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REASONABLE DOUBT JURY INSTRUCTIONS: THE SUPREME COURT STRUGGLES TO LIVE BY ITS PRINCIPLES

HENRY D. GABRIEL*
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I. INTRODUCTION

The “beyond a reasonable doubt” standard “plays a vital role in the American scheme of criminal procedure.”¹ A common aphorism states that it is better to have ten guilty people go free than to have one innocent person erroneously convicted.² This intrinsic societal belief has been encapsulated in the requirement that a criminal defendant be found guilty beyond a reasonable doubt to be convicted.³

The United States Supreme Court has repeatedly emphasized that this high burden of proof is so important that it rises to the level of a fundamental constitutional right.⁴ Although often reaffirming the significance of this right, the Court has allowed its

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¹ *In re Winship*, 397 U.S. 358, 363 (1970) (discussing reasonable doubt standard as “prime instrument for reducing the risk of convictions resting on factual error”).

² *See id.* at 372 (Harlan, J., concurring). “In a criminal case . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.” *Id.*; Ronald J. Allen, *Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 HARV. J.L. & PUB. POL’Y 627, 634 (1994) (noting that standard to convict is intentionally difficult so as to protect innocent people, “admittedly at the cost of freeing many guilty people”); William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 333-34 (1995) (stating that “fundamental value of Anglo-Saxon justice [is] that it is far worse to convict an innocent man than to let a guilty man go free”).

³ *See Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (indicating that “presumption of innocence is a doctrine that allocates the burden of proof in criminal trials”); *see also* Rachel M. Capoccia, *Piercing the Veil of Tears: The Admission of Rape Crisis Counselor Records in Acquaintance Rape Trials*, 685 S. CAL. L. REV. 1335, 1390 (1995) (noting that “American criminal justice system operates under the assumption that each person is innocent until proven guilty”). *But see* Marla L. Mitchell, *Beyond a Book Review: Using Clinical Scholarship in Our Teaching*, 2 CLINICAL L. REV. 251, 270 (1995) (book review) (claiming that system “in reality requires proof of innocence”).

⁴ *See, e.g., Winship*, 397 U.S. at 368 (characterizing beyond a reasonable doubt standard of proof as “constitutional safeguard”).

concerns for federalism, finality of convictions, and conservation of judicial resources to create stringent obstacles that prevent relief for a violation of this right. In this article, we discuss the conflict between the fundamental constitutional right that a defendant must be found guilty beyond a reasonable doubt to be convicted and the countervailing interests that the Court has allowed to dilute the essence of this principle.

A. *Establishment of the Reasonable Doubt Standard*

The necessity of proof beyond a reasonable doubt as a prerequisite to conviction of a crime dates back to the early years of our Nation.⁵ The most important purpose of this standard is to ensure that the accused is presumed innocent until the State proves otherwise.⁶ Without this presumption, individuals cannot have a relationship with the State that accords with basic democratic principles.⁷

The Supreme Court has long assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required.⁸ The Court explicitly acknowledged this requirement in *In re Winship*.⁹ The *Winship* Court found that the constitutional mandate for the reasonable doubt standard was embedded in the Due Process Clauses of the Fifth and Fourteenth Amendments, which "protect[] the accused against conviction except upon proof be-

⁵ See *id.* at 361 (noting origins of beyond a reasonable doubt standard); see also Christopher L. Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, 18 FALL FLETCHER F. WORLD AFF. 77, 96 (1994) (noting that "[t]he reasonable doubt standard has been the controlling standard for conviction in common law nations for over 200 years").

⁶ See Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402, 445 (1994). "The burden of proof requires the prosecution to persuade the jury of the accused's guilt; the presumption of innocence allows the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion' . . ." *Id.* (citations omitted).

⁷ See *id.* at 451 (discussing how movement "towards an inquisitorial system could also signal a larger transformation in the relationship between the citizen and the state"); see also Bryan K. Fair, *Using Parrots to Kill Mockingbirds: Yet Another Racial Prosecution and Wrongful Conviction in Maycomb*, 45 ALA. L. REV. 403, 408 (1994) (describing presumption of innocence as "central to our jurisprudential traditions").

⁸ See, e.g., *In re Winship*, 397 U.S. 358, 362 (1970) (citing cases which indicate that Constitution requires proof beyond a reasonable doubt).

⁹ 397 U.S. 358, 362 (1970).

yond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."¹⁰

The reasonable doubt standard provides a solid foundation for the presumption of innocence.¹¹ Because there is a risk of conviction resting on factual error when the accused's liberty is at stake, the reasonable doubt standard impresses on the factfinder the necessity of judging the facts to determine guilt with the utmost certainty.¹²

The right to a jury trial, or the right to be found guilty by a jury of one's peers, coincides with the reasonable doubt standard.¹³ These two principles working together ensure that the state is limited to convictions based not on the unbridled power of the state but only on a determination by individual citizens, the jury, to whom the state must satisfy its burden.

Recognizing that the jury is the instrument by which the beyond a reasonable doubt standard is upheld, the Court, in *Cage v. Louisiana*,¹⁴ examined a reasonable doubt jury instruction in light of *Winship*.¹⁵ The *Cage* Court considered "how reasonable jurors could have understood the charge as a whole."¹⁶ Finding that the instruction contained words that could have been interpreted to allow a guilty verdict based on a degree of proof lesser than that required by the Due Process Clause, the Court held the instruction unconstitutional.¹⁷

¹⁰ *Id.* at 364; see also *Jackson v. Virginia*, 443 U.S. 307, 313-14, 315 (1979) (restating that requirement of proof beyond reasonable doubt must be established for every element of crime charged).

¹¹ See *Winship*, 397 U.S. at 363; see also Jennifer R. Treadway, 'Residual Doubt' in Capital Sentencing: No Doubt It Is an Appropriate Mitigating Factor, 43 CASE W. RES. L. REV. 215, 236-37 (1992) (discussing significance of "proof beyond a reasonable doubt" standard and presumption of innocence).

¹² See *Winship*, 397 U.S. at 363-64; see also Leslie J. Harris, *Constitutional Limits On Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness*, 77 J. CRIM. L. & CRIMINOLOGY 308, 353 (1986) (discussing standard as described in *Winship*).

¹³ See Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 143 (1988) (discussing intertwining of reasonable doubt standard and right to jury trial).

¹⁴ 498 U.S. 39 (1990) (per curiam).

¹⁵ *Id.* at 40-41 (discussing applicable jury instruction in light of *Winship* and reasonable doubt standard).

¹⁶ *Id.* at 41.

¹⁷ *Id.* The Court found that equating a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt" suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard. *Id.*

Cage underscores the necessity of both the beyond a reasonable doubt standard and a jury determination of guilt.¹⁸ To ensure that the jury makes its decision based on the beyond a reasonable doubt standard, the instruction must properly convey the meaning of a reasonable doubt.¹⁹ Furthermore, to ensure that it is in fact the jury that makes this determination, the *Cage* Court focused on how the jurors "could have" interpreted the language of the instruction.²⁰

The Court reiterated the importance of a jury determination of guilt beyond a reasonable doubt in *Sullivan v. Louisiana*.²¹ The *Sullivan* Court held that the use of a reasonable doubt instruction that could have been misinterpreted is not subject to harmless error review.²² The erroneous instruction is not subject to a determination that it was harmless and, therefore, of no significance to the outcome. In other words, if there is a deficient instruction on reasonable doubt, the conviction must be overturned. Furthermore, to guarantee that the jury has made this determination, if there is any question as to whether the jury could have been misled about the standard, there can be no conviction.

The *Sullivan* Court explained that the use of *Cage* jury instructions results in "a misdescription of the burden of proof . . . which vitiates all of the jury's findings."²³ Thus, a deficient reasonable doubt jury instruction not only dilutes the standard of proof to a level below that which is constitutionally permissible, but also precludes a guilty verdict from even coming into existence.²⁴ Both *Cage* and *Sullivan* stand for the proposition that without a finding of guilt beyond a reasonable doubt, there can be no conviction.

¹⁸ *Id.* (noting that erroneous instruction or interpretation can allow "finding of guilt based on a degree of proof below that required by the Due Process Clause").

¹⁹ See *Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (per curiam) (indicating that jury must understand meaning of beyond reasonable doubt standard).

²⁰ *Id.*

²¹ 113 S. Ct. 2078, 2080 (1993) (discussing prosecution's burden and importance of factfinder's determination regarding guilt).

²² *Id.* at 2082 (describing use of harmless error review under such circumstances as "illogic[al]").

²³ *Id.* at 2082.

²⁴ See *Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (per curiam) (stating that jury instruction at issue could have resulted in finding of guilt "based on a degree of proof below that required by the due process clause"); see also *In re Winship*, 397 U.S. 358, 363-64 (1970) (discussing importance of reasonable doubt standard in protecting individual's liberty and in commanding respect and confidence in criminal law system).

B. Limitations on the Reasonable Doubt Standard

While acknowledging the importance of a determination of guilt beyond a reasonable doubt and attempting to clarify the constitutional mandates of a reasonable doubt jury instruction,²⁵ the Court has struggled with the conflict between this principle and the Court's concerns for finality, federalism and conservation of judicial resources.²⁶ The result of this struggle has been to diminish seriously the availability of challenges to deficient reasonable doubt jury instructions.

1. Retroactivity

The Court has restricted the availability of challenges to defective reasonable doubt instructions in the area of retroactivity. In *Teague v. Lane*,²⁷ the Court held that a new rule cannot be applied retroactively on collateral review where a conviction was final prior to the announcement of the new rule.²⁸ *Cage* has been held to be a new rule,²⁹ therefore habeas petitioners will be denied relief from a *Cage* error if their direct appeal ended before the *Cage* decision.³⁰ The new rule results in the anomalous situation that, although there has been no conviction, there can be no relief because of the *Teague* bar and the defendant will stand convicted.³¹

The Court, however, may have resolved this conflict when, in *Sullivan*, it held that deficient reasonable doubt jury instructions

²⁵ See *Victor v. Nebraska*, 114 S. Ct. 1239, 1243-44 (1994) (discussing whether jury instruction, in requiring proof beyond reasonable doubt, passed constitutional muster); *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2083 (1993) (noting that denial of right to jury verdict of guilt beyond reasonable doubt constitutes error); *Estelle v. McGuire*, 502 U.S. 62, 72-73 (1991) (analyzing constitutionality of jury instruction).

²⁶ See, e.g., George M. Dery III, *The Atrophying of the Reasonable Doubt Standard: The United States Supreme Court's Missed Opportunity in Victor v. Nebraska and Its Implications in the Courtroom*, 99 DICK. L. REV. 613, 617 (1995) (discussing inconsistency of Supreme Court's jurisprudence on reasonable doubt standard).

²⁷ 489 U.S. 288 (1990).

²⁸ *Id.* at 305-10.

²⁹ See *Adams v. Aiken*, 965 F.2d 1306, 1312 (4th Cir. 1992) (finding *Cage* to be new rule), *cert. denied*, 113 S. Ct. 2966 (1993), *cert. granted on reh'g and judgment vacated*, 114 S. Ct. 1365 (1994); *Skelton v. Whitley*, 950 F.2d 1037, 1043 (5th Cir.) (same), *cert. denied*, 113 S. Ct. 102 (1992). However, the reason for this finding is unclear. Arguably, *Cage* is nothing more than a factual application of the long-espoused principle, formalized in *Winship*, that a defendant must be found guilty beyond a reasonable doubt to be guilty of a crime.

³⁰ See *Teague*, 489 U.S. at 288 (discussing effect of "new rule" on petitioners).

³¹ See Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 419-20 (1995) (defining "new rule" and describing situation that results when new rule is applied to pre-*Cage* decision).

are not subject to harmless error review.³² The *Sullivan* holding arguably brings *Cage* within an exception to the *Teague* bar on retroactive application, which is that there may be retroactive application of new rules that involve procedures "implicit in the concept of ordered liberty."³³ Although the *Teague* Court attempted to strike a balance between finality of judgments and certainty of outcomes,³⁴ the finality interest must yield where the constitutional error involved is of such a nature that there can be no confidence in the result produced by the procedure in question.³⁵ Because *Sullivan* teaches that the consequence of an improper reasonable doubt jury instruction is that there has been no conviction, *Cage* comes within the exception to *Teague* and should, therefore, be applied retroactively on collateral review.³⁶ Thus, retroactivity appears to be one area in which the reasonable doubt principle has prevailed over competing judicial concerns.

2. Standard of Review and the Language of the Jury Instructions

Notwithstanding *Sullivan*, all is not well. In *Victor v. Nebraska*,³⁷ the Supreme Court greatly diluted the fundamental principles established in *Cage* and *Sullivan*, with regard to both the standard of reasonable doubt and the jury's role in the determination of guilt.³⁸

As for the jury's role, the *Victor* Court held that the proper standard for measuring the constitutional validity of a reasonable

³² *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2080 (1993) (discussing applicability of harmless error review).

³³ *Teague v. Lane*, 489 U.S. 288, 311 (1989) (applying exception first advocated by Justice Harlan in *Mackey v. United States*, 401 U.S. 667, 675 (1971)); see also Paul J. Heald, *Retroactivity, Capital Sentencing, and the Jurisdictional Contours of Habeas Corpus*, 42 ALA. L. REV. 1273, 1277-78 (1991) (discussing *Teague* exceptions).

³⁴ *Teague*, 489 U.S. at 308-09 (recognizing that interest of finality must be considered); see also Ellen E. Boshkoff, *Resolving Retroactivity After Teague v. Lane*, 65 IND. L.J. 651, 654 (1990) (discussing *Teague* Court's interest in finality); Heald, *supra* note 33, at 1278-79 (same).

³⁵ See *Teague*, 489 U.S. at 308 (recognizing that interest in finality is outweighed if constitutional error would result); see also Heald, *supra* note 33, at 1279 (noting that concerns regarding constitutional error override concerns for finality of judgment).

³⁶ See *Adams v. Aiken*, 41 F.3d 175, 178 (4th Cir. 1994) (finding, on remand from United States Supreme Court with instructions to reconsider in light of *Sullivan*, that *Sullivan* permits retroactive application of *Cage* on collateral review); *Nutter v. White*, 39 F.3d 1154, 1156-57 (11th Cir. 1994) (holding that *Cage* falls within second *Teague* exception and therefore may be retroactively applied on collateral review).

³⁷ 114 S. Ct. 1239 (1994).

³⁸ See *Dery*, *supra* note 26, at 614-16 (discussing dilution of reasonable doubt standard in *Victor*).

doubt jury instruction is whether there is a "reasonable likelihood" that the jury applied the instruction as a whole in an unconstitutional manner.³⁹ In the earlier *Cage* opinion, however, the Court had endorsed a different standard of review.⁴⁰ "In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole."⁴¹ In *Victor*, the Court adopted a more stringent standard of review for a *Cage* error.⁴² By doing so, the Court has supplanted the judge's determination for that of the jury.⁴³ In *Cage*, the question of whether a jury *could have been* misled clearly focuses on the jury's role in determining guilt beyond a reasonable doubt.⁴⁴ The "reasonable likelihood" standard adopted by the *Victor* Court, on the other hand, neglects the question of what the jury might have done and instead focuses on what the court thinks a reasonable jury should have done.⁴⁵ This is nothing more than the harmless error standard coming in the back door, a result that contradicts *Sullivan*, and greatly diminishes the ability to challenge defective jury instructions.⁴⁶

In addition to usurping the jury function by heightening the standard of review, the *Victor* Court greatly diminished the rea-

³⁹ *Victor*, 114 S. Ct. at 1243; see also *Boyde v. California*, 484 U.S. 370, 380 (1990). This standard was first promulgated by the Court in *Boyde*. *Id.* The *Boyde* Court explained that the "reasonable likelihood" standard requires a showing of more than how a single hypothetical "reasonable" juror might have acted, but does not require a showing that the jury was more likely than not to have been impermissibly influenced by the instruction. *Id.*

⁴⁰ See Matt Nichols, *Victor v. Nebraska: The "Reasonable Doubt" Dilemma*, 73 N.C. L. REV. 1709, 1714-15 (1995) (discussing differences between *Cage* and *Victor* standards of review).

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

⁴² See *Victor v. Nebraska*, 114 S. Ct. 1239, 1243 (1994). The Court indicated that "beyond a reasonable doubt" is the appropriate standard. *Id.*; *Estelle v. McGuire*, 502 U.S. 62, 75 (1991). The *Estelle* Court noted that *Cage* had endorsed a different standard of review than that generally applied. *Id.* at 72 n.4. *Estelle*, by disapproving the standard of review language in *Cage*, cast considerable doubt on *Cage*'s validity and, to "once again speak with one voice on this issue," the Court reaffirmed the general standard. *Id.* Whether *Cage* jury instructions would survive review under this standard was left unresolved. *Id.*; see also Nichols, *supra* note 40, at 1718. The author notes that the *Estelle* standard revolved around whether there was a "reasonable likelihood" that the jury applied the instruction in an unconstitutional manner. *Id.*

⁴³ See *Victor*, 114 S. Ct. at 1251.

⁴⁴ See Nichols, *supra* note 40, at 1710 (discussing jury's role and understanding of reasonable doubt instructions).

⁴⁵ See Shelagh Kenney, *Upholding the Constitutional Merit of Misleading Reasonable Doubt Jury Instructions*, 85 J. CRIM. L. & CRIMINOLOGY 989, 993-95 (1995) (discussing *Victor* decision and jury role).

⁴⁶ See Raymond A. Kimble, Note, *The Standard for Determining the Harmfulness of a Constitutional Trial Error on Collateral Review Is Whether the Error Had a Substantial and Injurious Effect or Influence in Determining the Jury's Verdict* — *Brecht v. Abrahamson* 113 S. Ct. 1710 (1993), 5 SETON HALL CONST. L.J. 771, 771-73 (discussing diminution of constitutional rights by application of harmless error standard).

sonable doubt standard itself by narrowly confining the basis for challenging jury instructions that contain misleading language.⁴⁷ The *Victor* Court upheld two sets of jury instructions similar to those used in *Cage*⁴⁸ by distinguishing them on the ground that the questionable words and phrases found to be misleading in *Cage* were neutralized by their context in the instructions taken as a whole.⁴⁹ The *Victor* Court emphasized that its concern in *Cage* was "that the jury would interpret the term 'substantial doubt' in parallel with the preceding reference to 'grave uncertainty,' leading to an overstatement of the degree of doubt necessary to acquit."⁵⁰ The Court explained, however, that these problematic terms can be neutralized by other words that prevent the jury from requiring anything more than a reasonable doubt to acquit.⁵¹ A petitioner has a substantial burden to prove that a due process violation resulted from an inadequate jury instruction because the Constitution does not require that any particular language be used for an instruction to be constitutional.

The Court's analysis, however, appears to be no more than a pretextual retreat from the standard articulated in *Cage*. Instead of focusing on whether a jury could have been misled by the instruction, the Court categorically decides that the jury would not have been.⁵² This standard is nothing more than a transparent usurpation by the Court of the jury's rightful domain.

Victor contradicts the fundamental principle that, in a jury trial, the jury, not the judge, should ultimately determine the defendant's guilt. *Victor* also calls into question the continued viability of the reasonable doubt standard. Unlike the other Court-

⁴⁷ See *id.* at 798 (noting that reasonable doubt standard is diminished by harmless error review).

⁴⁸ *Victor v. Nebraska*, 114 S. Ct. 1239, 1242, 1248 (1994) (comparing *Cage* instructions with those given at trial of petitioners and noting that all included "moral certainty" as partial definition for reasonable doubt).

⁴⁹ *Id.* at 1239; see also Nichols, *supra* note 40, at 1715 (discussing Court's comparison of jury instructions in *Cage* and *Victor*).

⁵⁰ *Victor*, 114 S. Ct. at 1250; see also *Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (finding instruction referring to "grave uncertainty" and "substantial doubt" unconstitutional).

⁵¹ See *Victor*, 114 S. Ct. at 1250. The Court found that the words "substantial doubt" were neutralized because they were explicitly distinguished from "mere possibility," "bare imagination," and "fanciful conjecture." *Id.* at 1241-42. "[S]ubstantial doubt" was also mitigated by use of the "hesitate to act" test. *Id.* The disabling aspects of the phrase "moral certainty" were alleviated by reference to the need for an "abiding conviction" of the defendant's guilt, as well as by the instruction that the jurors should base their verdict on the evidence presented. *Id.* at 1242.

⁵² See *id.* at 1248 (stating that it was not reasonably likely that jury understood words "moral certainty" to suggest standard lower than "beyond a reasonable doubt").

imposed limitations discussed in this article, however, these limitations were not justified by any countervailing policy. Given the importance of the principle, and its acknowledgement by the Court in other cases, the *Victor* opinion is baffling.

3. Procedural Bars To Relief

Assuming that a claimant is not barred by the barriers erected by *Teague* and *Victor*, he or she may still encounter procedural bars to relief where a review of an alleged *Cage* violation is sought in a petition for a writ of habeas corpus in a collateral action.⁵³ Although the law of habeas corpus began as a mechanism to challenge the wrongful detention of any person, it has expanded in scope and application to focus on a penumbra of constitutional rights and liberties.⁵⁴ Thus, a writ of habeas corpus is used today to challenge convictions where a prisoner claims a violation of certain constitutional rights.

In evaluating habeas corpus petitions, courts have sought to determine whether there was a "fundamental defect" which inherently resulted in a "complete miscarriage of justice."⁵⁵ A "fundamental defect" results in a "complete miscarriage of justice"

⁵³ See Comment, *Criminal Law: Adams v. Aiken*, 50 WASH. & LEE L. REV. 297, 298-301 (1993) (noting that *Adams* Court, in relying on *Teague*, "found that the new rules do not apply retroactively to cases brought on collateral review"); Bruce Ledewitz, *Habeas Corpus as a Safety Valve for Innocence*, 18 N.Y.U. REV. L. & SOC. CHANGE 415, 424-26 (1990-91) (illustrating *Teague's* new approach to retroactivity).

While its exact origins are uncertain, the writ of habeas corpus is traceable to the English common law. See William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983, 1054 (1978). After the founding of the nation, the writ was successfully transplanted to the American colonies and into the Constitution of the United States. *Id.*; see also U.S. CONST. art. I, § 9, cl. 2. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Id.*

⁵⁴ See *Fay v. Noia*, 372 U.S. 391, 402-06 (1963) (documenting historical writings that indicate "habeas corpus was available to remedy any kind of governmental restraint contrary to fundamental law"); *Brown v. Allen*, 344 U.S. 443, 453 (1953) (challenging death sentence based on alleged constitutional violations, primarily racial discrimination); *Frank v. Mangum*, 237 U.S. 309, 331 (1915) (stating "[t]here is no doubt of the authority of the Congress to thus liberalize the common law procedure of *habeas corpus* in order to safeguard the liberty of all persons within the jurisdiction of the United States").

⁵⁵ *Hill v. United States*, 368 U.S. 424, 428 (1962) (holding that failure of trial court to ask defendant represented by counsel whether he had any words before sentencing is not "fundamental defect" cognizable under habeas corpus); see Christopher D. Cerf, *Federal Habeas Corpus Review of Nonconstitutional Errors: The Cognizability of Violations of the Interstate Agreement on Detainers*, 83 COLUM. L. REV. 975, 1007-08, 1011-14, 1016-18, 1021-23 (1983) (discussing in-depth "fundamental defect" test); Jack A. Guttenberg, *Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617, 669 (1984) (discussing *Hill* language as applied in *United States v. Addonizio*, 442 U.S. 178, 185 (1979)).

whenever a conviction or sentence is the result of a violation of a federal constitutional right.⁵⁶ Therefore, a writ of habeas corpus should be the perfect vehicle for challenging improper reasonable doubt jury instructions.

The appointment of more conservative Supreme Court justices and changes in the governing federal habeas statutes, however, have resulted in a re-examination of the law of habeas corpus.⁵⁷ Habeas corpus law has been restricted and is now more a matter of judicial discretion than constitutional imperative.⁵⁸ Stringent obstacles now exist to second, successive, and procedurally defaulted claims.⁵⁹

The most common stumbling block to a writ of habeas corpus is a procedural default. A procedural default exists when there is failure to comply with a procedural rule, such as a rule requiring that a given claim be raised at a certain time or in a certain manner or court.⁶⁰ If a claim is forfeited for purposes of direct appeal by reason of a procedural default, the claim is also deemed forfeited for post-conviction purposes, so long as the procedural default rests on "adequate and independent state grounds."⁶¹

⁵⁶ See Deborah J. Gonder, *Innocent of Death: A Habeas Petitioner's Last Chance*, 48 U. MIAMI L. REV. 229, 246-47 (1993) (quoting *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992) (Blackmun, J., concurring)). "[T]he fundamental miscarriage of justice exception focuses on the preservation of constitutional rights." *Id.*

⁵⁷ See Max Rosenn, *The Great Writ: A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 355 (1983) (noting that since 1976 Supreme Court has limited availability of federal habeas relief).

⁵⁸ See, e.g., *Kuhlmann v. Wilson*, 477 U.S. 436, 454 n.16 (1986) (noting that "unlimited availability of federal collateral attack burdens our criminal justice system"); *Wainwright v. Sykes*, 433 U.S. 72, 91 (1977) (holding that failure to make timely objection under state rule barred habeas review of *Miranda* claim); *Stone v. Powell*, 428 U.S. 465, 481-82 (1976) (holding that habeas corpus relief was not required where state provided "opportunity for full and fair litigation of Fourth Amendment claim").

⁵⁹ See *Wainwright*, 433 U.S. at 86 (holding that absent showing of "cause" and "prejudice," federal habeas corpus review is barred); see also *Engle v. Isaac*, 456 U.S. 107, 129 (1982) (reaffirming *Wainwright's* requirement that prisoner demonstrate "cause" and "actual prejudice").

⁶⁰ See *Wainwright*, 433 U.S. at 81-91. Procedural default commonly results from a defendant's failure to follow state rules requiring the defendant to make a contemporaneous objection to particular improprieties at trial or requiring that certain issues be raised by the defendant on appeal in the state system. *Id.*

⁶¹ *Coleman v. Thompson*, 501 U.S. 722, 729-31 (1991) (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)). Federal habeas courts will presume that no adequate and independent state ground exists only when the state court's decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Id.* at 733; *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). If the last state court to address the claim ignores a potential state procedural default and reaches the merits of the claim, federal habeas courts may consider the claim. *Id.*; *Coleman*, 501 U.S. at 733-35. If the state court addresses both the substantive merits and a state procedural default when rejecting

A court may also refuse to entertain a second or successive habeas petition.⁶² Under the successive petitions rule, a court may dismiss a second or subsequent petition if the claim raised was denied on the merits in the previous proceeding and the ends of justice would not be served by reaching the merits of the claim.⁶³ The petitioner has the burden of showing that relitigation of the claim would serve the interests of justice.⁶⁴

Even if a petitioner raises new grounds in a later petition, the court may still dismiss that petition if the failure to allege those grounds in the earlier petition constitutes "an abuse of the writ."⁶⁵ Under the abuse of the writ rule, a second or subsequent motion on behalf of the same petitioner and involving the same custody may be dismissed at the discretion of the court if the petitioner "deliberately withheld" a claim from an earlier petition or has "otherwise abused the writ."⁶⁶

The same standard is used to determine whether to excuse a procedural default when a state court decision is found to rest on adequate and independent state grounds.⁶⁷ To overcome the abuse

a petitioner's claim, federal habeas review of the claim remains precluded unless the presumption against adequate and independent state grounds is applicable. *Id.*; *Ylst*, 501 U.S. at 803. When the last state court judgment does not indicate whether it is based on procedural default or on the merits of a federal claim, the federal court will presume that the state court has relied on the same grounds as the last "reasoned" state court opinion. *Id.*

⁶² See 28 U.S.C. § 2244(b) (1994); see also H.R. REP. NO. 1471, 94th Cong., 2d Sess. 8 (1976), reprinted in 1976 U.S.C.C.A.N. 2478, 2485. Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts provides: "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." *Id.*

⁶³ See 28 U.S.C. § 2244(b); see also *Kuhlmann v. Wilson*, 477 U.S. 436, 452-54 (1986) (emphasizing importance of finality and goals of federalism, deterrence, punishment and rehabilitation).

⁶⁴ See *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991) (stating that if petitioner is unable to show cause, failure to raise claim earlier may be excused by showing of fundamental miscarriage of justice); *Price v. Johnston*, 334 U.S. 266, 292-93 (1948) (indicating initial burden is on petitioner).

⁶⁵ *Amos E. Hartston & Jay Gonzalez, Habeas Relief for State Prisoners*, 83 GEO. L.J. 1392, 1420 (1995) (discussing abuse of writ of habeas corpus); see 28 U.S.C. § 2244(b) (1994).

⁶⁶ 28 U.S.C. § 2244(b).

⁶⁷ *McCleskey*, 499 U.S. at 490 (indicating same standard used when state court decision is reached on independent state grounds); see Matthew L. Anderson, *Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting*, 79 MINN. L. REV. 1197, 1212-13 (1995) ("According to the [procedural default or independent and adequate state ground] doctrine, if a state court denies a prisoner's habeas petition because the prisoner failed to meet the state's procedural requirements for seeking relief, the federal court cannot provide relief."); James J. Turocy, *Recent Decision: Reaching the Merits of Successive and /or Abusive Petitions*, 34 DUQ. L. REV. 373, 392-95 (1995) (not-

of the writ rule in successive or second habeas petitions, the petitioner must show "cause" for the default and "actual prejudice," or that failure to review the claim will result in a "fundamental miscarriage of justice."⁶⁸

The existence of cause turns on whether the petitioner can show that an "objective factor external to the defense" hampered the defense's efforts to comply with the procedural rule which was violated.⁶⁹ Under this standard, cause can be demonstrated by showing that the "factual or legal basis of a claim was not reasonably available to counsel" or that governmental interference rendered procedural compliance impracticable.⁷⁰ Claims are "reasonably available" even where their assertion would in all likelihood be futile.⁷¹ "[T]he question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of default the claim was 'available' at all."⁷²

Claims of defective reasonable doubt instructions have been raised in the courts as far back as 1965,⁷³ and therefore, this type of claim was "available" at the time of most procedural defaults. Thus, a petitioner with a *Cage* violation will not be able to demon-

ing that *McCleskey* Court refined previously obscure standard for evaluating abuse of writ of habeas corpus).

⁶⁸ See *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); see also *Smith v. Murray*, 477 U.S. 527, 533 (1986) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)). The *Smith* Court held that it did not need to reach the merits of whether the lower court's failure to accept the habeas writ of the defendant had caused the defendant prejudice, because the defendant had failed to establish cause for non-compliance with the state rule. *Id.* at 533-39.

⁶⁹ See *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)); see also *Smith*, 477 U.S. at 537 (concluding petitioner failed to establish cause for failure to comply with state procedural rules); *Reed v. Ross*, 468 U.S. 1, 14 (1984) (noting that defense counsel may not "forego a procedural opportunity" with intent to raise habeas claim in event of tactical failure).

⁷⁰ *Carrier*, 477 U.S. at 488 (noting that "the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made"); see *Reed*, 468 U.S. at 13-16 (holding that "absent exceptional circumstance a defendant is barred by decisions of competent counsel" but noting that if counsel has no reasonable basis upon which to formulate constitutional question, second habeas claim may not be precluded); *Engle v. Isaac*, 456 U.S. 107, 124-35 (1982) (barring respondents from habeas review because they failed to follow state procedural rules).

⁷¹ *Engle*, 456 U.S. at 130-31. The *Engle* Court noted that even "[i]f a defendant perceives a constitutional claim and believes that it may find favor in the federal courts, he may not bypass the state courts simply because he thinks that they will be unsympathetic to the claim." *Id.* But see *Reed*, 468 U.S. at 15. The *Reed* Court indicated that "[a]lthough there is a remote possibility that a given state court will be the first to discover a latent constitutional issue and to order redress if the issue is properly raised, it is far more likely that the court will fail to appreciate the claim and reject it out of hand." *Id.*

⁷² *Smith*, 477 U.S. at 537.

⁷³ See, e.g., *Scurry v. United States*, 347 F.2d 468, 469 (D.C. Cir. 1965) (alleging trial court erred in defining reasonable doubt).

strate cause under the current standard. Accordingly, a petitioner will be denied relief from a constitutional violation which left a petitioner convicted without a cognizable determination of guilt.⁷⁴

Since both cause and prejudice must be demonstrated to obtain relief, if cause cannot be shown, the petitioner has no relief irrespective of the prejudicial nature of the harm caused by the defective jury instruction. The absurdity of this result is demonstrated by examining the extreme prejudicial effect of a *Cage* violation.

To meet the prejudice requirement of the cause and prejudice standard, the petitioner must show "actual prejudice amounting to a denial of fundamental fairness."⁷⁵ In the case of jury instructions, the Supreme Court has noted that, to show prejudice, it is not enough that "the instruction is undesirable, erroneous or even universally condemned."⁷⁶ Instead, "the petitioner must demonstrate that the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process."⁷⁷

Under *Sullivan v. Louisiana*,⁷⁸ the reasonable doubt jury instruction clearly meets this standard. As stated in *Sullivan*, unconstitutional reasonable doubt jury instructions take away the essential element of a valid basis for reasonable doubt and thus, the entire "trial cannot reliably serve its function."⁷⁹ The use of *Cage* jury instructions so infects the entire trial that the petitioner is denied a true jury verdict against him and thus, there is effectively no conviction.⁸⁰

An analysis of the prejudicial effect of an unconstitutional reasonable doubt instruction on a petitioner's trial draws one to conclude that, because many petitioners are unable to meet the cause and prejudice standard, a fundamental miscarriage of justice ex-

⁷⁴ *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2081-83 (1993) (finding harmless error review inapplicable even though trial court's reasonable doubt instruction was identical to that found improper in *Cage*).

⁷⁵ *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991) (noting that, notwithstanding failure to show cause, petitioner may have earlier petition excused provided "he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim"). See generally *Jordan Steiker, Innocence and Federal Habeas*, 41 U.C.L.A. L. REV. 303, 374 (1993) (questioning how Court can discern whether state's refusal to provide mechanism for newly-discovered evidence of innocence violates traditional notions of fundamental fairness).

⁷⁶ *United States v. Frady*, 456 U.S. 152, 169 (1982).

⁷⁷ *Id.*

⁷⁸ 113 S. Ct. 2078 (1993).

⁷⁹ *Sullivan v. Louisiana*, 113, S. Ct. 2078, 2083 (1993), 113 S. Ct. at 2083 (citing *Rose v. Clark*, 478 U.S. 570, 577 (1986)).

⁸⁰ See *id.* (indicating effect of *Cage* jury instructions on entire trial).

ception for this type of error is necessary so that relief can still be obtained.⁸¹

Traditionally, a "fundamental miscarriage of justice" occurred whenever a conviction or sentence was the end result of a violation of a federal constitutional right.⁸² A trio of habeas decisions, however, has shifted the focus of procedurally defaulted, successive, or abusive habeas claims to a fact-based inquiry into the petitioner's innocence or guilt and away from the preservation of constitutional rights.⁸³

The Court's focus on a presumption of guilt conflicts with the principle that one is presumed innocent until proven guilty. Our criminal justice system and the United States Constitution protect the right to a presumption of innocence until a determination of guilt. Thus, the Court's focus on a presumption of guilt conflicts with the nature of our criminal justice system⁸⁴ when applied to a *Cage* error because the denial of a factual determination of guilt results in no basis for denying the petitioner's actual innocence.

The Court, however, has concluded that deference to the state's interest in the finality of convictions, as well as principles of comity and federalism, require limitations on second, subsequent, and procedurally defaulted petitions.⁸⁵ Thus, the Court linked the miscarriage of justice exception to a petitioner's innocence in order to balance the desire to prevent its overuse with the need to "extend relief to those who were truly deserving."⁸⁶ These interests conflict because the type of error that arises from a *Cage* violation, unlike other errors, results in the extraordinary case of there being no determination of guilt.

⁸¹ See *Ward v. Whitley*, 887 F. Supp. 897, 901-02 (E.D. La. 1995) (noting that "[t]he Court is gravely troubled that the apparent failure to instruct the jury in accordance with constitutional principles on 'reasonable doubt' does not fall into the category of a 'fundamental miscarriage of justice'") (citations omitted); see also *Ward v. Cain*, 53 F.3d 106, 108 (5th Cir. 1995) (Poltz, J., concurring) (expressing concern that person may be executed in absence of jury verdict of guilt beyond a reasonable doubt).

⁸² See, e.g., *Hill v. United States*, 368 U.S. 424, 428 (1962).

⁸³ See *Smith v. Murray*, 477 U.S. 527, 537-39 (1986) (holding that petitioner did not meet burden of showing prejudice where actual innocence was not proven); *Murray v. Carrier*, 477 U.S. 478, 497 (1986) (same); *Kuhlmann v. Wilson*, 477 U.S. 436, 444-55 (1986) (same).

⁸⁴ See *Smith*, 477 U.S. at 545 (Stevens, J., dissenting) (arguing both Constitution and criminal justice system serve values in addition to reliability of guilt or innocence determination).

⁸⁵ See, e.g., *Schlup v. Delo*, 115 S. Ct. 851, 862-63 (1995) (noting broadening of scope of writ of habeas corpus posed danger to "finality of state court judgments and to principles of comity and federalism").

⁸⁶ *Id.* at 864.

CONCLUSION

The Supreme Court has continuously recognized the constitutional right to a determination of guilt beyond a reasonable doubt and the impact of the reasonable doubt jury instruction on this right. The Court, however, has limited the avenues by which a petitioner can obtain relief for a violation of this constitutional right. Because of the prejudicial effect of a *Cage* violation, the Court's limitations are too restrictive and should yield to the need to correct the fundamental defect that results from a *Cage* violation. Otherwise, we have the anomalous result that although a claimant may never have been found legally guilty, there is no avenue for recourse.

