe there's any ambiguity in the opinion of the Nebraska supreme court concerning the merits of this case.

Indeed, the most recent opinion on this particular instruction, State v. Cook, a Westlaw cite out of Nebraska from last month, indicates that in spite of this Court granting certiorari in this case, and in spite of the Federal District Court for the District of Nebraska holding the distinction drawn by the State of Nebraska,

the supreme court of the State of Nebraska, they would adhere to their distinction drawn between this defective instruction and the defective instruction in Louisiana, and I believe again properly before this Court.

QUESTION: In this case we just didn't have the use of the phrase, moral certainty, by itself. It was also specifically opposed to and absolute or a mathematical certainty. Don't you think that eliminates whatever confusion might otherwise exist? What kind of a certainty would you describe as being required, absolute certainty?

MR. WEBER: Not at all, Your Honor. Obviously, it's the distinction drawn. There has to be some between mathematical certainty --

QUESTION: And moral certainty, that certainty which is the only certainty that can be had pertaining to human conduct -- moral certainty.

MR. WEBER: The problem -- excuse me. The problem, Your Honor, is today moral certainty doesn't mean today what it did at the time that the instruction was passed, and as Sandoval counsel --

QUESTION: Maybe --

MR. WEBER: -- counsel will point out to you the instruction means something totally different today.

QUESTION: It does to me. Maybe it does not

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have only that meaning. Maybe it has acquired another, and indeed, quite contrary meaning, but at least when it's used in a charge that opposes it to mathematical certainty. I mean, if I just said moral certainty, then I can understand the argument, but if it says, you know, it must be to a moral certainty, not a mathematical certainty, what other possible meaning could it have than the old meaning of moral certainty?

MR. WEBER: That's the problem, Justice Scalia, it has several different meanings. It is certainly possible that someone will properly interpret the term, moral certainty, in and of itself to mean something that it is supposed to mean, but is it reasonably likely, taking that instruction in context, the meaning moral certainty is the same as a civil preponderance standard, which is almost what the instruction says?

QUESTION: It's your burden to show that it has to be reasonably likely that it would be misunderstood, isn't it?

MR. WEBER: Yes. Yes, it is.

QUESTION: Well then, what line of reasoning would say that moral certainty means roughly like the civil preponderance standard? Is that what you're saying the --

MR. WEBER: The only thing I'm saying is that,

as the prior decisions of this Court have noted, we are not necessarily to parse language and view the particular terms under a microscope, and I'm saying it is certainly possible, indeed, reasonably likely, that a jury looking at the moral certainty language and noting that they can convict on the strong probabilities of the case that those are tantamount to similar or same meanings, and it's reasonably likely that they will be given that meaning by a jury.

QUESTION: So you say that because of the juxtaposition of moral certainty and strong probabilities that that gives meaning to moral certainty?

MR. WEBER: To me I believe it does, and I believe it does to the common juror, and I believe that's what we need to focus upon here. Obviously, as I think is noted in the briefs, the Court and certainly counsel have focused upon these terms ad nauseam.

QUESTION: Inordinately.

MR. WEBER: Yes, and the problem is that we maybe have removed ourselves too far from what the common juror on the street is going to think when they look at this instruction, and if we're to do the best we can and look at the instruction as a whole, I don't think there's any question when you look at what I submit is the conviction language, and that takes the graver more

important transactions of life language, the moral certainty language, and the strong probability language taken together.

It certainly on a continuum pushes the standard much, much closer to what would be the same as a civil greater weight of the evidence -- the reaffirmation that you can find the defendant guilty by the greater weight of the evidence, read greater weight of the evidence and still be aware of the possibility that you may be mistaken, I think is consistent with what a reasonable juror would look at.

QUESTION: Well, wait, I certainly don't agree with that as to the first sentence, as to the "such a doubt as would cause a reasonable and prudent person in one of the graver, more important transactions of life to pause and hesitate before taking the representative facts as true."

Are you saying you only pause or hesitate when the fact is -- you only pause or hesitate when the fact is true by a bare preponderance of the evidence?

MR. WEBER: No, that's not what I'm saying.

QUESTION: I don't think so. I think it takes much more certainty than that to eliminate any hesitation on my part.

MR. WEBER: Certainly, but another reading of

that instruction would be that possibly the decision to acquit in this case could be grave and thus, again, raising the burden of the defendant unconstitutionally.

QUESTION: I don't understand what you're saying.

MR. WEBER: If --

QUESTION: I take that first sentence to define reasonable doubt in such a way to say the kind of doubt that would cause you to pause. Well, boy, I pause somewhat well short of preponderance.

MR. WEBER: But I also think the more clear definition of reasonable doubt provided in the instruction is the one at the conclusion of the instruction, that being a reasonable doubt is an actual and substantial doubt.

QUESTION: Okay, I'll give you that one, but you were trying to use the first sentence as supporting your case --

MR. WEBER: I'm only --

QUESTION: -- and I think it's something you have to overcome rather than something you can use.

MR. WEBER: I understand. I only look at it in the context that if we read the instruction as a whole there are certain possibilities of juror interpretation, and with those possibilities it's reasonably likely that a

jury would misapply constitutional principles.

I would like to save a little time for rebuttal, and accordingly I would like to conclude with portions that I think in context we need to look at. This case is unique in that certiorari was denied on direct appeal and this issue was properly presented to the Court at that time.

And if in fact we somehow fall between a Griffith style application of the rules of this Court or a Teague problem, I do not feel first of all that we should be in a Teague-related situation. It is more akin to Griffin in that we have satisfied the requirements that the issue was presented on direct appeal. The State concedes that it was presented on direct appeal, and in fact with respect to the default issue, the State did not object on a procedural basis in its app cert in this case.

With respect to Teague, we certainly would fall under the second exception where fundamental fairness of trial is compromised in that conviction would be undermined or in this case would diminish the likelihood of obtaining a conviction.

In this case we have a fundamental violation of the Eighth and Fourteenth due process violations as well as the Fifth Amendment guarantees, as noted in Winship, that the proof beyond reasonable doubt is required, and

also the Sixth Amendment trial by jury guarantees that were noted within Sandstrom and Franklin.

I'd like to reserve the remaining time for rebuttal.

QUESTION: Very well, Mr. Weber.

Mr. Milthaup. Is it Multhaup, or Milthaup?

MR. MULTHAUP: Multhaup.

QUESTION: Multhaup. Mr. Multhaup.

MR. MULTHAUP: Thank you.

ORAL ARGUMENT OF ERIC S. MULTHAUP

ON BEHALF OF THE PETITIONER ALFRED ARTHUR SANDOVAL

MR. MULTHAUP: Mr. Chief Justice and may it please the Court:

Regarding the Sandoval instruction, the first point I would like to emphasize is that this instruction lacks much -- lacks any of the potentially corrective language found in its progenitor, the extended discussion of reasonable doubt found in Commonwealth v. Shaw, and the corrective language found in the current Massachusetts version of -- of defining reasonable doubt, the updated Shaw version found at page 18 of Appendix B.

QUESTION: Of course, you would say at the time of Shaw it was not corrective at all, that --

MR. MULTHAUP: Exactly.

QUESTION: The average juror at the time of Shaw

understood what moral certainty meant.

MR. MULTHAUP: Exactly, Your Honor.

QUESTION: You don't really think that, do you? It was a technical term even then, wasn't it? Wasn't it a term of moral philosophy?

MR. MULTHAUP: Your Honor, you're raising an interesting point more as to the scope of American education than as to whether it was a technical versus nontechnical term, and my belief is that anybody who knew what the phrase meant at all knew what it meant in the terms that Justice Shaw penned it. Whether it was a term that was oblivious to 2 percent or 92 percent of the American public, I don't know, but at the time --

QUESTION: Are the dictionary definitions different? You gave us a lot of contemporaneous definitions. What about in the 1850's, what did the dictionaries say? Did they say something different?

MR. MULTHAUP: Yes, Your Honor, and as we traced from our petitioner's opening brief through the reply brief, the common meaning of moral certainty as reflected in lexicographical sources meant moral certainty in terms of the highest degree of certainty that you could obtain, based on empirical evidence from Daniel Webster's -- Noel Webster's first dictionary in 1827 through approximately the turn of the century.

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Then, at the turn of the century, dictionaries began having -- including definitions or substituting definitions much more consistent with the current definitions, that being probable, strong probability, for practical purpose as opposed to legal purposes. Those phrases are drawn from the 1906 version quoted in the reply brief, so the transformation occurred somewhere around the turn of the century.

QUESTION: And yet in so many model instructions the term appears well past the turn of the century.

MR. MULTHAUP: That's certainly true, Your Honor, and I think that brings up -- that brings up the fundamental problem in this case, where lawyers and judges as law-trained people hear this phrase as reiterating what they have learned since the beginning of law school and throughout their practice, while the lay public uses it, understands it in a very different manner, and they're --

QUESTION: But might that manner be favorable to the defendants, and might it not be that the defendants' desire to have it explains how it continues to persist, despite what you see the shift in definitions after 1900?

MR. MULTHAUP: I think that is a very unlikely possibility. How reasonable -- how sensible would it be for a defense attorney to, having scanned the dictionary definitions contained or reviewed in petitioner's opening

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brief, a fairly extensive, exhaustive review of American dictionaries --

QUESTION: I'm not sure that that's what the defense attorneys are doing, but they're still asking for moral certainty language.

MR. MULTHAUP: Nobody asks for it, Your Honor, I don't believe. I believe that it's given as a matter of historical inertia.

QUESTION: Why didn't -- didn't California just make a decision to preserve that language after a rather extensive review of the instruction?

MR. MULTHAUP: No, I -- if Your Honor's referring to the CALJIC review in the mid-1980's, that review went so far as to consist of asking the lawyers and judges whether they saw any reason for changing the instruction. By analogy, if, for example, a president conducted a survey of whether health care reform was needed by a survey of pharmacists and physicians, that would not carry a lot of credibility.

The question is what the instruction means to the public who are serving on juries, not what it means to the lawyers and judges who are immersed in it.

QUESTION: How many people -- what percent of the general public do you think frequently use the phrase, moral certainty, in their conversation?

MR. MULTHAUP: Your Honor, I don't believe that that's the test.

QUESTION: Well, I didn't ask you whether that was the test.

MR. MULTHAUP: Yes.

QUESTION: I asked you what percent you thought used the expression. You're perfectly entitled to say you don't know.

MR. MULTHAUP: I don't know what percent use it in their ordinary conversation, but I do know that there's a high likelihood that most people hear it used in contemporary parlance in the newspapers, as indicated by our contemporary references. In petitioner's brief we survey a number of usages of both moral certainty and moral evidence -- the New York Times, the Washington Post, the Sacramento Beat -- so that it's familiar to people. The usage that's consistent with the dictionary sources is familiar to people.

QUESTION: It's familiar to the readers of the Washington Post and the New York Times and the Sacramento Beat, but you're not required to read those newspapers to get on the jury.

MR. MULTHAUP: No. No, Your Honor, but what I'm trying to suggest is what is the most likely explanation that a juror, a California juror, Sandoval's jurors,

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understood for moral certainty.

QUESTION: You'd have to do that from its context, wouldn't you, and although I happen to agree with you that the word has acquired a different meaning, I'm not sure it has eliminated the original meaning. Some modern dictionaries continue to use that original meaning, don't they, as one of the possible meanings of moral certainty?

MR. MULTHAUP: I disagree with that as a factual matter, Your Honor. There's only -- there's no American dictionary which uses it consistent with reasonable doubt, and only the Oxford English Dictionary, which is well-known for preserving historical meanings, is consistent with contemporary usage. Respondent --

QUESTION: Maybe that means it's a better dictionary. Webster's Third gives us one of the meanings -- capable of being judged as good or evil -- meaning moral. This is the word you're looking up in all of these.

Moral, capable of being judged as good or evil in terms of principles of right and wrong action, resulting from or belonging to human character, conduct, or intentions, and that's what moral -- when you use moral in the phrase, moral certainty, it means the certainty that pertains to judgment of human actions, and I take

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that to be an indication of that definition.

MR. MULTHAUP: I was more -- Petitioner Sandoval focused more on those dictionary definitions which specifically took the phrase, moral certainty, as a phrase, rather than simply the word, moral certainty.

QUESTION: Oh, well, but you couldn't expect every dictionary to single out the phrase, moral certainty. Most of them don't have that phrase at all. It seems to me you have to look up the word, moral, and see how it would be used with certainty.

How would you explain the concept that used to be described by the word, moral certainty?

MR. MULTHAUP: Well, that question is --

QUESTION: If you wanted to explain to a juror -- I don't want mathematical certainty. You can never have mathematical certainty. I mean, deciding whether somebody committed a crime is not like 2 plus 2 equals 4. You can never be mathematically certain. Now, how would you put the fact that you're not asking for mathematical certainty? You might well say, you want moral -- I would say that. You want moral certainty.

MR. MULTHAUP: I would put it exactly as -- first of all, there are any number of possible definitions for, consistent with the concept of reasonable doubt. There's no one true way to do it.

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What I would recommend as the simplest solution to the California quandary would be to take the rendition given by Professor Shapiro in her article in the thirtieth Hastings Law Review, where she took -- set forth in full in the petitioner's brief at a footnote on approximately page 35, where she took the Webster instruction -- she's a historian and rhetoricist at Cal, and immersed herself in the history of what reasonable doubt was supposed to mean, and then rendered the Webster instruction into contemporary English, and it starts off with some of the exact phrases that Your Honor uses.

QUESTION: I agree with you that that would be a better idea.

MR. MULTHAUP: Yes.

QUESTION: But the question before us here is whether it was likely that not doing that -- likely that not doing that misled the jury.

Now, in this instruction the word, moral, was used a couple of times, not just used in the phrase, moral certainty. Earlier the judge said, "It is not a mere possible doubt, because everything related to human affairs and depending on moral evidence is open to some possible or imaginary doubt."

MR. MULTHAUP: Yes.

QUESTION: How could you possibly make it

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clearer that the word, moral, means pertaining to human action? What do you think the jury thought moral evidence meant?

MR. MULTHAUP: Your Honor, it pertains to human action when a civil jury returns a verdict of liability. It pertains to a human action when a fact finder returns a finding according to clear and convincing evidence. We want to make sure that the criminal juries know that they're dealing with human actions, of course, but the standard of certainty has to be way up there at the top of the ladder of evidentiary certainty.

QUESTION: I agree with you, but you're making the argument that the only meaning this jury could have taken, or it is more likely than not that the jury took moral certainty not to mean that degree of certainty that -- which is the highest degree we can have in matters of human affairs --

MR. MULTHAUP: Yes.

QUESTION: -- and I say that it is very likely that they took it to mean that, since earlier the judge refers to moral evidence, and in that context the only thing it could have meant to the jury is evidence relating to human action, and moral certainty means that certainty which is certainty relating to human action. I don't know why you can just pluck out the use of moral one time in

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the instruction and not see how it was described earlier.

MR. MULTHAUP: Well, Your Honor --

QUESTION: Relating to human affairs, everything relating to human affairs and depending on moral evidence is open to some possible doubt, and then he goes on to say, "You must be convinced to a moral certainty." My goodness, after that sentence a juror should understand that that's what he means.

MR. MULTHAUP: Well, I question whether a juror hearing that would be able to distinguish whether a juror's level of certainty had to rise merely to say clear and convincing evidence, or had to rise above that to the utmost certainty. That sentence that you read is equally consistent with both, and under that circumstance, because the dictionary definitions, the current usage, is more consistent with clear and convincing evidence than it is with utmost certainty --

QUESTION: Moral is susceptible to both meanings, yes, but certainty is not susceptible of both meanings, when you combine the word moral with the word certainty, it means --

MR. MULTHAUP: It means --

QUESTION: That highest degree of assurance you can have in matters of human conduct.

MR. MULTHAUP: Well, see, there's where we have

a fundamental disagreement, because if you take any American dictionary that does have the phrase, moral certainty, defined in it -- moral certainty, and a definition -- it's clearly inconsistent with proof beyond a reasonable doubt. It's only consistent with clear and convincing evidence. Respondents don't contend otherwise. They don't contend that any of the definitions of moral certainty or any of the usages of moral certainty are consistent with proof beyond a reasonable doubt. They fight elsewhere.

QUESTION: The OED gives that meaning. I thought you acknowledged that.

MR. MULTHAUP: I certainly did.

QUESTION: Okay. You don't count that as a dictionary.

MR. MULTHAUP: I count that as the most -- as the most widely recognized dictionary --

QUESTION: It's too good.

MR. MULTHAUP: -- to preserve historical meanings at the expense of current American usage.

QUESTION: At the expense of current American -- I thought they gave American usage.

MR. MULTHAUP: Yes. We have one English --

QUESTION: They purport to give American usage.

MR. MULTHAUP: Pardon me?

QUESTION: They purport to give American usage.

MR. MULTHAUP: I think Your Honor is exactly correct in using the word, purport, because we have -- we have twelve American-published dictionaries giving definitions of moral certainty inconsistent with the standard that we all know in our minds is proof beyond a reasonable doubt, and we have one venerable English dictionary -- everybody enjoys reading the OED -- consistent with the historical meaning.

The question is, how are jurors in California, in Los Angeles, when they read moral certainty, are they going -- is it going to resound in their minds as consistent with how they hear it in the L.A. Times, how it's read, or are they going to say, maybe it's meant the way John Locke meant it 150 or 300 years ago.

QUESTION: I suppose it depends on the context. I mean, the word moral -- moral, in one of the dictionaries you cite, moral is defined as sexually virtuous. Now, I don't think when a juror in this context hears moral certainty, I don't think the juror thinks it has anything to do with being sexually virtuous.

MR. MULTHAUP: No.

QUESTION: It's the context that determines its meaning, and when the context is following a sentence that says, everything relating to human affairs and depending

on moral evidence is open to some possible doubt, and therefore you must have a moral certainty, I think that's a quite different context from just coming up to somebody and saying, moral certainty. You'd get a quite different answer.

MR. MULTHAUP: Well, if I may, Your Honor, I believe that by referring to -- if you refer to usage and definitions of the word, moral, separate from the phrase, moral certainty, there are 22 different definitions, nuances, subtleties of the word, moral, including sexually virtuous, which have nothing to do with the context of the reasonable doubt instruction here.

Each time -- each indication that we have, and Sandoval is not conjuring these things up, Sandoval has his nose in the dictionary and his nose in newspapers trying to find out how people are actually use these phrases. Moral certainty has its own meaning, which has evolved today.

The point I would like to emphasize is that this instruction is defective not only because of that phrase. Cage didn't purport to constitute an exhaustive list of constitutional defects. The phrase, moral evidence in this case compounds the problem for moral certainty for the following reason. Moral evidence, as currently understood, as opposed to its historical usage, means,

according to the same dictionaries that we've been consulting, pertaining to character, pertaining to tendencies of human nature.

When juxtaposed with those aspects of moral -- of the definitions of moral certainty, which are, such as based on a strong likelihood rather than on solid evidence, invites the juror to use their view of what's the moral character of Sandoval here? What can I piece together about Sandoval's moral character, based on the moral evidence involved, to supplement the prosecutor's factual evidence.

QUESTION: Would it have been all right for the judge simply to have refused to charge, as I take it in some jurisdictions that's done? Would that have met the constitutional requirements?

MR. MULTHAUP: Your Honor, that -- the answer to that question is not necessary to the decision here, but the overwhelming weight, 48 out of the 53 jurisdictions surveyed do give a definition of reasonable doubt.

QUESTION: What is the definition that's satisfactory?

MR. MULTHAUP: Well, Your Honor, I'd say 43 out of the definitions contained in petitioner's Exhibit B from around the country are satisfactory. A good one is found in petitioner's brief at footnote 26. That's where

Professor Shapiro takes the language of Shaw and translates it into the contemporary American idiom.

QUESTION: May I ask you about that? It's the -- unless you've reached the highest level of certainty of the defendant's guilt that it's possible to have about things that happen in the real world. That -- you think that any court has ever set a standard that's that high?

MR. MULTHAUP: Well, Your Honor, my understanding is that's what this Court has said. In Winship, this Court said that it would be wrong, it would be a violation of due process, for people to be convicted except on utmost certainty. Now, utmost might be overstating it in fact.

QUESTION: What if a juror said to another juror, I really am convinced the man did it, but I'd be even more convinced if we'd seen it on television at the same time, but we didn't. I'd really be positive then. I don't have any -- I really don't have any doubt, but I'd be more convinced then.

MR. MULTHAUP: Well --

QUESTION: Convict or acquit?

MR. MULTHAUP: Would it be constitutional to convict if an instruction had been given sort of tracking Your Honor's phrasings?

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QUESTION: Yes.

MR. MULTHAUP: It would be constitutional because you had the removal of doubt involved, and some --

QUESTION: But you don't really mean to suggest you can never convict if you can conceive of a case that would be even more convincing than the one you've seen?

MR. MULTHAUP: I'm sorry, Your Honor, I didn't understand the question.

QUESTION: Do you mean to say that you may never convict if you can conceive of a set of evidence that would be even more convincing than the evidence that was actually presented?

MR. MULTHAUP: Certainly not, Your Honor.

QUESTION: Well, that's what this instruction says at footnote 26. It says, it must be the highest degree of certainty that the human mind can reach.

MR. MULTHAUP: Oh, about things that happen -- about things that happen in the world, and realistically the -- we have three standards of proof, preponderance, clear and convincing evidence, and proof beyond a reasonable doubt. These are ranges of certainty. There's no mathematics here.

QUESTION: One/s 51 percent, one's 75 percent -- what is the top one, 90, 99, 100? It's not 100, is it?

MR. MULTHAUP: Of course not, and it's foolish

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to assign numbers. There's an interesting discussion by Judge Posner in U.S. v. Hall, 854 Fed 2d, about how badly uninstructed jurors understand the concept of reasonable doubt when they're asked to put numbers on. It's been characterized as ridiculously low.

But let's stay away from numbers. Let's make sure that a constitutionally correct instruction distinguishes for a jury between preponderance of the evidence, not good enough, clear and convincing evidence, still not good enough, lead them up to proof beyond a reasonable doubt. The Webster instruction in Massachusetts does just that.

QUESTION: Mr. Multhaup, in our opinion in Holland, Justice Clarke's opinion gives strong support to the idea that you're better off not defining reasonable doubt.

MR. MULTHAUP: Well, Sandoval's position is that whether or not there's a constitutional obligation to define it, you can't give an instruction which drags the jury away from the core concept. If it's not defined, it's hard to say that the words, proof beyond a reasonable doubt, are so devoid of meaning to a reasonable jury that they're left asea. Of course, if a defendant wants a particular instruction on -- wants one defined, I believe that certainly the court would be obligated to give it, to

specify to the jury --

QUESTION: Notwithstanding the observations in Holland that violate the Constitution if a judge refuse to give an elaboration on the meaning of the term, reasonable doubt?

MR. MULTHAUP: Well, I would certainly argue on behalf of a client who --

QUESTION: Well, I -- to say you would argue --

MR. MULTHAUP: Yes.

QUESTION: -- on behalf of a client, I'm sure you would, but do you think that's what the law is?

MR. MULTHAUP: There's no law whatsoever that says it's flatly unconstitutional not to define proof beyond a reasonable doubt, no question about that. Cage, on the other hand, is clear that it's unconstitutional to drag the jury away from the core concept of proof beyond a reasonable doubt.

I'd like to conclude by pointing out that under the Boyde analysis we have to look at the record as a whole here, where here the jury's deliberating for 14 days. The likelihood that there was a compromise somewhere at the very lowest degree of certainty consistent with the instructions that the jury could reach to get consensus -- given the weakness of the prosecution's case, the indeterminacy of the eyewitness

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identification, the unreliability of the informer, there's more than a reasonable likelihood here that the jury returned a verdict inconsistent with proof beyond a reasonable doubt. There's an actual likelihood.

That's more than Boyde requires. Boyde doesn't require that the petitioner prove more likely than not, just that there is a likelihood, more than a speculation.

Sandoval's case, the jury was invited to take bits and pieces of the evidence, fanned by the prosecutor, to portray an image of him as a stereotypical Hispanic, East Los Angeles gangster.

The prosecutor argues, take a thug like this, imagine him in the streets. He's got a mustache, he's got a different hairstyle, he's wearing different clothes -- that's Sandoval.

That's the type of stereotypical evidence that the jury is going to use under the moral evidence rubric to supplement the apparent shortfalls in the prosecution's factual objective case.

QUESTION: What did Boyde -- well, never mind. That's all right.

MR. MULTHAUP: Thank you.

QUESTION: Thank you, Mr. Multhaup.

General Stenberg, we'll hear from you.

ORAL ARGUMENT OF DONALD B. STENBERG

ON BEHALF OF THE RESPONDENT NEBRASKA

GENERAL STENBERG: Mr. Chief Justice, and may it please the Court:

Petitioner Victor's arguments underscore the problems created for the States by the Cage decision. Defendant's counsel will pick five or six words from a jury instruction and argue that those five or six words invalidates the entire instruction. This is like a doctor who operates on a patient and upon opening the patient up sees a perfectly healthy and normal appendix, reaches in, cuts the appendix in half, and has now found a defective appendix. We must look at the entire instruction and not simply pick out pieces that have been cut out from the whole.

Taken as a whole, there's nothing wrong with Nebraska's reasonable doubt jury instruction. This jury instruction was written by a distinguished committee of Nebraska lawyers, judges, and professors. Two of the members of the committee that wrote the Nebraska jury instruction in 1965 are now on the U.S. district court bench in the State of Nebraska. This is an extremely good faith effort by the State of Nebraska, under the direction of the Nebraska supreme court, to explain a concept that admittedly is hard to explain and yet is a very important one.

I should point out that this instruction is more widely used in Nebraska than petitioner suggests. Indeed, that is illustrated by the reply brief of the petitioner. The Nebraska supreme court, on December 17th, 1993, decided the Cook case. The Cook case was a crime committed in February of 1992 and tried sometime later that year. The same instruction was used there that is before this Court today, and that case came out of Douglas County, our State's most populous county.

Under our current Nebraska supreme court rule, a trial judge may use either the old instruction which is before this Court today, or the newer one.

QUESTION: And the newer one leaves out moral certainty? What is the new one?

GENERAL STENBERG: The new one leaves out all of the three phrases that are questioned here, Your Honor. However, that has not protected it from assault by the defense bar. The Nebraska supreme court has already had to address the constitutionality of our new reasonable doubt jury instruction under the Cage analysis, despite the fact that it does not contain any of the words used in the Cage instruction.

There are substantial precedents supporting the committee's work in writing this jury instruction. Indeed, at the time Cage was decided, at least by our

count there were 28 States that used one or more of the phrases that were questioned in Cage: 23 States used the term, moral certainty, in the jury instruction, and 16 other States, including Nebraska, used the term, substantial doubt.

I think it's very clear that the widespread retroactive invalidation of all of these jury instructions would create enormous difficulties in the administration of justice over half of the States, or nearly half of the States of this United States. States would be required to go back and retry several years, perhaps 5 years or 10 years, depending how far we take retroactivity, of criminal jury trials.

QUESTION: Why do you say, half, General Stenberg? Do the other half of the States use instructions that would not be faulted under Cage?

GENERAL STENBERG: Well, I would say -- I guess I would use the term, at least, Your Honor, because as I pointed out, even our new instructions which contains none of the phrases that were commented upon in Cage, has been challenged.

I don't know where, if the Nebraska and California instructions are invalidated by this Court, where the line will stop, and that's why I would suggest the word -- suggest that at least 16 or 23 or 28 States

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would be directly affected, and possibly more.

QUESTION: You said 10 years. It doesn't take 10 years to exhaust direct review in all these States, does it?

GENERAL STENBERG: Well, Your Honor, let's start at least by looking at the Victor case to answer that question. Mr. Victor committed his crime in 1987. His trial was held in 1988, and here we are in 1994, 6 years later.

QUESTION: Yes, but we're not on direct review. I mean, his direct review was completed in 1990, wasn't it, when this Court denied cert?

GENERAL STENBERG: Well, I think on the record here it's a little unclear as to whether we're on direct review or not, Your Honor, but I would note that the petitioner in his reply brief -- Petitioner Victor in his reply brief argues that even under the Teague standard, because this is so fundamental, because the reasonable doubt jury instruction is so fundamental, it is part of the concept of ordered liberty, that if the instruction is invalid, that we would have to go back under a Teague test as well, and that, of course, is not the position of the State of Nebraska.

QUESTION: Well, if you did, it's because that was the law before -- I mean, you don't -- it seems to me

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you don't have to reach that issue. If somebody raises the Teague problem, isn't the answer to that that the law as announced in Cage had been announced prior to the exhaustion of direct review in this case?

GENERAL STENBERG: Well, I guess my response, Your Honor, would be that there's no question that we're looking at several -- that obviously retroactivity affects exactly how many cases are affected, but I don't think there's any question that we're looking at several years' worth of retrials if these jury instructions are broadly rejected by this Court.

QUESTION: Has the defense bar been regularly objecting to all these instructions?

GENERAL STENBERG: I think since Cage there has been a pretty general -- it's been a fairly standard objection to object to reasonable doubt jury instructions, Your Honor.

QUESTION: Of course, prior to Cage, at least with respect to cases prior to Cage in which there were not objections, for example, as I understand it we don't know and we couldn't possibly tell on this record whether the supreme court of Nebraska will find a complete procedural bar.

They simply skipped over that issue because they thought it was easier to decide it on the merits, but if

we reverse on the merits, that tells you nothing one way or the other about the existence of procedural bars with respect, for example, to those who may not have been objecting.

GENERAL STENBERG: Well, that, of course, is exactly the argument we make on retroactivity in our brief, Your Honor.

Turning, I guess, to some of the phrases, and I remind myself as I do this that we're not supposed to do this -- we're not supposed to look at these in isolation, but I guess there's no other way to talk about it.

Now, I'll start with the term, substantial doubt. Like many words in the English language, substantial has more than one meaning. Substantial certainly can mean a large amount of something, such as "the rich woman has a substantial amount of money," but substantial has other meanings as well.

For example, a Nebraskan might say, "My great-grandfather and grandmother homesteaded Nebraska and they built a small, one-room sod house, but it was a substantial structure able to withstand the strong winds of the prairies."

So substantial has more than one meaning. It can mean something solid, and in fact, to turn to our dictionary, Webster's Third International Dictionary

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defines substantial as "consisting of or constituting substance, not seeming or imaginative, not illusive," and it is that meaning which is used in the Nebraska jury instruction, and if we look at the entire sentence in which the term, substantial doubt, is used in our instruction, it is clear that that is what is meant.

In the Joint Appendix on page 11, that part of the instruction reads as follows: "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."

So substantial doesn't always mean a large quantity. It can mean, solid, something that is not simply imaginary, and that is the way it is used in the Nebraska jury instruction, and I think it is clear from the context.

Strong probabilities language is also objected to, and I think a mere reading of the sentence in which that language appears answers the objection. That sentence reads as follows: "You may find the 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."

Substantially the same language was specifically upheld in this Court -- by this Court in 1895 in the Dunbar case.

Finally, we turn to the moral certainty language, and the California Attorney General I know will discuss this in greater detail so I will try and be reasonably brief on the subject. First of all, I would note that unlike the moral certainty language in Cage, the Nebraska jury instruction specifically ties the moral certainty that the juror must feel to the evidence in the case.

This sentence reads as follows: "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." So Nebraska carefully ties the moral certainty, the fact that moral certainty must be felt as a result of the evidence presented in the case.

Secondly, I would point out that this Court has long approved the moral certainty language. Going back to 1880, the Miles case, Perovich, Wilson, and another case cited in our brief.

The State of Nebraska and 23 other States have in good faith relied upon those holdings of this Court,

and it certainly would be a great disservice to those States to now invalidate carefully written instructions based on this Court's own sentences, and certainly that should not be done for any light reason, and great deference should be given to the States in their decision to employ this language.

QUESTION: Do you acknowledge that the meaning of the phrase, moral certainty, has changed over time?

GENERAL STENBERG: I do not believe so, Your Honor. I -- it was hinted at earlier here, I think. I think of the juries of the frontier State of Nebraska in the 1870's, 1880's, and 1890's. Most of them were illiterate. If they had been to a couple of grades, they'd done well. If they'd been to eighth grade, they were considered pretty well-educated.

I don't think that the meaning to the common State of Nebraska has -- of moral certainty has changed over the years.

QUESTION: Have the dictionary definitions of it changed?

GENERAL STENBERG: Your Honor, I do not profess to be an expert on dictionaries. The petitioner says so, but I think there is contemporary understanding also of what moral certainty means.

Let us say -- if we say, for example, that the

woman who was strongly pro-life was morally certain that abortion was wrong, morally certain as used in that context means that she was as sure as she could possibly be, and I think that's how we use moral certainty in our jury instruction.

The juror has to be as sure as the juror can possibly be, and I would submit that if anything that is a higher standard than the law requires, because arguably that is higher than beyond a reasonable doubt. It is beyond all doubt.

Unless the Court has questions on the retroactivity issue --

QUESTION: General Stenberg, you refer to our decision in the Miles case. As I read that case, that does not set out the instruction that was given, at least in the Court's opinion. Do you -- have you gone back and read the instruction in the lower court before it, or --

GENERAL STENBERG: The quote I have from the Miles case, Your Honor, is found at page 309 in 103 U.S., and the quote as I have it written here, is "proof beyond a reasonable" -- this is from the instruction, Your Honor. "Proof beyond a reasonable doubt as such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist, so that you feel certain it does."

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The Court then approved this language, saying, "The language used in this case, however, was certainly very favorable to the accused, and is sustained by respectable authority.

QUESTION: You're quite right.

GENERAL STENBERG: If the Court wishes, I would address the retroactivity issue. Otherwise, I believe I have completed my argument.

QUESTION: Thank you, General Stenberg.

GENERAL STENBERG: Thank you.

QUESTION: General Lungren, we'll hear from you.

ORAL ARGUMENT OF DANIEL E. LUNGREN

ON BEHALF OF THE RESPONDENT CALIFORNIA

GENERAL LUNGREN: Mr. Justice, may it please the Court:

California has an instruction on reasonable doubt which has in a sense stood the test of time in California. It had its genesis in the Webster case from Massachusetts, first appearing, perhaps, in the California supreme court reports in 1860 when it commented favorably on that, continuing to impress it into statute form, and in 1927, the legislature, believing this instruction to be effective and to be accurate, further enacted legislation which said that if you give this instruction in a criminal case, no other instruction on reasonable doubt need be

given, up to the present time, including the study that Justice Scalia mentioned a moment ago concerning CALJIC, our committee which reviews jury instructions and comes up with standardized jury instructions.

While there is no empirical evidence before this Court as to how a particular juror understands this instruction, the best thing that I can direct you to is the review done by the CALJIC committee in 1987 pursuant to a request by the legislature to look at this instruction and to judge whether or not we should maintain that instruction, give no instruction whatsoever, or give another instruction.

The committee was made up of both prosecutors and defense counsel and judges, including a Federal appellate justice, and the consensus at that time was that no change ought to be made, and of the minority report -- a small minority, but in the minority report there was no consensus as what ought to be done in its place.

And the reason I bring this up is that we all agree there can be no perfect way of defining reasonable doubt, I think, and yet when one would suggest that we need a definition other than that given in California for over 100 years, I would state that they have the burden of showing that their particular answer is better than what we have in the sense that it will not have some of the

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same challenges that admittedly any imperfect instruction would have.

Counsel for Sandoval stated it very well. There is no one true definition of reasonable doubt. This Court has never found that there was one true definition of reasonable doubt. This Court has never stated that there is a constitutional requirement that it be defined, or has prescribed its description.

Rather, this Court, by not prescribing or requiring, has allowed the States to utilize their best judgment as long as they meet the standard of reasonable doubt, or unreasonable doubt -- or reasonable doubt has been suggested constitutionally in the context of the Due Process Clause, and I would suggest that we might look at In Re Winship to see what, in fact, this Court believed what was so essential to the beyond a reasonable doubt instruction or concept that it was incorporated into our belief of due process.

In Re Winship, in quoting Davis, a previous U.S. Supreme Court case, said that no man should be deprived of life under the forums of law unless the jurors are able upon their consciences to say that the evidence before them is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.

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The essential connection there is that the beyond a reasonable doubt standard protects the defendant and enforces or reinforces the obligation or burden on the State for proof, to carry the burden of proof of one's guilt.

Further, referring to In Re Winship on page 364, the Court referred to two -- I would say two definitions that I find virtually synonymous with moral certainty. That is, they talked about the subjective state of certitude, and they also spoke of the utmost certainty.

I believe that if you interjected those words into, to a moral certainty, found in the California instruction, they would mean virtually the same thing. At least there is no constitutionally significant difference between the expressions used by this Court in In Re Winship and the moral certainty used in the instruction in California.

I believe that the petitioner mistakes time-worn for time-honored. In fact, this instruction has stood the test of time in California. We admit it is not the perfect instruction, because there is no perfect instruction. It is important that we look at any instruction, obviously, as the standard requires us to do, in its total context.

Boyde said that we could not judge any

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instruction in artificial isolation, and if you break down what to a moral certainty means in the context of this instruction, it in no way detracts from the obligation of the State to present its case and carry its burden.

In fact, I believe the most reasonable, the most likely reading of it, is to say that it enhances and reinforces the obligation of the fact-finder. It, in a very real sense, tells them that they are to go about their task of finding facts and then applying the law in a serious-minded fashion, much as In Re Winship suggested that jurors must be able to say, upon their consciences.

That's not to say, religious beliefs. That means, to be true to themselves. That means, to make a judgment that they can live with. It reinforces the concept of abiding, long-lasting.

On the contrary, petitioner suggests that you take a definition of moral certainty which is contrary to the sense of certainty itself, and if you would accept or adopt petitioner's definitions, you would get to some strange sort of senses, that I have a lastingly and abiding sense that perhaps, maybe, something might be true. That just falls on its face when you put it into context.

QUESTION: How about, proof beyond a reasonable doubt is proof that leaves you firmly convinced of the

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defendant's guilt, period?

GENERAL LUNGREN: Some have suggested that it is better not to have any instruction whatsoever, and to just say, reasonable doubt, and to say unreasonable doubt is that doubt which is not reasonable, and leave it at that, yet we have found that in California, at least, we have those who inquire as to that.

QUESTION: I ask about this particular instruction, proof beyond a reasonable doubt is proof that leaves you firmly convinced of defendant's guilt, because it is the one that the Federal Judicial Center recommends, and I was surprised to see in all of the definitions in all of these briefs that it wasn't mentioned.

GENERAL LUNGREN: That is not meant as a criticism on our part. It is to suggest, however, that there are many constitutionally valid definitions of reasonable doubt, and that's what we're about here, to determine what is constitutionally required, if there is one.

In California, we have believed that it is more effective to frame it in the manner that we have, making sure that we don't run afoul of the problems articulated in Cage, chief of which I believe, at least concerning the phrase, reasonable doubt, was somehow it lacked what I would call an evidence connection.

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The reference to moral certainty in our instruction is always in the background of evidence. That is, it goes, reasonable doubt 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.

Consistently throughout the instructions given in California, jurors are directed to evidence. There is no problem, as was suggested in Cage, that somehow they would believe that they should have something other than evidence, that somehow this meant that this was to be put in the place of evidence. This modifies the abiding conviction. This talks about the manner of reaching, the manner about which -- the seriousness about which you go about your business, but it does nothing to interfere with the quantum of proof obligated to the prosecution under the Constitution.

The California instruction does not have the other great impediment found by this Court in Cage, and that is to somehow create a equivalent or substitute definition, an unadorned, equivalent or substitute definition that is misleading, that being primarily, in Cage, grave uncertainty.

A grave uncertainty in Cage implicates to the juror that that manner, that amount of doubt necessary to acquit, is more than what is constitutionally permissible, or in many ways -- you can look at it either from that standpoint or say, by virtue of so changing the amount of doubt necessary to acquit, you basically have shifted the burden of proof from the State to the defendant, and obviously that is -- does not meet constitutional standard in any regard.

At the very least we can say that Cage thereby exaggerated or overstated the doubt necessary to acquit. There is no problem like that in the California instruction whatsoever. There is no -- as our California supreme court said in viewing this in People v. Jennings, there is no transformation of true, reasonable doubt as it has been traditionally defined into a higher degree of doubt.

We also do not have the words, actual or substantial, although I think the real problem in Cage is the context in which actual, substantial were found, and again it gave an equivalency, a rough equivalency to the notion of reasonable doubt, unadorned whatsoever.

Lastly, I would say with respect to our difference between the California instruction and Cage, that moral certainty, the position of the expression moral

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certainty in the Cage instruction was devoid of any reference to evidence. It was an awkward appendage hanging out there that was susceptible to misinterpretation because of the context in which it found, and just as this Court has suggested, that we need to look at the entire instruction and then the instruction in the context of all of the instructions, we need to look at moral certainty as it applies throughout.

With respect to the dictionary definitions, whether there's been a change in definitions, I think we would have to agree that there has been in some change in definition, but petitioner has been somewhat selective in his choice of definitions. In a number of his definitions that he quoted, one of the definitions given is virtual. Would virtual be -- virtual certainty be unconstitutional?

QUESTION: Mr. Lungren, can I ask you a question? Do you think, as a theoretical matter, and I -- assuming there's been some change in it, but let's assume for present purposes the change isn't enough, as of today, to invalidate the instruction.

Would you agree with the thesis that at least it is conceivable that over the years the term could have an additional change in meaning that sooner or later would make it unconstitutional?

GENERAL LUNGREN: It could if viewed in the

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context of the instruction. I think that's very important.

QUESTION: Right.

GENERAL LUNGREN: That the word, hold, means many different things. We say, those of us in the law, the Court held something. I don't go home and say to my children, we hold you children have violated the rules of the house and therefore you're not getting an allowance this week and, certainly, having been through four knee surgeries, I can tell you in football holding is not considered something positive.

It depends on the context in which it's placed, and I think it is possible, certainly, that a term could change so much so that there is a sole notion of the term, so even placed in the context into which it had previously been appropriate, would be inappropriate, but we are not here --

QUESTION: I understand your argument. In that light, in order to avoid the risk of further changes and the same kind of problem of retroactivity and the like, do you think California would be better off -- now, just, really, it's a close question for me -- simply to omit the words, to a moral certainty, from the last line of their standard charge? They'd avoid this risk of further charge, and I don't know, frankly, whether that makes it a

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higher or lower burden than with or without the words, but I'm curious to know what your view of the case is.

GENERAL LUNGREN: If you're asking my view as a practitioner, I would tell you that I think more prosecutors would accept that than more defense counsel.

QUESTION: Taking the --

GENERAL LUNGREN: We have made reference in our brief to defense manuals that specifically instruct defense attorneys in criminal trials to argue to the point of moral certainty, because it assists them. It helps them.

QUESTION: In other words, you think the words, to a moral certainty, enhance the burden of proof.

GENERAL LUNGREN: I don't think there's any doubt about it, and if you look at the way it has been used by this Court in many references where it was not reviewing a question of instruction but the Court attempting to express how it saw something being seriously -- a dissent by the chief justice in Schnebel -- talking about moral certainty didn't go to the question of moral certainty, but it advanced the cause that the decision made was a decision that was made seriously, and with the quantum of proof necessary beyond a reasonable doubt.

QUESTION: Could you make the same comments in

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the same context on the phrase, moral evidence? Do defense attorneys rely upon that in their closing arguments?

GENERAL LUNGREN: We've not seen the same sort of expression of interest in that phrase, and frankly, I believe you pick up the sense of that phrase in its proper sense in the context of the sentence itself, because it refers to those things of human affairs, and I don't think there is any difficulty in them understanding it.

Frankly, I don't think most people go around talking about moral evidence, and they're probably confronted with it for the very first time as jurors, and the question then is the dictionary -- well, let me put it this way. I think the dictionary the jurors use are the instructions, and the question is, do these phrases that petitioner suggests are somehow inadequate, so inadequate that they rise to a constitutional challenge? Do they in fact mislead the juror?

The standard is, is there any likelihood they mislead the juror, and I would believe that as you review those, they don't. If anything, the sense of moral certainty reinforces -- it adorns the obligation that someone has. Is it essential? Perhaps not, but I would suggest there are many things in the legal system that are not essential, but we believe they assist in doing our

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job.

I think this adds to the solemnity of the obligation of the jurors, much like, when we come into a courtroom, judges and justices wear robes. That's not essential to decision-making, but it adds to the solemnity of the occasion. I believe the phrase, to a moral certainty, adds to the solemnity of the obligation of the jurors, and it is very difficult to understand how someone would come in and believe it does otherwise.

If there are any questions --

QUESTION: Well, I -- instead of dropping it, you might also consider the possibility of having a campaign to use the term properly instead of using it as a slovenly description of something that is not at all a certainty, far from certain. It is often use that way, but it's probably an incorrect use.

GENERAL LUNGREN: I would also say it is important, and I believe it is important, that the California committee charged with the responsibility of standardized instructions continues to review these and other instructions on a regular basis, as they do, so that we in fact can have the least amount of difficulty with instructions before our jurors.

Thank you.

QUESTION: Thank you, General Lungren.

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Mr. Weber, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF MARK A. WEBER

ON BEHALF OF PETITIONER VICTOR

MR. WEBER: Thank you. One of the matters that I initially would like to take exception to is again the emphasis by the Nebraska Attorney General that somehow legions of individuals are going to be affected, in essence, the doors of the prisons left wide open in the State of Nebraska because of the throwing out of this invalid instruction, but I believe Justice Souter recognized that this fear, as I've said before, is a gross exaggeration. I don't believe there are very many, at all, individuals similarly situated to the petitioner in this case.

As Mr. Stenberg I believe later recognized, I believe there are only a handful of individuals that objected to this instruction under direct review, as petitioner did in this case.

QUESTION: May I ask on that point, is the reason that defense counsel may not have objected to the instruction the reason given by the California Attorney General that they think putting in, to a moral certainty, provides someone a good argument to the jury?

MR. WEBER: That's a good question. I would take exception to the California Attorney General. I

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believe that just the mere fact that that language happens to be lectured upon within the defense manuals from my perspective from the defense bar is more of a tacit admission that we're stuck with what we've got and we've got to make some sort of headway with that language.

I don't believe you'll find many defense counsel certainly within Douglas County, Nebraska, where I practice, would concede that the moral certainty language is something that we like.

Indeed, just submit the instruction I referred to recently -- or, excuse me, the instruction used now, again contained in B-23 of Petitioner Sandoval's brief as an appendix, none of the defective language -- moral certainty certainly is not contained within that instruction, and I would submit that, as Mr. Stenberg noted, the plaintiffs bar of the State of Nebraska as well as the defense bar were involved in the construction and creation of this instruction. If that language were so readily wanted and so defensible by the Attorney General, then I would wonder why there wasn't some sort of stipulation that the moral certainty language would be contained within that instruction.

Secondly, with respect to the idea that other individuals had not raised this particular issue on direct appeal, and perhaps they would, I would submit that

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number 1, that's not the issue in this case, but number 2, it's directly addressed by the Nebraska supreme court in the case of the State v. Van Akron, in which, similar to Cage, the Court recognized the plain error analysis ability to review the instruction, and quite frankly, as the Court noted in that opinion, the raising of that issue at trial, much for the same reason it wasn't raised at trial in this case, was due to the futility of raising it in light of its prior decisions distinguishing the instruction given in Nebraska from the defective instruction in Cage.

Finally, I find it very interesting that the Attorney General concedes at the beginning that we're not supposed to parse language and look at the individual terms, and yet he spends a great deal of his time arguing about -- I see my time is up. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Weber. the case is submitted.

(Whereupon, at 2:16 p.m., the case in the above-entitled matter was submitted.)

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BY Ann Mari Federico

(REPORTER)