

SUPREME COURT OF LOUISIANA

NO. 99-KP-2916

STATE OF LOUISIANA

Versus

ESTHER PENNS

Consolidated with

NO. 99-KP-3282

STATE OF LOUISIANA

Versus

NELSON DAVIS

JOHNSON, J., dissenting

The reasonable doubt instructions which were given to the juries in these two cases were virtually identical to the instruction which the United States Supreme Court found constitutionally flawed in *Cage v. Louisiana*, 498 U.S. 39 (1990) (*per curiam*). In defendant Penns' case, the jury was instructed as follows:

Now if you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give her the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one, that is, one founded upon a real, tangible, **substantial basis**, and not upon a mere doubt as would give rise to **grave uncertainty**, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a **moral certainty** of the defendant's guilt . . . A reasonable doubt is not a mere possible doubt. It should be an **actual and a substantial doubt**. It is such a doubt as a reasonable man would seriously entertain. It is a serious doubt for which you could give **good reason**.

R. at 184-5 (emphasis added). The reasonable doubt instruction given to the Davis jury mirrored the above instruction.

The majority reached its conclusion by suggesting that *Victor v. Nebraska*, 51 U.S. 1 (1994), somehow changed the result of *Cage*. However, in *Victor*, the United States Supreme Court upheld the reasonable doubt instructions at issue by **distinguishing** those instructions found to be constitutionally deficient in *Cage*. It is clear that *Cage* has not been overruled. Furthermore, the

Cage court specifically held that “the words ‘substantial’ and ‘grave’ suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard.” *Cage* at 41. Unlike the jury charges at issue in the present cases, the instructions in *Victor* did not include the term “grave uncertainty.” Thus, since the instructions at issue in these cases are identical to those found in *Cage*, the holding of *Cage* should govern their resolution.

I also disagree with this court’s pronouncement that *Cage* does not retroactively apply to final convictions subject only to collateral attack. Criminal defendants who have been convicted as a result of the failure to adhere to the mandates of the state and federal constitutions have the right to judicial review. Our federal and state constitutions prohibit the deprivation of a person’s liberty without due process of law, and Louisiana’s Code of Criminal Procedure provides for post-conviction relief for persons who are in custody after sentence for conviction of an offense if “the conviction was maintained in violation of the constitution of the United States or the state of Louisiana.” LSA-C.Cr.P. art. 930.3. Whenever the fundamental fairness of a trial is affected by constitutionally impermissible jury instructions, I believe that the defendant should be allowed to seek redress of the error.

Based upon the reasoning in *Cage*, I agree with the lower courts’ decisions. I would set aside the defendants’ convictions and order new trials.