

Number ____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 2018

BENITO RIVERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

1. Should certiorari be granted to find that, while a district court need not define reasonable doubt, if it does so, it cannot employ a definition that creates a reasonable likelihood of leading the jury to believe that it could convict on some lesser standard of proof, such as “doing justice?”

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	7
ARGUMENT	8
POINT 1: CERTIORARI SHOULD BE GRANTED TO FIND THAT, WHILE A DISTRICT COURT NEED NOT DEFINE REASONABLE DOUBT, IF IT DOES SO, IT CANNOT EMPLOY A DEFINITION THAT CREATES A REASONABLE LIKELIHOOD OF LEADING THE JURY TO BELIEVE THAT IT COULD CONVICT ON SOME LESSER STANDARD OF PROOF, SUCH AS “DOING JUSTICE”	8
CONCLUSION	12
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Cage v. Louisiana</i> , 498 U.S. 39, 112 L. Ed. 2d 339, 111 S. Ct. 328 (1990)	9
<i>In re Winship</i> , 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). .	9
<i>United States v. Jones</i> , 674 F.3d 88 (1 st Cir. 2012)	10
<i>Victor v. Nebraska</i> , 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)	8

FEDERAL STATUTES

18 U.S.C. § 922(g)(1)	3
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OPINION BELOW

There was one decision below, which is attached to this petition.

JURISDICTION

The order of the Court of Appeals was decided on June 14, 2019, and this petition for a writ of certiorari is being filed within 90 days thereof, making it timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment due process clause and the Sixth Amendment right to a fair trial.

STATEMENT OF THE CASE

Petitioner was convicted of being a felon in possession of a weapon, in violation of 18 U.S.C. § 922(g)(1), and was sentenced to 72 months' imprisonment.

STATEMENT OF FACTS

On August 7, 2016, at about 2:30 p.m., Kevin Michael Flynn, a state trooper with the Massachusetts State Police, was driving a marked Ford police cruiser when he ran the registration of a black Honda Civic and found that it had been revoked for failure to pay insurance. Flynn, who was aware that the driver, Benito Rivera, had previously been convicted of a felony, asked him to step out of the car. Rivera was holding a blue canvas bag as he exited the car. As Flynn was patting down Romano, he ran away while holding the blue bag. During the foot-chase, Flynn fell, and lost sight of Romano. He later tackled him from behind and placed him under arrest.

Meanwhile, on August 7, 2016, Jams Abreu and Debora Soares were talking outside the Cavalry church in Lynnfield, Massachusetts, when, from 35 yards away, they saw a law enforcement officer running after a man who threw an item over a fence into the backyard of a nearby house. Abreu told the police where he had seen the man throw the item.

Lieutenant Patrick Silva, the commanding officer of the Massachusetts State Police K9 unit, asked Petitioner why he ran, and he

said “... because I had marijuana on me.” Within one hour of Petitioner being tackled, Silva’s police dog, Charbo, alerted to a handgun, which was between his two paws. Lassaad Ayari, in whose backyard at 1 Upton Lane, Lynnfield, Massachusetts the police found the gun, testified that neither he nor his wife owned a handgun.

At trial, defense counsel asked the Court for an “... instruction on reasonable doubt and actually define the term for the jury.” The district court said it was not “required to,” and noted counsel’s objection.

In summation, the government then argued to the jury, in its last comments: “Ladies and gentleman, in a short while[,] you’re going to go back into the deliberation room and you are ultimately going to render a verdict. The word ‘verdict’ comes to us from two Latin words, ‘meritus dictum,’ they mean ‘To speak the truth,’ and in your verdict you will speak the truth.”

In its jury charge, the Court then instructed the jury that the jury’s verdict must be “... beyond a reasonable doubt” It told the jury “[w]e ask you to do justice.” It later said “... I believe you will do justice in this case”

After the summations and the jury charge, defense counsel implored the Court to issue “... an actual reasonable doubt charge.” The Court replied, “... I won’t give it, but your rights are saved.”

The jury then found Petitioner guilty of being a felon in possession of a firearm and ammunition and the district court sentenced him to six years’ imprisonment.

SUMMARY OF ARGUMENT

Certiorari should be granted to find that, while a district court need not define reasonable doubt, if it does so, it cannot employ a definition that creates a reasonable likelihood of leading the jury to believe that it could convict on some lesser standard of proof, such as “doing justice.”

ARGUMENT

POINT I

CERTIORARI SHOULD BE GRANTED TO FIND THAT, WHILE A DISTRICT COURT NEED NOT DEFINE REASONABLE DOUBT, IF IT DOES SO, IT CANNOT EMPLOY A DEFINITION THAT CREATES A REASONABLE LIKELIHOOD OF LEADING THE JURY TO BELIEVE THAT IT COULD CONVICT ON SOME LESSER STANDARD OF PROOF, SUCH AS “DOING JUSTICE.”

When defense counsel asked the district court to define reasonable doubt, it refused. Instead, it instructed the jury that it could return a guilty verdict if it found proof beyond a reasonable doubt, did “justice” and was “speaking the truth.” Because these definitions of reasonable doubt--justice and speaking the truth--creates a reasonable likelihood of leading the jury to believe that it could convict on a lesser standard of proof, this violated Petitioner’s Fourteenth Amendment due process right to a fair trial. *See Victor v. Nebraska*, 511 U.S. 1, 5, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)(the “beyond a reasonable doubt standard is a requirement of due process.”).

While “the Constitution does not require ... any particular form of words,” *Victor*, 511 U.S. at 5, the district court retains significant

discretion in formulating its instructions, so long as it “correctly conve[ys] the concept of reasonable doubt to the jury.” *Id.* (citation omitted). *Compare Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339, 111 S. Ct. 328 (1990)(per curiam)(rejecting “moral certainty” language).

The district court’s formulation of reasonable doubt reduced the government’s burden of proof, because the sole purpose of a jury in a criminal trial is not to do “justice,” but, rather, to determine whether the government has proved every element of the charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)(The government must prove every element of the charged offense beyond a reasonable doubt).

Colloquially, to do justice means to be accurate, fair, just, fair-minded or evenhanded. Yet that is neither the purpose nor function of either a criminal trial or petit jury. On the contrary, a jury is tasked as the finder of fact with one limited goal: to convict only upon proof beyond a reasonable doubt--without qualification. Being just and evenhanded fall woefully short of proof beyond a reasonable doubt, which is a real doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

The government further reduced the district court's standard of proof when it argued that the jury's function was to "speak the truth" and convict the defendant of "possession of that handgun and those seven bullets." It is wrong. The jury's sole function is to deliberate on the evidence, and unanimously decide whether the government adduced evidence beyond a reasonable doubt against the defendant. It is not to speak the truth. Such comments imply that the jury can convict even if not convinced beyond a reasonable doubt--so long as it believed its verdict represents the "truth."

The First Circuit Court of Appeals has previously found such exhortations to the jury to be improper. *Cf. United States v. Jones*, 674 F.3d 88, 93 (1st Cir. 2012) ("... the prosecutor's entreaty to the jury that it 'speak the truth' and convict Jones might seem close to *United States v. Andújar-Basco*, 488 F.3d 549, 560-61 (1st Cir. 2007), and like cases where courts found improper exhortations to the jury 'to do its duty' and find the defendant guilty * * * we are not endorsing the flourish used here").

The reduction of the government's burden of proof to doing justice had a substantial and injurious effect on the jury's verdict. The

jury may have believed it could find the single disputed circumstantial factual issue in the case--whether the defendant threw the recovered gun--not be based on proof beyond a reasonable doubt, which was never defined, but, rather, on an amorphous, far lower standard of "doing justice" in the case. The error was, therefore, not harmless.

On these facts, this Court should grant certiorari and find that, while a district court is not bound to define reasonable doubt, if it does so, it cannot employ a definition that creates a reasonable likelihood of leading the jury to believe that it could convict on some lesser standard of proof, such as "doing justice."

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE
GRANTED.

Dated: June 19, 2019
Uniondale, New York

Respectfully Submitted,

Steven A. Feldman
Steven A. Feldman

UNITED STATES
SUPREME COURT

BENITO RIVERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

I affirm, under penalties of perjury, that on June 19, 2019, we served a copy of Petitioner's petition for writ of certiorari, by first class United States mail, on the United States Attorney, District of Massachusetts, John Joseph Moakley United States Federal Courthouse, 1 Courthouse Way, Suite 9200, Boston, MA 02210, the Solicitor General, 950 Pennsylvania Avenue, NW Washington, DC 20530-0001, and on Benito Rivera, 23644-038, USP Hazelton, 1640 Sky View Drive Bruceton Mills, WV 26525. Contemporaneous with this filing, we have also transmitted a digital copy to the United States Supreme Court.

Steven A. Feldman
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