No. _____

IN THE

Supreme Court of the United States

CHARLES RAINER SINEK,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner was convicted of one count of conspiring to distribute a controlled substance, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(C). At trial, the defense requested the jury be instructed on the affirmative defense of duress. The district court refused to provide the parties with a written copy of any jury instructions, but told the parties that, if any duress charge was given, it would be the pattern jury charge. Without notifying the parties, the district court used language which had been proposed by the government when it instructed the jury on the elements of duress. That language, which was not part of the pattern jury instruction, significantly undermined the arguments made by the defense in summation.

On appeal, the Second Circuit denied relief because it did not believe that the jury instructions sufficiently contradicted Petitioner's summation to establish prejudice. Therefore, the following is the question presented.

When a district court violates Fed. R. Crim. P. 30 and delivers a jury instruction different than what the parties were told to expect,

must a defendant show that the instruction given explicitly contradicted statements made in the defense summation in order to establish prejudice?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

- *United States v. Sinek*, No. 12 Cr. 448, United States District Court for the Northern District of New York. Judgment of Conviction and Sentence entered June 26, 2018.

- *United States v. Sinek*, No. 18-2010, United States Court of Appeals for the Second Circuit. Judgment entered January 14, 2020.

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The unpublished Summary Order of the United States Court of Appeals for the Second Circuit, *United States v. Sinek*, 789 Fed.Appx. 910 (2d Cir. 2020), was issued on January 14, 2020, and is reproduced as Appendix A.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 2020, and on March 10, 2020, this Court entered an Order extending the time to file any petition for a writ of certiorari to 150 days from the date of the lower court judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS CITED

Rule 30 of the Federal Rules of Criminal Procedure

Jury Instructions

> (a) In General. Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.
>
> (b) Ruling on a Request. The court must inform the parties before closing arguments how it intends to rule on the requested instructions.
>
> (c) Time for Giving Instructions. The court may instruct the jury before or after the arguments are completed, or at both times.
>
> (d) Objections to Instructions. A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

STATEMENT OF THE CASE

A. Background

According to the government, from at least July 2011 until September 2012, Petitioner, an American Olympic figure skater, and his co-defendant, Joseph Paul MasterJoseph, engaged in a scheme to fraudulently obtain prescription opioids in California and redistribute them in New York. In September 2012, a federal grand jury in the Northern District of New York returned an indictment charging Petitioner and MasterJoseph with conspiring to possess with intent to distribute and to distribute controlled substances in violation of 21 U.S.C. § 841(b)(1)(C).

During Petitioner's trial, MasterJoseph testified for the government. Petitioner testified on his own behalf and recounted numerous instances of violent behavior over the course of several years by MasterJoseph directed at Petitioner and Petitioner's brother, Edward. Edward also testified and corroborated Petitioner's testimony.

B. The request for a duress instruction

After both sides rested, the defense requested that the court instruct the jury on the affirmative defense of duress. Specifically, the defense described the elements of duress as "a threat of death or serious bodily injury," which was "immediate or imminent," and that "instilled a reasonable fear" in the defendant who had "no reasonable means to escape or report to authorities except to commit the crime." Tr. 307; Appendix C at 9a. The district court wanted to consider the issue overnight and told the parties they would find out "in the morning before ya deliver your summation whether I'm gonna charge it. But I would presume, were I the parties, that I'm *gonna* charge duress as it's stated by the Circuit in Sand & Siffert, pretty much the elements as [defense counsel] laid it out." Tr. 311; Appendix C at 113a (emphasis added). The district court then told defense counsel "I don't think you're entitled to it, but I'm gonna charge it, that's what I'm tellin' ya. . . . Unless, thinking better of it I change my mind overnight, in which case I'll tell ya." *Id.*

The district court did not provide the parties any draft of the charge it intended to give, and, when asked by defense counsel if there was a printed version to review, answered "no." As such, there was no actual charge conference, but the court said that it would "pretty much" follow the pattern instructions, because "Second Circuit admonition, they like it, likely because Leonard Sand drafted 'em, but they like 'em." Tr. 313; Appendix C at 15a.

That evening, defense counsel submitted a proposed instruction based on Modern Federal Jury Instruction 8.06 and the Second Circuit's decision in *United States v. Zayac,* 765 F.3d 112 (2d Cir. 2014). That proposed instruction is reproduced immediately below.

> To find that the defendant's actions were justified, and therefore, that he is not guilty, the defendant must establish the following elements by a preponderance of the evidence:
>
> 1. he faced a threat of force;
>
> 2. sufficient to induce a well-founded fear of impending death or serious bodily injury to himself or others; and

> 3. he lacked a reasonable opportunity to escape harm to himself or others, other than by engaging in the illegal activity.

Appendix D at 116a.

The government responded and requested the pattern instruction, which was as written below.

> To find that the defendant's actions were justified, and therefore, that he is not guilty, the defendant must establish the following elements by a preponderance of the evidence:
>
> First, that the defendant was under an unlawful, present, imminent and impending threat of such a nature as to induce a reasonable fear of death or serious bodily injury to himself or others;
>
> Second, that the defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be put into the position of having to choose to engage in criminal conduct;
>
> Third, that the defendant had no reasonable legal alternative to violating the law; that is, that he had no reasonable opportunity to avoid the threatened harm without committing the crime; and
>
> Fourth, that the defendant reasonably believed that by committing the criminal acts he would avoid the threatened harm[.]

Appendix D at 117a-118a, *quoting* 1 Modern Federal Jury Instructions-Criminal P 8.06. Based on authorities outside of the Second Circuit referenced in the commentary to that pattern instruction, the government also requested the district court to instruct the jury: "the phrase 'unlawful, present, imminent and impending' excludes both prior threats of future harm," and "[a] subjective belief by the defendant that going to the police would not alleviate the threat is not sufficient to satisfy the third element." *Id.*

C. The defense summation

Summations started the next morning and the district court never indicated to the parties that it had changed its ruling on the duress instruction and would include non-standard language. During his summation, defense counsel made the arguments below.

> The reason [counsel] asked [Charles] these questions about what he knew about MasterJoseph, because it was only in explaining that to you that you could understand what he was going through. And ya know, folks, you didn't just need Charles. You heard it from the man himself [MasterJoseph] and you heard it from the Government. What did [MasterJoseph] share

> with you about [his] background? He told you a story about his grandfather running Yonkers, being in the Italian mob, and that any charges against him and his family would just get dropped. These were what MasterJoseph had told Charles.
>
> * * *
>
> I asked [MasterJoseph] these things because he told them to Charles. And [MasterJoseph] said [he] told Charles what [MasterJoseph] was told [by MasterJoseph's family]. There was a possibility that [MasterJoseph's] grandfather was a, quote unquote, bad man, thought he said bag man, it's an old term. But other than that, no. [MasterJoseph said he has] extended family that were part of the unions. That's what he's telling you folks, what he's telling Charles, he's not denying it, saying what [he] told Charles is what [he] told Charles.

Tr. 341-42; Appendix C at 42a-43a.

> Counsel reminded the jury about the time that Petitioner and his brother, Edward, were with MasterJoseph, and MasterJoseph fired a gun at Edward – laughing about it and saying he missed on purpose. Tr. 343; Appendix C at 44a. And going further, [counsel] asked Charles about other instances of violence, and he says there was a time when he had delivered a desk to him and he put it in his parking garage or his parking spot. And MasterJoseph was upset [and] needed to teach him a lesson. What did he do? Punched him in the face. Charles, did you defend yourself? No. It made it harder for him. I asked Charles,

> did you call the police? He said no. Why not? He said he knew from the stories that people that called the police on [MasterJoseph] got beat after calling the police. He told you about this horrific incident, which Edward spoke to you about, where MasterJoseph was angry at Edward for not taking care of MasterJoseph's wife and not watching her. And so, while Charles is on the phone with him, he puts the phone down and proceeds to beat the hell out of Edward. Then he gets back on the phone and says not to worry, [Edward is] not dead. What does Edward tell you? He says he was dragged, half asleep, [MasterJoseph] was hitting him with the left hand, Edward has a scar to this day, tells you about the big gash and how MasterJoseph had cut his hand on his teeth. He admitted it. I said you also broke his nose. [MasterJoseph] said oh, I just thought I split his lip and he had to get some stitches. I said do you remember beating Edward up? He remembers hitting Edward once with his left hand. [Counsel] asked [Charles] did you think about calling the police? He says no. Why not? Because his brother would end up being beat further. If somethin' happened to me, it would be much worse.

Tr. 344-45; Appendix C at 45a-46a.

Counsel also emphasized that Petitioner had testified about another incident years ago where MasterJoseph dragged him out of a car and into a basement, and then made him strip so he could check for

a listening device, because MasterJoseph had recently been interrogated by police. MasterJoseph then began to question Petitioner while holding a knife and repeatedly jabbed it into a table between Charles' hands. Tr. 346; Appendix C at 47a.

During summation, counsel reminded the jury that MasterJoseph's brother was a DEA Agent. MasterJoseph had previously given his brother's DEA business card to Petitioner—a card found in Petitioner's home during the execution of a search warrant—and told Petitioner "you can run, but you can't hide." Tr. 348; Appendix C at 49a. Petitioner didn't try and contact the police because "[MasterJoseph's] brother would find out and [Petitioner] would be dead." *Id.*

In sum, it was all of those incidents which, defense counsel explained, meant that "[Petitioner] was in reasonable fear for his life and the life of his wife, the life of his in-laws and the life of his mother. He couldn't go to law enforcement because of who MasterJoseph's brother was." Tr. 349; Appendix C at 50a.

D. The district court's duress instruction

On the affirmative defense of duress, the district court instructed the jury as written below.

> To find that his actions were justified, and, therefore, that he is not guilty, he must establish the following elements by a preponderance of the evidence:
>
> First, that he was under an unlawful, present, imminent and impending threat. The phrase "unlawful, present, imminent and impending" excludes both prior threats and threats of future harm;
>
> Second, that the threat was of such a nature as to induce a reasonable fear of death or serious bodily injury to himself or others;
>
> Third, that he lacked a reasonable opportunity to escape harm, other than by engaging in the illegal activity; that is, that he had no reasonable opportunity to avoid the threatened harm without committing the crime. This is an objective test, measured from the viewpoint of a reasonable person. A subjective belief by [Petitioner] that going to the police wouldn't alleviate the threat is not sufficient to satisfy this element.

Tr. 385-86; Appendix C at 86a-87a.

E. The Second Circuit's Ruling

On appeal, Petitioner argued that the district court violated Fed. R. Crim. P. 30 by not informing the parties that it had changed its initial ruling on the duress instruction and would be using the non-standard language proposed by the government.

The Second Circuit denied Petitioner relief, finding that he "cannot show the requisite prejudice, because the jury instructions were correct and because they did not contradict [Petitioner]'s arguments related to the duress instruction." Appendix A at 1a-2a.

REASON FOR GRANTING THE PETITION

THE SECOND CIRCUIT'S CONCLUSION THAT PETITIONER MUST SHOW AN EXPLICIT, VERBATIM CONTRADICTION BETWEEN ARGUMENTS MADE IN SUMMATION AND A JURY INSTRUCTION DELIVERED IN VIOLATION OF FED R. CRIM. P. 30 TO ESTABLISH PREJUDICE IS UNREASONABLE

A. The district court failed to comply with its obligation to inform the parties prior to summation that it was granting the government's request to deliver an instruction which deviated from the pattern charge they had been told would be given

In a criminal trial, closing arguments are "a basic element of the factfinding process." *Herring v. New York*, 422 U.S. 853 (1975). Under

Rule 30(b) of the Federal Rules of Criminal Procedure, which governs the delivery of jury instructions, a district court "*must* inform the parties before closing arguments how it intends to rule on [any] requested instructions." Fed. R. Crim. P. 30(b) (emphasis added).

That Rule reflects "basic concepts of fairness, allowing counsel to conform their arguments to the law as it will thereafter be presented by the judge to the jury." *United States v. Rommy*, 506 F.3d 108, 125 (2d Cir. 2007) (quotation marks omitted). Here, the trial judge clearly violated Rule 30 by never ruling at all on the defense's requested language for the duress instruction while also refusing to provide any of its instructions to counsel before summations. *See United States v. Clarke,* 842 F.3d 288, 295 (4th Cir. 2016) ("By refusing to provide its instructions to counsel before closing arguments, we must hold that the district court violated Rule 30(b)"). And the district court also violated the Rule by informing counsel to expect the pattern duress charge unless told otherwise, and then delivering a charge which contained additional language beyond the pattern instruction without any advance notice. *See United States v. James*, 239 F.3d 120, 124 (2d Cir.

2000) (Purpose of Rule 30 "is frustrated if the judge, after informing counsel of his proposed charge, then changes the charge after the summations are completed.")

As courts has previously explained, it is "not difficult" to avoid violating Rule 30.

> Typically, before counsel sum up the trial judge furnishes them with a draft charge reflecting all rulings made at the charging conference. All the judge then has to do is read the charge accurately. A previously unannounced departure by the judge from the written word is fraught with peril. . . . If during the charging conference the judge has ruled upon the contents of the charge but not yet reduced those rulings to a definitive text, the judge must be careful not to depart from the rulings that were made. If the judge, as the result of further meditation or research, decides to alter the contents of a previously agreed upon charge, the judge must inform counsel accordingly before they sum up, so that counsel can be heard in objection or otherwise.

United States v. James, 239 F.3d at 126.

Here, the Rule 30(b) violations placed defense counsel in "the difficult position of having to argue to the jury without knowing how the court would ultimately instruct the jury," and "deprived the parties of

the opportunity to lodge objections to the proposed instructions and thereby give the court the opportunity to correct any errors before instructing the jury." *United States v. Clarke*, 842 F.3d at 295. *See also United States v. Guadalupe*, 979 F.2d 790, 794 (10th Cir. 1992) (disapproving of only providing final draft of instructions just before the charge is rendered, because it deprives counsel of the opportunity to raise meaningful objections).

B. The instruction delivered by the district court deviated from the pattern charge in a manner which explicitly and/or implicitly charged away the summation given by defense counsel

The affirmative defense of duress requires a defendant to establish each of the elements by a preponderance of the evidence. *See Dixon v. United States*, 548 U.S. 1, 8 (2006). The Second Circuit has repeatedly stated that three discrete elements must be met to establish coercion or duress. These elements are the following: (1) a threat of force directed at the time of the defendant's conduct; (2) a threat sufficient to induce a well-founded fear of impending death or serious bodily injury; and (3) a lack of a reasonable opportunity to escape harm

other than by engaging in the illegal activity. *United States v. Hernandez*, 894 F.3d 496, 503 (2d Cir. 2018) (quoting *United States v. Gonzalez*, 407 F.3d 118, 122 (2d Cir. 2005)). *See also United States v. Zayac*, 765 F.3d 112, 120 (2d Cir. 2014) (same).

During the "charge conference," when discussing the first element, the district court commented "when you look at it and say it has to be immediately, within close proximity to the commission of the crime, you have a repetitive commission of the crime here, don't ya?" Tr. 308; Appendix C at 10a. Petitioner, however, was not charged with multiple offenses—he was charged with a single conspiracy. And "because conspiracy is an inchoate crime, [the defendant] was required to demonstrate that the necessary threatened force was present at the time of his agreement to participate in the conspiracy." *United States v. Podlog*, 35 F.3d 699, 704 (2d Cir. 1994). Without explaining this to the jury, declaring that "prior" threats were not relevant was wrong, unduly confusing, and gave the jury no way to know it was supposed to be looking at a discreet window of time for that element.

As then Judge Kavanaugh explained: "[r]easonableness – under both the imminence prong and the no-reasonable-alternative prong – is not assessed in the abstract. Rather, any assessment of the reasonableness of a defendant's actions must take into account the defendant's 'particular circumstances,' at least to an extent." *United States v. Nwoye*, 824 F.3d 1129, 1137 (D.C. Cir. 2016) (citing Model Penal Code § 2.09 (duress defense appropriate whenever a "person of reasonable firmness in his situation would have been unable to resist" threat of unlawful force)). Specifically,

> [t]he circumstances that juries have historically considered in assessing reasonableness have been factors "that differentiate the actor from another, like his size, strength, age, or health," as well as facts known to the defendant at the time in question, such as the defendant's knowledge of an assailant's violent reputation. Model Penal Code § 2.09 cmt. at 375 (1985); *Smith v. United States*, 161 U.S. 85, 88 (1896). On the other hand, courts have typically precluded juries from considering factors such as the defendant's particular "psychological incapacity" or her "clarity of judgment, suggestibility or moral insight." Model Penal Code § 2.09 cmt. At 373-74 (1985).

United States v. Nwoye, 824 F.3d at 1137.

In this case, when addressing the third element of duress (the lack of a reasonable opportunity to avoid harm) the district court stressed that it was an "objective test" and referenced the "viewpoint of a reasonable person" just before telling the jury that Petitioner's subjective belief would not be sufficient. Tr. 385; Appendix C at 86a. At no time, however, did the court tell the jury that the "reasonable person" they were considering should be one who shared the knowledge Petitioner had about MasterJoseph—in other words—Petitioner's subjective understanding of the situation *needed* to be considered. *See United States v. Dixon*, 901 F.3d 1170, 1179 (10th Cir. 2018) ("Dixon needed to show more than just a subjective belief that going to the police would be futile: she had to put forth specific reasons to doubt that the law enforcement alternative was viable."); *United States v. Beckstrom*, 647 F.3d 1012, 1017 (10th Cir. 2011) ("A defendant may pursue a duress defense by showing that the alternative of contacting law enforcement was illusory or futile. . . . But Beckstrom did not proffer any specific reasons to doubt that the law enforcement alternative was viable.")

Contrary to the Second Circuit's conclusion, the additional language used by the district court was not only confusing but also explicitly contradicted the entire theory of the defense, as explained in summation. That theory was that: 1) MasterJoseph had threatened Petitioner with violence to get him to join the conspiracy; 2) Petitioner knew that MasterJoseph was a violent individual so the threat was not idle; and 3) MasterJoseph had specifically made Petitioner believe that going to the authorities would be futile because MasterJoseph's brother was a DEA agent.

As explained above at pp. 7–11, defense counsel had specifically argued to the court that the threat in this case was different than in the ordinary case, because it was "constant, [Petitioner] testified to that, that if anything happened, he would be killed or his family would be killed." Tr. 307; Appendix C at 9a. In sum, it was all of the prior incidents which, defense counsel explained, meant that "[Petitioner] was in reasonable fear for his life and the life of his wife, the life of his in-laws and the life of his mother. He couldn't go to law enforcement because of who MasterJoseph's brother was." Tr. 349.

But the duress instruction given by the district court undermined or outright contradicted every aspect of defense counsel's summation because the jury was told that "prior threats" were *not relevant* to the determination of whether the defendant believed he was under an imminent threat. Tr. 385-86; Appendix C at 86a-87a.

CONCLUSION

For the reasons set forth above, the Court should grant this writ of certiorari.

Respectfully submitted,

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Dated: June 12, 2020

APPENDIX

789 Fed.Appx. 910 (Mem)

United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Charles Rainer SINEK, Defendant-Appellant. [1]

18-2010-cr
|
January 14, 2020

Appeal from the United States District Court for the Northern District of New York (Sharpe, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Attorneys and Law Firms

Appearing for Appellant: Vinoo P. Varghese, New York, N.Y.

Appearing for Appellee: Rajit S. Dosanjh, Assistant United States Attorney, for Grant C. Jaquith, United States Attorney for the Northern District of New York, Syracuse, N.Y.

Present: ROSEMARY S. POOLER, PETER W. HALL, RAYMOND J. LOHIER, JR., Circuit Judges.

***911 SUMMARY ORDER**

Charles Sinek appeals from the judgment of conviction entered on June 26, 2018 by the United States District Court for the Northern District of New York (Sharpe, *J.*) following his conviction after trial on one count of conspiracy to possess with intent to distribute a controlled substance in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(C). He was principally sentenced to 87 months' imprisonment, a three-year term of supervised release and ordered to forfeit $164,025. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

Sinek first argues that the district court committed reversible error by not distributing a written copy of its duress charge to counsel prior to charging the jury as required by Federal Rule of Criminal Procedure 30. Assuming the district court's actions violated Rule 30, Sinek cannot show the requisite prejudice, because the jury instructions were correct and because

they did not contradict Sinek's arguments related to the duress instruction. *See United States v. Eisen*, 974 F.2d 246, 256 (2d Cir. 1992). Moreover, the jury being excused for 14 minutes is plainly not enough to establish prejudice against Sinek or his counsel.

In this Circuit, a defendant seeking to prove the affirmative defense of duress must show: "(1) a threat of force directed at the time of the defendant's conduct; (2) a threat sufficient to induce a well-founded fear of impending death or serious bodily injury; and (3) a lack of a reasonable opportunity to escape harm other than by engaging in the illegal activity." *United States v. Gonzalez*, 407 F.3d 118, 122 (2d Cir. 2005). "A defendant must make some showing on each element, including the element that the defendant lacked a reasonable means to escape the threatening conduct by seeking the intervention of the appropriate authorities." *Id.* (internal quotation marks omitted). The district court correctly charged the jury that "[t]he phrase 'unlawful, present, imminent and impending' excludes both prior threats and threats of future harm." Gov't App'x at 442; *see, e.g., United States v. White*, 552 F.3d 240, 247 (2d Cir. 2009) (immediate danger to defendant ended once defendant knocked the gun out of potential assailant's hands and ran out the door); *id.* (collecting cases). It is well established that a defendant must show that there was "a threat of force directed *at the time of the defendant's* ***912** *conduct*." *Gonzalez*, 407 F.3d at 122 (emphasis added); *see also United States v. Paul*, 110 F.3d 869, 871 (2d Cir. 1997) ("The availability of the duress defense in this case turns on the point in time as to which the defendant faced imminent danger and lacked an opportunity to avoid the danger except by committing an unlawful act."); *United States v. Podlog*, 35 F.3d 699, 704 (2d Cir. 1994) (defendant in conspiracy case was "required to demonstrate that the necessary threatened force was present at the time of his agreement to participate in the conspiracy").

The district court's charge as to the third element, that Sinek "lacked a reasonable opportunity to escape harm other than by engaging in the illegal activity[,]" was also correct. *Gonzalez*, 407 F.3d at 122. Sinek argues that "a reasonable person" would be one with Sinek's knowledge about the alleged ongoing threats. Appellant's Br. at 41. However, *Gonzalez* stands squarely for the proposition that a defendant's "subjective belief that going to the police would have been futile is insufficient to demonstrate that she had no reasonable alternative but to violate the law." 407 F.3d at 122.

Nor do we find any merit to Sinek's challenges to his sentence. In reviewing a sentence for substantive and procedural reasonableness, we employ "a particularly deferential form of abuse-of-discretion review." *United States v. Cavera*, 550 F.3d 180, 188 n.5 (2d Cir. 2008). A procedural error in sentencing occurs when a district court "(1) fails to calculate the Guidelines range; (2) is mistaken in the Guidelines calculation; (3) treats the Guidelines as mandatory; (4) does not give proper consideration to the [statutory sentencing] factors; (5) makes clearly erroneous factual findings; (6) does not adequately explain the sentence imposed; or (7) deviates from the Guidelines range without explanation." *United States v. Johnson*, 567 F.3d 40, 51 (2d Cir. 2009). When an alleged

procedural error has not been raised below, the district court's sentencing determination is reviewed for plain error. *See United States v. Zillgitt*, 286 F.3d 128, 131 (2d Cir. 2002).

Sinek's principal argument is that the district court was hostile toward him and his counsel, and failed to properly consider duress or diminished capacity to support either a downward departure or a variance from the Guidelines range. Sinek points to the district court's comments regarding the jury's rejection of the duress defense as evidence that the district court failed to appreciate that it could consider duress on sentencing. The sentencing colloquy makes clear that the district court appreciated the difference between duress as a defense and duress as a sentencing consideration. The district court simply did not credit either Sinek's contention that he acted under duress, or the evidence Sinek put forth regarding his diminished capacity, stating "I totally reject those arguments. I reject them because I sat and listened to the proof in this case." App'x at 563.

We have considered the remainder of Sinek's arguments and find them to be without merit. Accordingly, the order of the district court hereby is AFFIRMED.

All Citations

789 Fed.Appx. 910 (Mem)

Footnotes

1 The Clerk of the Court is directed to amend the caption as above.

LexisNexis(R) Forms FORM 485-8-6

Litigation

Jury Instruction

U.S. District Court, All Districts

Instruction 8-6 Duress and Necessity

The defendant has introduced evidence that he committed the acts charged in the indictment because he was acting under duress (*or* necessity). If you conclude that the government has proved beyond a reasonable doubt that the defendant committed the crime as charged, then you must consider whether the defendant's actions were justified by duress.

To find that the defendant's actions were justified, and therefore, that he is not guilty, the defendant must establish the following elements by a preponderance of the evidence:

First, that the defendant was under an unlawful, present, imminent and impending threat of such a nature as to induce a reasonable fear of death or serious bodily injury to himself or others;

Second, that the defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be put into the position of having to choose to engage in criminal conduct;

Third, that the defendant had no reasonable legal alternative to violating the law; that is, that he had no reasonable opportunity to avoid the threatened harm without committing the crime; and

Fourth, that the defendant reasonably believed that by committing the criminal acts he would avoid the threatened harm; (and)

(*In escape and felon-in-possession cases:* Fifth, that the defendant did not maintain the illegal conduct any longer than necessary; that is, that the defendant turned himself in to the authorities at the first reasonable opportunity after the escape (*or* did not possess the weapon any longer than necessary to avoid the threat)).

As I told you, the defendant has the burden of proving this defense by a preponderance of the evidence. To prove something by a preponderance of the evidence means to prove only that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more convincing. In determining whether the defendant has proved this defense, you may consider all of the testimony and evidence, regardless of who produced it.

It is important to remember that the fact that the defendant has raised this defense does not relieve the government of the burden of proving all of the elements of the crime, as I have defined them, beyond a reasonable doubt.

Authority

United States Supreme Court: *Dixon v. United States, 548 U.S. 1, 6–8, 126 S. Ct. 2437, 165 L. Ed. 2d. 299 (2006)*; *United States v. Bailey, 444 U.S. 394, 412–15, 100 S. Ct. 624, 62 L. Ed. 2d. 575 (1980)*.

First Circuit: *United States v. Leahy, 473 F.3d 401, 405–09 (1st Cir. 2007)*.

Third Circuit: *United States v. Taylor, 686 F.3d 182, 186 (3d Cir. 2012)*; Third Circuit Model Criminal Jury Instruction 8.03.

Fifth Circuit: Fifth Circuit Pattern Criminal Jury Instruction 1.36.

Sixth Circuit: *United States v. Capozzi, 723 F.3d 720, 725–26 (6th Cir. 2013)*; Sixth Circuit Pattern Criminal Jury Instruction 6.05.

Eighth Circuit: *United States v. Diaz, 736 F.3d 1143, 1150 (8th Cir. 2013)*.

Eleventh Circuit: Eleventh Circuit Pattern Criminal Jury Instructions, Special Instruction 16 (citing **Treatise**).

Comment

This instruction has been completely revised following the Supreme Court's decision in *Dixon v. United States* addressing the allocation of the burden of proof with respect to the duress and necessity defenses.

The defenses discussed here fall within the general category of justification defenses by which the defendant is excused from criminal liability because he or she acted under some outside threat of harm. The justification defenses actually encompass four separate defenses, although the distinction between them, especially between duress and necessity, has blurred. First, if X threatens defendant Y that X will hit Y if Y does not hit Z, and Y hits Z, that is duress. This is often called coercion, but duress and coercion are the same concept viewed from different perspectives in that Y acts under duress as a result of X's coercion. Second, if the threat comes from some non-human threat (for example, breaking into a building to avoid the path of a tornado), the defense is called necessity. Third, if X threatens to hit Y, and Y hits X instead, that is self-defense. Finally, if X threatens to hit Z, and Y hits X to prevent it, that is defense of others. Instruction 8-6 is intended to cover the first two defenses, duress and necessity. Self-defense and defense of others are discussed in Instruction 8-8, *below*.

Prior to *Dixon*, the Supreme Court had questioned whether the common law defense of duress even applies in modern criminal law, suggesting that the courts might not have the authority to recognize non-statutory defenses to statutory offenses. That being said, every court of appeals has recognized the existence of the defense, and the government's failure to raise the issue in *Dixon* suggests that it accepts the defense. In any event, the defense is "an extremely difficult defense on which to succeed," and the failure to instruct the jury on the defense rarely results in reversal. It should also be understood that duress is not a defense to murder.

Instruction 8-6 adopts the formulation of the defense adopted by a number of circuits, and tacitly approved by the *Dixon* Court. Other courts and several of the published pattern instructions have approved formulations omitting either the second or fourth element, or both, but would likely incorporate the omitted elements in an appropriate situation. Note as well that several courts use these various formulations interchangeably.

The first element of the defense is that the defendant was under an unlawful, present, imminent and impending threat of such a nature as to induce a reasonable fear of death or serious bodily injury to himself or others. The phrase "unlawful, present, imminent and impending" excludes both prior threats and threats of future harm. It also requires that the threat be definite: a "generalized fear of attack by some unknown or unspecified assailant at some unknown time in the future" is not sufficient.

The recommended instruction uses the phrase "reasonable fear." This is often expressed as either a "well-founded" or a "well-grounded" fear. As the Ninth Circuit has pointed out, these terms are all intended to establish an objective test, so the more familiar term "reasonably" is used.

Lastly, this element requires a threat of serious physical harm. Threats of other non-physical injuries are not

sufficient. The threatened harm may be directed to the defendant or to others. There is wide agreement that the defense extends at least so far as to include threats to persons who are members of the defendant's immediate family or with whom the defendant has a close personal relationship. Indeed, several of the published pattern instructions limit the defense to family members. On the other hand, most of the published instructions adopt the broader position that a threat against any other person would be sufficient.

The second element of the defense is that the defendant did not recklessly or negligently place himself in the situation in which it was probable that he would be put into the position of having to choose to engage in criminal conduct. As noted above, some of the published pattern instructions omit this element, although it appears to be an accepted part of the defense. This element is not often relevant, but becomes important in the situation when the defendant arguably initiated the confrontation that led to the threat.

The third, and most critical, element of the defenses of duress and necessity is that the defendant had "no reasonable legal alternative to violating the law." As the Tenth Circuit has stated, the defense can only be asserted "by a defendant who was confronted with … a crisis which did not permit a selection from among several situations, some of which did not involve criminal acts." This is an objective test, measured from the viewpoint of a reasonable person.

The most common issue to arise in duress cases with respect to this element (and the one most likely to defeat the defense) is that the defendant had the opportunity to contact the authorities rather than go ahead with the criminal conduct, but failed to do so. A subjective belief by the defendant that going to the police would not alleviate the threat is not sufficient to satisfy this element. Indeed, the Ninth Circuit has approved the following instruction: "Once a defendant has reached a position where he can safely turn himself in to the authorities, he will have a reasonable opportunity to escape the threatened harm."

The fourth element of the instruction requires the jury to find that the defendant reasonably believed that by committing the criminal acts he would avoid the threatened harm. Similar language is included in several of the circuit pattern instructions. This element is often stated as requiring a direct causal relationship between the criminal action and the avoidance of the threatened harm, and can be charged to the jury in those terms, but the more jury-friendly language of the recommended instruction is preferred. Again, this element is generally not in dispute, although there are occasional cases when it does come into play.

The final element, that the defendant did not maintain the illegal conduct any longer than necessary, is required in cases charging the defendant with escape, and in cases involving the illegal possession of a weapon. In *United States v. Bailey*, the three defendants escaped from the District of Columbia jail, and were charged with escape under *18 U.S.C. § 751*. At trial, defendants raised the defense that they had been subjected to intolerable and dangerous conditions in the jail. Each testified that he had tried to contact the FBI after the escape to arrange a surrender, but was unable to do so for various reasons, remaining free for one to four months. The district court refused to charge the jury on the duress defense, but the court of appeals reversed. The Supreme Court agreed with the district court and reinstated the escape convictions, holding that a defendant charged with escape and seeking a jury charge on the theory of duress or necessity must offer evidence of "a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force."

As the Court explained, this element is really a part of the third element that the defendant had no reasonable alternative to the illegal conduct. Escape is a continuing offense, so the duress defense should only be available when the defendant had no reasonable alternative to the continuing illegal conduct. Under that theory, it would seem inevitable that this element would be applied to any continuing offense. Indeed, the courts appear to be agreed that duress is a defense to a charge of being a felon-in-possession of a weapon under *18 U.S.C. § 922(g)*, but only if the defendant establishes that he did not have possession of the weapon any longer than necessary to alleviate the imminent threat.

Prior to *Dixon*, the courts of appeals had agreed that the burden of production was on the defendant but had fractured as to the placement of the burden of persuasion, with one placing the burden on the defendant in all

cases, at least five bifurcating the defense such that the burden was on the defendant with respect to some crimes but not others depending on the required mental state of the offense, and the remainder placing the burden on the government in all cases. In *Dixon*, the Court examined the history of affirmative defenses and the constitutional issues underlying this question, concluding that the burden of persuasion should be on the defendant by a preponderance of the evidence.

First, the Court held that there is no constitutional problem with placing the burden of persuasion on the defendant. The government must disprove an affirmative defense beyond a reasonable doubt if that defense tends to controvert an element of the offense. However, in the Court's view, with one possible exception, the duress and necessity defenses do not undercut the scienter elements of most federal crimes. That is, even if a crime requires willfulness (defined as knowledge that one's actions were unlawful) or knowing conduct, a finding that the defendant acted under duress does not in any way prevent him from acting with the required mental state. The only possible exception when the burden might be required to be placed on the government under *Patterson* is when the statute requires malicious conduct, and only then when the statute incorporates the common law definition of malicious as acting with the intent to commit an unlawful act without justification or excuse.

Second, the Court noted that historically the burden of persuasion was placed on the defendant with respect to all affirmative defenses. This rule was in accord with the evidentiary precept that when the facts underlying some issue are peculiarly within the knowledge of one party, the burden of persuasion with respect to that issue is generally allocated to that party. The Court then rejected the position of the Model Penal Code, which places the burden of persuasion on the government, noting that there is no reason to believe that Congress intended to incorporate the provisions of the Code into federal criminal law in derogation of the common law rule.

As a result, the Court concluded: "In the context of the firearms offenses at issue—as will usually be the case, given the long-established common-law rule—we presume that Congress intended the [defendant] to bear the burden of proving the defense of duress by a preponderance of the evidence."

Accordingly, the recommended instruction has been revised to place the burden of persuasion on the defendant and to explain the preponderance of the evidence standard to the jury, being careful to remind them that the burden remains with the government to prove each element of the offense beyond a reasonable doubt.

The court should instruct the jury on the defense whenever the defendant offers sufficient evidence for a reasonable jury to conclude that the defendant has satisfied the burden with respect to each element. As discussed in Instruction 9-7B, *below*, if the defense is submitted to the jury, they should be instructed that they cannot reach a verdict unless they agree unanimously on whether the defendant has established the defense. The only federal court to discuss the issue has held that the failure to reach unanimous agreement on an affirmative defense is a mistrial.

defense will also make a motion for a dismissal pursuant to Rule 33, that the Government has failed to prove its case beyond a reasonable doubt, your Honor.

THE COURT: That motion is denied.

All right. Let's take up the issue of the charge. I want to begin with the defense of duress. The defendant has offered me nothing throughout these proceedings by way of anything of a legal nature explaining to me their view of duress and how it applies to this case. Ya said nothing in your pretrial memorandum, you've offered me nothing by way of a requested charge, you've done nothing other than mention the word "duress" once during the course of the trial. Are ya capable, at this point, of tellin' me exactly -- who has the burden of proving duress, can we start there?

MR. VARGHESE: Sure. Duress is an affirmative defense.

THE COURT: Did you put that in your pretrial submissions telling me what affirmative defenses, if any, you were gonna raise?

MR. VARGHESE: Judge, by way of Mr. --

THE COURT: The answer to the question is "no," by the way. I've looked at your answer to that question and you didn't do it. Go ahead, explain to me how duress applies in this case.

MR. VARGHESE: Duress, your Honor, is basically four prongs, the Second Circuit has laid out most recently in the case *United States versus Zayac* in 2014. There has to be a threat of death or serious bodily injury to either himself or a family member, which there was in this case; two, that threat must be immediate or imminent. In this case, Mr. Sinek told you that it was constant, he testified to that, that if anything happened, he would be killed or his family would be killed. Three, the actions of Mr. MasterJoseph instilled a reasonable fear in Mr. Sinek based on everything, their long history, which had come out during the course of the trial; and because Mr. -- and four, there was no reasonable means to escape or report to authorities except to commit the crime.

In this situation, because of Mr. Sinek's -- I'm sorry, Mr. MasterJoseph's brother being a DEA agent, a business card of which was recovered during the execution of the search warrant, Mr. MasterJoseph made it very clear to Mr. Sinek he could not report this to the authorities or if he did, he would face -- either his mother, his wife, his in-laws or himself would face death.

THE COURT: What does Mr. Sinek concede was the first time within which he sent the drugs to MasterJoseph for sale and what was the close of that period? What's the period of time that Mr. Sinek concedes that he was involved

in the drug distribution charged here?

MR. VARGHESE: It started -- it started sometime in 2011, your Honor.

THE COURT: And concluded when?

MR. VARGHESE: Concluded with his arrest.

THE COURT: In?

MR. VARGHESE: 2012.

THE COURT: 2012. So more than a year then.

MR. VARGHESE: The entire period was -- we're not disputing the period of the indictment, your Honor.

THE COURT: But don't the immediacy requirements and the other aspects -- in other words, I don't take any qualms with your recitation of the elements of a duress defense, but when you look at it and say it has to be immediately, within close proximity to the commission of the crime, you have a repetitive commission of the crime here, don't ya?

MR. VARGHESE: Sure, and that's what's different about this case. Cases that are out there in the Second Circuit tend to be these drug deal cases, where it's one instance. In this situation -- none of those cases, the earlier cases, none of those cases deal with this kind of issue. There is nothing like this kind of fact pattern in any of the cases we've seen in the Second Circuit, and even outside the case. There is a case, and if Your Honor would

permit me, I actually have, ya know, to the extent -- your Honor, there are cases outside the Circuit that are not in conflict with Circuit cases, and one is called *Contento-Pachon*, it is a Ninth Circuit case, that talked about the reasonable fear.

THE COURT: Did it survive scrutiny by the Supreme Court?

MR. VARGHESE: It never went to the Supreme Court, your Honor.

THE COURT: I'm teasin'.

(Laughter.)

THE COURT: Go ahead.

MR. VARGHESE: Obviously not binding on you --

THE COURT: I'm not throwin' stones at the Ninth Circuit, being the Second is right behind 'em. Go ahead.

MR. VARGHESE: I actually have a little bit about that, can you give me a second, your Honor? I'll pull up some information about that case.

THE COURT: Go ahead. Before ya do that, let me see if we can short-circuit this. Given the fact that the standard is whether any view of the evidence is sufficient to interpose the defense, what's the Government's view about whether, out of an abundance of caution, we oughta charge this?

MR. HANLON: I guess you're readin' my mind,

Judge. I would say a couple things. First of all, I would acknowledge it's their burden, but it's a preponderance burden, so that's hurdle number one.

THE COURT: Yeah.

MR. HANLON: Hurdle number two is there's obviously testimony from the defendant himself claiming duress events. Assuming we could get over those hurdles, I would argue, first of all, there has to be a threat of imminent death, I'm not sure I heard that part, imminent, maybe did, and there is no part of this indictment that suggests imminent harm of injury or death during the time period we've alleged in the indictment. That's number one. In fact, the evidence on the record, putting aside the defendant's testimony, suggests quite the contrary.

Number two, the standard is you have to look at it from the eyes of a reasonable man as to whether or not that affirmative defense applies. And the testimony that, ya know, the brother of the defendant -- of the witness is a DEA agent, and if I tell the police then I'll be discovered, I don't think is reasonable, your Honor. But, again, all that aside, I get your point, it's a preponderance standard and it's their entire defense. So, I mean, we're buying an appeal, if we fight too hard. I get that, Judge.

THE COURT: I don't know that I could have said it better myself.

(Laughter.)

THE COURT: I'll give it some thought overnight and let ya know in the morning before ya deliver your summation whether I'm gonna charge it. But I would presume, were I the parties, that I'm gonna charge duress as it's stated by the Circuit in Sand & Siffert, pretty much the elements as you laid it out.

MR. VARGHESE: Yeah. If you'd permit me, I have it on my e-mail, which I have no internet access in here. If I step outside --

THE COURT: Have what?

MR. VARGHESE: A little bit of facts --

THE COURT: I don't care.

MR. VARGHESE: Okay.

THE COURT: I just told you I solicited the view of the Government, I don't think you're entitled to it, but I'm gonna charge it, that's what I'm tellin' ya.

MR. VARGHESE: Okay, thank you.

THE COURT: Unless, thinking better of it I change my mind overnight, in which case I'll tell ya. But if anything, it hangs by a thread, I don't think there's evidence that supports it, but whatever. No further explanation necessary.

The Government sought a charge on conscious avoidance. In light of the proof I heard, I don't know why.

Could have been somethin' in your mind at the time, anticipating what might arise or not arise, I'm simply askin' are ya still seeking that charge and, if so, why?

MS. RABE: No, your Honor, we are not seeking it.

THE COURT: Okay. Is there anything the Government has sought that it wants to inquire about?

MR. HANLON: I don't believe so, your Honor.

THE COURT: I think --

MR. HANLON: Oh, I'm sorry, your Honor, yes, your Honor. To the extent that -- no, no, I'll withdraw that. I don't believe we have anything further, your Honor.

THE COURT: The defense submitted no requests to charge. Is there anything specific they're requesting, other than duress?

MR. VARGHESE: No, your Honor. I presume you do the standard charges on burden of proof, presumption of innocence.

THE COURT: I do all of that. And we covered, in the pretrial conference, and we covered, in anticipation of jury selection in this trial, but the defendant has now testified, so you want me to give the standard language about that?

MR. VARGHESE: Yes.

THE COURT: Yeah. Evaluating his testimony as you would any other witness.

MR. VARGHESE: Yes, thank you.

THE COURT: All right. All right. Anything further on the issue of the charge?

MS. RABE: No, your Honor.

MR. VARGHESE: Judge, to the extent that, obviously, these are standards, can -- is it fair to say, and I've not actually seen your instructions, is there a printout to look at?

THE COURT: No.

MR. VARGHESE: Okay. Can I presume that you've -- you follow Sands Modern Jury Instructions?

THE COURT: That's pretty much what I follow.

MR. VARGHESE: Okay.

THE COURT: Second Circuit admonition, they like it, likely because Leonard Sand drafted 'em, but they like 'em.

MR. VARGHESE: The reason I ask, your Honor, is tomorrow, I'd like to refer to the elements, obviously, in my closing and I just want to make sure we're on the same page.

THE COURT: You do so at your own risk, I don't have any problem with that.

MR. VARGHESE: Okay.

THE COURT: But, obviously, what I tell 'em controls.

MR. VARGHESE: Of course.

THE COURT: Anything further?

MS. RABE: No, your Honor.

THE COURT: See ya in the morning.

MR. VARGHESE: Thank you.

THE COURT: Thank you.

(This matter adjourned at 4:38 PM.)

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

VS.

CHARLES RAINER SINEK,
Defendant.

CASE NO.: 8:12-CR-448

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. GARY L. SHARPE
WEDNESDAY, SEPTEMBER 21, 2016
ALBANY, NEW YORK

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(Court commenced at 9:09 AM.)

THE COURT: Be seated, please. All set?

MS. RABE: Yes, your Honor.

THE COURT: Okay. Bring 'em in, John.

(Pause in proceedings.)

(Jury present at 9:11 AM.)

THE COURT: Good morning, folks. As I said to ya yesterday, the next stage of the proceedings are the summations. In the federal system, the Government goes first, the defendant second and then the Government has a brief opportunity for a rebuttal.

Miss Rabe, please.

MS. RABE: Thank you, your Honor. May it please the Court, ladies and gentlemen of the jury, the defense:

At the outset, I told you this case is about a man, Charles Rainer Sinek, who obtained Schedule II controlled substances, oxycodone, oxymorphone, hydromorphone and morphine, in California and shipped them via Federal Express to his long-standing acquaintance, Joseph Paul MasterJoseph, in Saranac, New York, where they were redistributed and sold for profit. Sinek knew these pills were to be redistributed and willingly participated, the evidence showed.

The defendant is charged with conspiracy to possess with the intent to distribute Schedule II controlled substances. A conspiracy is simply an agreement between two

or more persons to do something the law forbids. And here that is to possess with the intent to distribute Schedule II controlled substances or prescription drugs.

Let's take a look at the evidence which establishes that the defendant agreed with MasterJoseph and Jesse Mashtare and other street level distributors to do something the law forbids: To possess with the intent to distribute or to distribute Schedule II controlled substances or prescription drugs.

First, you heard from Joseph Paul MasterJoseph. He testified that he and the acquaintance had been friends for over 25 years. MasterJoseph was prescribed pain pills and learned that these pills were worth a lot of money. He relayed this information to Sinek. The two figured that the pills could be resold for a lot of money. They developed a plan. MasterJoseph told you that Sinek would obtain prescription pills. Sinek would write fake prescriptions on his father-in-law's prescription pad and have them filled. He would then package the pills, tuck them inside his -- inside stuffed animal skate guards, inside bottles that had cotton in the top for ice skates. MasterJoseph told you these would come in Federal Express packages. MasterJoseph would take some of the pills himself, but sold most of them to a local drug distributor. MasterJoseph also told you that he would send the profits back to the defendant, they

split the profits 50/50.

MasterJoseph has a colorful history to say the least. He's a criminal, a drug dealer, a liar, a drug user who is addicted to painkillers and testosterone, and you heard a lot of testimony as to these facts. I told you this at the beginning of the case. But scrutinize what MasterJoseph told you versus the other types of evidence that exists in this case. That second sort of evidence was the testimony of Jesse Mashtare. Jesse Mashtare is a local pill and marijuana distributor in Plattsburgh, New York. Mashtare told you that in the beginning of late winter 2012, he purchased prescription pills from MasterJoseph. He would buy oxycodone, Opana, scientifically known as oxymorphone, and Dilaudids, which is scientifically known as morphone from MasterJoseph. Indeed, Mashtare told you -- indeed, Mashtare told you that he had purchased the oxycodones and Opana shown in Government Exhibit 3, the picture here on the screen, from MasterJoseph. The money that was depicted, he stated, was to pay MasterJoseph. As part of a controlled payment, Mashtare paid MasterJoseph $1500 on May 31, 2012, for those seized pills. Immediately thereafter, MasterJoseph asked Mashtare if he could bring him to TD Bank. Mashtare drove MasterJoseph to TD Bank.

Mashtare also purchased oxycodone from MasterJoseph on June 14, 2012. Mashtare also told you that

Mashtare would provide him with morphine when he was sick or was suffering from withdrawal from his pain medication. This would keep Mashtare as one of his customers.

Let's look at the third type of evidence. There was a search warrant of the defendant's residence at 6303 Dover Street in Oakland, California, where DEA agents found a blank prescription pad in the name of Desy Handra, Sinek's father-in-law. There was also a RiteAid receipt for 360 oxycodone pills for Charles Sinek dated January 30, 2012, written by Desy Handra.

Let's show you that prescription. This is Government Exhibit 41-L. This was a prescription for the oxycodone. That is similar to the RiteAid receipt that was written on June 30th -- that was obtained on January 30, 2012. That prescription was written on a prescription pad belonging to Desy Handra. It was not the only one.

The fourth type of evidence that you heard in this case was you heard testimony from numerous different pharmacists or custodians of record from Costco, CVS, Express Scripts, Prime Therapeutics and RiteAid. These prescriptions were all written on Desy Handra's prescription pads or the notations that were provided in these documents showed that Desy Handra had provided the prescription.

Let's look at a summary of these prescription purchases. This summary shows all of the different

prescriptions from which you heard the varying different pharmacists discuss. There's a large number of 'em here over a period of two years, and at this -- and they're all from the name of Desy Handra. They are all -- to fill these prescriptions, Charles Sinek, as this demonstrates, used varying different names. He used the name Charles Walbach and variations of his own name. Sinek, S-I-N-E-K; Seinek, S-E-I-N-E-K; Synek, S-Y-N-E-K. This was for a large number of pills. You can look at the dosage amounts of 120 pills, 360 pills at times, 1,080 pills at other times. These pharmacy records also show that on June 5, 2012, Express Scripts and Prime Therapeutics filled prescriptions for oxycodone. Jesse Mashtare told you that on June 14, 2012, he purchased oxycodone pills from MasterJoseph. That was about a week later.

Fifth, the fifth type of evidence you heard, was the defendant, in his own words and his own voice as a result of a wiretap obtained by the DEA. This is the only time where we heard from the defendant when he didn't know anyone was listening. And in these calls, you hear the defendant speaking with Joseph Paul MasterJoseph. They used coded language to discuss the availability of drugs and their sale in Saranac, New York. You hear the defendant advise MasterJoseph on how to sell drugs to Jesse Mashtare and how to make Jesse Mashtare pay for drugs upfront. You

also hear the discussion of the mailing and receipt of a package.

You heard one call, Government Exhibit 24, on August 22, 2012, at 12:51 PM. MasterJoseph calls the defendant and says, "I haven't caught the football yet." And asks, "Is everything okay?" Sinek responds, "Yes." Federal Express records show that a package was delivered to 114 Farrell Road at 13:58 PM military time, or 1:58 PM. That package had been mailed from, according to the custodian of records, Emeryville, California. It had not been mailed from St. Louis, Missouri. Then 15 minutes later, on August 22, 2012, at 2:11 PM, which was Government Exhibit 25, MasterJoseph calls to say, "Hey, I caught the football." And the defendant responds, "Egg salad, man." A package with that exact same tracking number was found by DEA Special Agent Andy Hermes in MasterJoseph's fireplace on September 4, 2012. It had been partially burned (indicating). But this wasn't the only Federal Express package sent from the defendant's shipping account. So fifth, you have 49 different packages being sent from Sinek's shipping account to Paul MasterJoseph between 2011 and 2012.

Can you show the second page?

The sender had varying different names, but they were all to the same recipient address of 114 Farrell Road.

He also sometimes put them in the care of his own name. Finally, you have the testimony of the defendant himself. He stated that he'd known MasterJoseph for 25 years, that he'd used his father-in-law's prescription pad, he used it to obtain prescription drugs and send them to MasterJoseph in Saranac. He stated he knew those drugs were being sold. The defendant, however, said that he feared MasterJoseph and that he had to send the drugs, that he was acting under some form of duress or compulsion and that his actions, he termed, were justifiable. But let's analyze that assertion, let's look at it closely. Let's look at what the evidence shows.

First, the defendant lived in California. MasterJoseph lived across the country in New York. More than 3,000 miles separated them. The distance was too great, there was no immediate threat. It takes a long time to get from California to New York.

Second, the defendant never notified the authorities of any threat. This conspiracy to distribute pills, we allege, is from at least 2011 to 2012. But the defendant never tried to call the police, he never tried to extricate himself or to reach out to authorities for help. Indeed, in 25 years, he never told any law enforcement of any alleged threat. He didn't go to the FBI, he didn't go to local police in either New York or Oakland, and they're

on different coasts.

But I submit the best evidence that the defendant was not under any duress or any compulsion are his own words. Think about the calls that you heard, and we'll replay small clips right now of a couple of those calls, and ask yourselves, was the defendant scared of MasterJoseph in these calls, or was he gleefully joining in on the selling of these pills. Ask yourselves, is he not somewhat directing Mr. MasterJoseph as to what to do in these calls? The first one here comes from Government Exhibit 20, and I believe at this point in time they're discussing the shipment, the sending or wiring back of $5,000 in cash.

(Played for the jury.)

MS. RABE: They're talking about sending back money. Listen to the voices. Let's listen to another clip. This one also comes from Exhibit Number 20.

(Played for the jury.)

MS. RABE: Does the defendant sound worried here or are they discussing the details of a business transacting drugs? Is Mr. -- is the defendant telling MasterJoseph that he has serious inventory? What does serious inventory mean? Let's listen to another clip. This one comes from Government Exhibit Number 21.

(Played for the jury.)

MS. RABE: What's happening in this call? Ask

yourselves that. Is the defendant suggesting to MasterJoseph what he should do, something of a violent nature, to further their business and take out a fellow person selling H, or what MasterJoseph testified was heroin?

Let's listen to one more, let's listen to another call, this one is from Exhibit 22.

(Played for the jury.)

MS. RABE: What are they discussing here? Are they discussing a business transaction? Does Mr. Sinek at all seem like there's any form of immediate threat being made to him, or is he advising Mr. MasterJoseph how to further sell the pills and get payment back from Mr. Mashtare?

Let's listen to another clip. This one comes from Government Exhibit Number 23.

(Played for the jury.)

MS. RABE: Does the defendant sound scared here? Or is he telling him that he's trying to hide varying different objects in his house? And what is he trying to hide and why is he trying to hide it from his wife?

We also heard a call about the sending of a package and the receipt of that package. And after that receipt of that call -- package, Mr. MasterJoseph calls Mr. Sinek, the defendant, again. And listen to the tones of their voices. Are they gleefully happy that this is

occurring? Let's play a small section of exhibit -- Government Exhibit Number 26.

(Played for the jury.)

MS. RABE: After that, there's another call and we'll hear a clip from it, where they talk about how there's more pills. Let's play a small portion here of Government Exhibit Number 29.

(Played for the jury.)

MS. RABE: What does "just the beginning" mean? Does that mean they're gonna further their business interests and try to sell more pills? Does Mr. Sinek, the defendant, sound at all remotely worried here?

Let's play one final clip, and this is also from Government Exhibit Number 29.

(Played for the jury.)

MS. RABE: What are they discussing here? Are they discussing what those pills are worth in street value and what they can get for selling them?

This is the evidence in the case. Stay focused on all of the evidence. At the end of this case, you'll have as this evidence testimony of the co-conspirators detailing how Sinek would obtain prescription drugs, send them from California to Saranac, New York, where they were sold; recordings of the defendant discussing prescription pills he has and coaching Mr. MasterJoseph on how to sell those

pills. You have a controlled purchase of oxycodone from MasterJoseph by Jesse Mashtare, you have items found during a search warrant and you have pharmaceutical records showing the purchase of drugs in California. You also have Federal Express records and these records go over two years. At no point in time did Mr. Sinek ever go to legal authority, no time did he try to get out of this relationship. The evidence has shown, rather, that beginning in at least 2011, the defendant agreed with his acquaintance of over 20 years, Joseph Paul MasterJoseph, and others, to obtain and to distribute thousands of prescription pills. Pursuant to that agreement, the defendant and his co-conspirators did, in fact, sell the prescription pills. The defendant was a willing participant who did not act under any form of duress.

We ask that you return the only verdict that's consistent with the law and the evidence in this case, and that's a verdict of guilty for conspiracy to possess with the intent to distribute and to distribute controlled substances.

Thank you.

THE COURT: Thank you. Mr. Varghese, please.

MR. VARGHESE: I just need a moment to connect my laptop.

THE COURT: Okay.

(Pause in proceedings.)

MR. VARGHESE: I apologize, folks.

(Pause in proceedings.)

THE COURT: Folks, I'm gonna ask ya to step aside and just as soon as we have worked out the technology, we'll bring ya back.

(Jury excused at 9:36 AM.)

(Court reconvened at 9:40 AM.)

THE COURT: Please.

MR. VARGHESE: Thank you, your Honor. Folks, it seems like weeks ago we were here, it was actually only two days ago, and two days ago, Judge Sharpe, His Honor, had the opportunity to address you about the system, about what makes jury service special. I then was able to speak to you for a few minutes, further talking about that concept, and then my colleague, Mr. Ring, also spoke to you and he thanked you for your service, 'cause Mr. Ring told you in opening statement that from day one, Mr. Sinek was arrested, he pled his innocence and he demanded a right to a jury trial. And that's why we're here. And as citizens, this is the opportunity for you, the most special thing as a citizen, to hold the Government accountable, to hold the Government to its burden of proof.

Now, Judge Sharpe, after we're all done, after I speak and sit down and Ms. Rabe gets to go again, is gonna

give you instructions on the law and the law, you'll have to accept the law as he puts it forth to you. But I want to talk about a fundamental concept here in criminal cases, and that is reasonable doubt. Judge Law (sic) is gonna give you an instruction on reasonable doubt, and here is the charge on reasonable doubt. Now the Government is required to prove the charge and there's one charge here, conspiracy. The Government's required to prove that charge beyond a reasonable doubt. The definition of reasonable doubt is there. It's a doubt based on reason. This is the entire definition, you're gonna have an opportunity to hear it, but I want to drawing your attention to one thing in particular. It is a doubt that would cause a reasonable person to act in a matter of importance in his or her personal life. When you go back to deliberate, you're gonna have that hesitation, you're gonna have that hesitation about the evidence.

It is not an easy story, as Ms. Rabe has given it to you. And why is that? Charles Sinek was never part of this conspiracy. What was the first thing Ms. Rabe said to you just a few minutes ago? She said he willingly participated. To be a part of a conspiracy, you must willingly participate. He never willingly participated in this. Yes, if you remember during jury selection and about 48 hours ago, I think, but it feels much longer, I had asked

you about the possibility under the law for when somebody may have done A, B and C, but may not be guilty. Hopefully some of you remember that. But we're gonna talk about that here. 'Cause in order to be guilty of a conspiracy, you must be a willing participant and he was never part of this conspiracy.

Let's look at his own words. He testified, and again, he didn't have to testify. But he chose to testify. Under the Constitution, he had a right to remain silent, but he chose to testify and expose himself before you, warts and all, and he did that, and you had the opportunity to view him and view his testimony in contrast to others. When I say "others," there was really only one other person from the Government's perspective that really matters for this case and that's Paul MasterJoseph.

Let's look at what Mr. Sinek told you, Charles. I asked him, Charles, before I get into everything, I will ask you questions about your background. Did you ever sell drugs, sell drugs to Paul MasterJoseph? He said no. This is the transcript of the case. Did you ever sell drugs to anyone? He said no. Did you send Paul MasterJoseph illegally obtained drugs? What did he say? He said I did. Then I asked him, did you do so willingly? He said absolutely not. In order to be guilty of conspiracy, you must have acted willingly.

Ask yourselves a question, folks: Why does somebody sell drugs? Ask yourselves this. Why sell drugs? Money. The sale of drugs is a financial crime. Not a white color crime, per se, but it's all about money. That's why people sell drugs.

All right. Well, let's talk about money here. You asked -- I asked Charles, did you make any money off the drugs that you had sent him? He said it was a losing proposition, he did not make money. And I asked him about what MasterJoseph had said about him, that he'd split things evenly with him. And what did Charles say? That's not true.

Let's look at what MasterJoseph said in his exam. Ms. Rabe asked him about oxycodone and how much he would pay. And MasterJoseph talked about selling it for $25, the 30-milligram pill he would sell for 17, 15-milligram OxyContin for even less. And she asked the question per pill, correct? And he answered that it was correct.

He continued to say about how many shipments would include -- those shipments, how many pills in an average shipment? Well, he said, it's hard to put a number on it. He said I can tell you financially over the course of time I was working with him, selling these medications, it started out where I was -- we were makin' about 15, $1800 every two weeks. Every two weeks MasterJoseph said he made $1800.

And then he was making $3,000 every two weeks, up to $6,000 every two weeks. Then, in the end he said, $12,000 every two weeks. Think about that for a second. So MasterJoseph says by the time, at the end of it, when he was arrested, he was makin' $12,000 every two weeks. A lot of money. No one is gonna argue with that. That's why he's in the business, right, he's tryin' to make money.

What did Special Agent Kadish, who is sitting here, what did he tell you about the drugs? And I had asked him about the street value. And he said at the time of the arrest, the oxycodone was goin' about a dollar per milligram, so you know there were 80-milligram tablets, so presumably $80 per tablet for 80 milligrams. The 40 milligram tablets of Opana at the time was approximately 45 to 65. So the evidence shows, and we don't dispute this, that Charles sent thousands of pills, he did. So that's a lot of money, street value wise. We asked Special Agent Kadish about paying for the drugs, Special Agent Kadish said he presumed that he did. MasterJoseph was asked by Ms. Rabe, did you make a profit from selling the pills? He said emphatically, yes. I would split the profits in half, send Charles the other half, minus expenses, whatever they may be. Money. Okay.

Then he says I would deposit the money into certain bank accounts and he would retrieve them

electronically. So MasterJoseph said he would deposit the money to split the profits with Charles into bank accounts, which Charles would then be able to extract electronically.

Special Agent Kadish said throughout the investigation, we did several searches, investigative databases, internet searches, requested shipping records, phone records, I'll come back to bank records, and prescription records throughout the case. Make no mistake about it, folks, the Federal Government spared no expense here, spared no expense. How many witnesses did they bring into court, how many records, Fed Ex, how many pharmacists did you hear from? How many shipments, how many charts? The amount of witnesses was staggering. Ask yourselves, how many did we ask any questions about?

Well, let's go back to this. He said that they did bank records. So answer my question, folks, where's the money? Where are those bank records? The Government didn't enter into evidence any single bank record. Where is the money that MasterJoseph said he deposited into this account -- you know, you heard some conversation about a bank account, and that our client, Mr. Charles (sic), would be able to retrieve electronically. Where's the money? Where are Charles' bank accounts? Where are his private jets? Where are his BMWs? Where is the yachts? Where are his fancy homes? You heard a lot of testimony about all

this, right? No, you didn't. You didn't hear a single -- you know they got bank records. Special Agent Kadish, sitting right here, under oath, told you that he got bank records, but the Government doesn't enter a single bank record into evidence.

Let's talk about what you do know about Charles. From another DEA agent, Agent Carbins, who testified -- I know there was a lot of witnesses yesterday, this was one of the few witnesses that we actually asked a question about, this was Mr. Ring asked him about Charles' residence in Oakland. And he asked him what kind of residence was this? It's a small residence. It was maybe a small studio, a two room residence, very small. That's where they executed the search warrant, folks. Not some mansion, not some yacht, ya didn't hear about seizure of cars and bank accounts -- well, they have bank records, but they didn't share those with you. Why is that? When our client says he didn't make money, well, will you believe that? Their witness, MasterJoseph, said electronic transfers. Where's the proof of that? None.

So, when we asked about the search warrant, was there any money recovered at the time? He says at first I don't recall, but I don't believe there was any money recovered at that time. No money recovered. They weren't in the bed sheets, in a secret compartment, no safe with

millions of dollars. I mean, the street value, and I asked Special Agent Kadish about all the numbers, and I'm not a math guy, that's why I became a lawyer, but I imagine if you do the multiplication of the numbers Special Agent Kadish gave you and you do the math, that street value is pretty high. Thousands of pills, the street value of those drugs may be in the millions. And you didn't hear anything about that, or you didn't hear anything about the money.

We started speaking to you about being a member of a conspiracy, you have to be a willing member of a conspiracy. You cannot be a willing participant if your will was overborne, so I want to talk to you about the violence that you heard about and Charles not being a voluntary member of this. Conspiracy was with MasterJoseph and others, Charles wasn't part of it.

So, we asked Special Agent Kadish about guns being recovered. This is not about the second apartment, it's about what was recovered from the home. Drug dealers often have guns, it goes with the trade. Who had guns, shotguns, rifles? Who had 'em? MasterJoseph, not Charles Sinek. Jesse Mashtare, who also testified, didn't have much to ask him about 'cause he didn't know Charles, he had a gun. Two guys that came in in jumpsuits, guarded by the Marshals. And he said there were guns recovered, Special Agent Kadish, three guns; they were shotguns.

Now, I asked Special Agent Kadish about the wiretap, specifically what was on the wiretap. And Special Agent Kadish confirmed that he learned about a conversation between MasterJoseph and his own father about killing his own mother and brother, yes, Special Agent Kadish confirmed that. Asked him were there gory details? He didn't like the word gory, he preferred disturbing. I have no issue with that, folks. And at the time that MasterJoseph was arrested, Special Agent Kadish, doing his duty, turned that information over to the lead prosecutor and that information was used to keep MasterJoseph in jail.

Let's talk about MasterJoseph and what he said. He said somethin' about his dad blaming his brother's wife, or Lee Ann, for his separation and his father wanting to hurt the daughter-in-law, his daughter-in-law. He admitted that he offered to help him do this, he admitted that they discussed detonating a bomb. Charles admitted he shipped drugs to MasterJoseph under duress. MasterJoseph admits to detonating a bomb or talking about it, obtaining firearms, MasterJoseph admitted to lying to law enforcement. I asked him you talked about arson, correct, about burning a house down? What does he say? I don't remember. Ya think if ya had a conversation about burning a house down you may remember? About killing your mother? I think that there were two different plots here: Plot to kill his mother and

a separate plot to kill Lee Ann, all right, 'cause he talked about it and he said I was just gonna bring an AK, AK47, and spray the house. But I don't remember exactly what was said in the conversation.

Government, yeah, they come up here before you, say he's a criminal, scrutinize his testimony carefully. But that's not what they want you to do. They want you to accept the fact that now that he's cloaked with the prestige, the imprimatur of the United States Government, therefore he has to be telling the truth when he's up there. That's what they want ya to believe. That's exactly what our Founders didn't want you to accept at face value, outrageous claims like that from the Government.

Now, I asked him, in his cooperation agreement, if you remember, the Government didn't initially enter into a cooperation agreement, but when I was asking him questions about it on redirect, Miss Rabe sought to enter it in and I said just enter the whole thing in and she did. So I asked him, is there anything about the arson plot, about the plot to kill your mother and brother? He says no. So, you know, at this point he's not saying -- you saw him, always clarifying this or that, he didn't say no, no, no, no, it was a plot to kill Lee Ann at this point. Later on he says that. But there's nothing in that cooperation agreement that speaks about it.

So I said let me get this straight, you're sittin' up there and you haven't been prosecuted for a plot which they caught you on the wire attempting to commit murder or conspiring to commit murder? And he was tryin' to dodge the question, and then I ultimately asked him have you been charged with a conspiracy to kill your mother and your brother? He says no. Of course he does clarify at the end that it was about Lee Ann, but there's nothing in the plea agreement about that either.

So, I want ya to think about this as you're deliberating. MasterJoseph, because he chooses to testify for the Government, gets to walk free on a murder plot. Charles exercises his right to trial for selling -- shipping, not selling, drugs to MasterJoseph, and he's sitting over there (indicating).

Let's talk about MasterJoseph, and of course, you know, as Miss Rabe and the Government tells you, they want you to scrutinize his testimony. Did they present his testimony for you to review? I asked him -- or I'm sorry, she asked him, have you been in any altercations while you've been in prison? Altercation. Something about him shaving over it, the first one, got into a fight in prison. The second altercation, this one he says was financial, someone was supposed to make him Christmas cards, and he didn't. Well, second altercation in jail. Think about

that. This man gets into fights in prison.

We asked Charles, did you observe him being violent towards others? And he spoke about a very sad incident that he observed with MasterJoseph's first wife, talked about observing him beating her. I asked what did you do? He tried to break it up as best as he could. And he was thrown away like a fly, and he was held up against the wall. We asked MasterJoseph, MasterJoseph has quite a history with women, says did you plead guilty to cruelty to persons, this was on his direct examination? He says his wife lost her spleen, I was responsible for that under Connecticut State Law.

I asked him there about the facts of the case, he denied it. I said the authorities found your wife in a pool of blood? He denied it. He says it's not established that she was in a pool of blood for days. He said any blood that came out was coming from her private parts. That's what he said.

But he said he gave an explanation for it. He said that they weren't getting along, somethin' about goin' to the bedroom and sliding doors, and he said, when I asked him, so, I said, so are you saying that this was just an accident? He said no. She was overmedicating because -- some of the medication did not allow her body to heal. Heal from what? What did she need to heal from? Him.

But he was convicted of cruelty to persons. This is the Government's star witness, the one who they call to provide to you what Charles Sinek was thinking. Think about it, folks. If this case were so -- such a slam dunk for them, why would they ever call this man? If those tapes are as damaging as Ms. Rabe says, why are they calling him? The United States Government is calling a vicious, vicious, psychotic -- the words can't do him justice. You heard about his psychiatric history. You've heard about his violence. So, clearly, something is amiss. The Government knows the tapes alone don't explain the whole story, they know that, or else they would have just used the tapes. Why bring him in, why bring that monster into this courtroom? 'Cause they've got to get a way to explain what happened with Charles. And when I spoke to you about reasonable doubt in the beginning, do you have some hesitation here, folks, about what's goin' on?

I asked him, you were a person who got into a lot of fights? Yes. You're an enforcer type, you have a way of getting your way through violence? He said no, I just don't let people take advantage of me. I said what does that mean, you don't let people take advantage of you? Sometimes violence is necessary. I don't know about you folks, but that sent chills down my spine when I was askin' questions and I was thinking thank God the Marshals are here.

Now, this is amazing. He was a teacher at some point. He was a teacher in Yonkers, part time. And you were fired from your job as a teacher, weren't you? He said no, absolutely not, he says. There was an altercation with that student, they switched me from middle, Mark Twain school, to Roosevelt High School. He got in a fight with a middle school student. This is the Government's star witness. But, of course, he was adamant that wasn't the reason he got terminated. He admits there was an altercation with the student in middle school.

Charles, we asked Charles, and the reason Charles asked him these questions about what he knew about MasterJoseph, because it was only in explaining that to you that you could understand what he was going through. And ya know, folks, you didn't just need Charles. You heard it from the man himself and you heard it from the Government. What did he share with you about background? He told you a story about his grandfather running Yonkers, being in the Italian mob, and that any charges against him and his family would just get dropped. These were what MasterJoseph had told Charles. And then other stories, about people getting beat-downs, his brother participating in those beat-downs with him. Again, folks, what am I doing? What did the Government do in their opening statement when they said that? Played you a tiny snippet of a call. Are the calls

really that big? You can listen to 'em. They played little snippets for you. Said oh, here, we'll get to the calls. What am I doin' here? Showing entire transcripts. I'm highlighting things for you, that's the official court transcript. I asked him, told him that your grandfather Rocco was a mob boss? He said no, he was head of the Democratic party in Yonkers. And he says -- I asked him did you ever tell Charles your father was in the mafia? I asked him these things because he told them to Charles. And he said I told Charles what I was told. There was a possibility that my grandfather was a, quote unquote, bad man, thought he said bag man, it's an old term. But other than that, no. Says I have extended family that were part of the unions. That's what he's telling you folks, what he's telling Charles, he's not denying it, saying what I told Charles is what I told Charles.

Let's talk about his motive to lie here. The hopes of getting a lenient sentence. I asked him, and you agreed to give testimony here today against Mr. Sinek, correct? That's correct. He had to say that, had to admit that. That's part of the agreement. There are things that he can't get away with, he tells you. So I asked him how many years he's facing. Originally it was 20. He took a plea, talked about President Obama giving him some sort of a reduction, not personally, but there was a change in the

laws that worked to his benefit, so got him down to -- from twenty years to eight years, seven months, and he's completed four. He's hopin' to get out. He says -- I asked are you hopin' to get outta court (sic)? He says I'm hopin' the Judge has mercy on me. I said, so the Government has to submit a letter long after you're gone, after this case, you're gonna be back before the Judge, and in that time period he'll make a determination of whether they're gonna give him a letter to help support his sentencing. Talk about a motive. Just say things the Government wants to hear. And he says yeah, I believe so. 'Cause he can't deny that, that's the way the process works.

Let's get back to this. I spoke to you about his violence, talks about Charles' will. So I asked him about some of the direct incidents of violence with MasterJoseph, things that he would do. They were hangin' out. And he just picks up a rifle, points it at his brother and pulls the trigger, six inches from his brother's head. We were indoors. He said he didn't ask him, he was stunned, said MasterJoseph laughed it off and said he missed on purpose.

Let's talk about what MasterJoseph says. I asked him, did you fire a rifle? You missed Sinek, Edward Sinek, did you fire the rifle in his direction inside the home? Well, he remembers firing a rifle in New Jersey. You know, it's amazing that the details that he can remember, at one

point I asked him was it in Toms River? He said no, it was Beachwood, New Jersey, four exists away on the Turnpike, New Jersey Turnpike, he remembers that. Doesn't remember where he shot exactly. He's like yeah, there was some episode about firing a rifle. But you know what he says? He says but it was okay because I was upset about something. He has reasons for everything, for him.

So we asked Edward, Charles' brother testified before you, I said were you ever present along with Charles when MasterJoseph committed any acts of violence? He said yeah. What did he tell you? He said we were drinking, there was some practice shooting with the rifle, we were sitting across from each other, in a basement, and he fires the gun about five inches from his head.

Go back, what did MasterJoseph tell you? He remembers firing a rifle in New Jersey, I asked him about firing it at Edward Sinek. I asked Charles about other instances of violence, and he says there was a time when he had delivered a desk to him and he put it in his parking garage or his parking spot. And MasterJoseph was upset. I needed to teach him a lessen. What did he do? Punched him in the face. Charles, did you defend yourself? No. It made it harder for him. I asked Charles, did you call the police? He said no. Why not? He said he knew from the stories that people that called the police on him got beat

after calling the police. He told you about this horrific incident, which Edward spoke to you about, where MasterJoseph was angry at Edward for not taking care of MasterJoseph's wife and not watching her. And so, while Charles is on the phone with him, he puts the phone down and proceeds to beat the hell out of Edward. Then he gets back on the phone and says not to worry, he's not dead. What does Edward tell you? He says he was dragged, half asleep, he was hitting him with the left hand, Edward has a scar to this day, tells you about the big gash and how MasterJoseph had cut his hand on his teeth. He admitted it. I said you also broke his nose. He said oh, I just thought I split his lip and he had to get some stitches. I said do you remember beating Edward up? He remembers hitting Edward once with his left hand. Charles, asked him did you think about calling the police? He says no. Why not? Because his brother would end up being beat further. If somethin' happened to me, it would be much worse. Mr. Ring, who was asking Mr. Edward Sinek questions, asked him did you go to the police? Why not? At that point, Edward Sinek realized who actually MasterJoseph was. The stories he told were comin' together.

Charles told him -- told you about another incident, where in the '90s, he tells him to go from Pittsburgh, to come to Westchester County now. Charles

does. He had his young wife, they weren't married at the time, but his young wife with him at the time. Before he gets out of the car, he pulls him out, drags him in and takes him to the basement, tells Charles to take off his clothes. Charles tells you he doesn't have any underwear on. So he checks him for a wife, then he was kind enough to throw him a pair of shorts, and then he starts to play a game with him. Psychological warfare. Hunting knife. Made Charles put his hands on the table and asked him questions. I asked Charles what did he do with the knife during the time you were downstairs in his basement? He picked the knife and jabbed it into the table, and he would do that between his hands, folks. And the Government claims he wasn't under duress. We'll get back to that.

MasterJoseph, what happened here? Well, ya know, I was interrogated by the State Police, he came to see me, we went down. I said you thought he was wired? So he made him take off his clothes. Doesn't remember the rest of it, but he says, you know what, he wasn't fully naked, just down to his underwear, so it's okay.

Now, there was a period of time when Charles Sinek was able to get away, and in that time, Charles Sinek's life flourished. He began training, he began teaching, ultimately became an Olympian in 2002, representing our country in the Olympics in Salt Lake City. I asked him

about that. He had moved out to California, teaching figure skating, all the way through the Olympics, him and his wife. Then, in 2010, the world tumbled around Charles Sinek. It was at this time in his life that MasterJoseph had been trying to get in touch with him during this period. First there was a letter which wasn't opened. Opened a second one. And eventually, as Charles told you, MasterJoseph calls him and he talks to him. And he was suggesting things, that he move closer to him, he wanted to move in with Charles and his wife, and Edward and his wife and a young child. He had brought this up, and Charles told you, and the more he said no, the more agitated he became. So he said I want to pay some bills, so he sent him money. He said he initially sent him 2,000 to help pay his property taxes, then 11,000 to help with Immigration, to get an Immigration lawyer, because he was bringin' over a wife from the Philippines. But he wanted to move in with him. So Charles sent about $20,000 to keep him away.

So I asked him when did the idea of prescription pills come about? He told him he kept making excuses why it wouldn't work, he pushed him off, and MasterJoseph kept pushing him, pushing him, says okay, you don't want to send me pills? You can send me pills so I can sell 'em or else we have an alternative. The alternative, says I'm gonna kill your wife's parents, we'll just give him part of the

inheritance.

What does Charles say? He's tryin' to come up with all reasons why it's a bad idea, 'cause if he says no, the real answer, that he likes Beata's parents, I don't want to see 'em dead, I don't want to see my wife goin' through that pain. Charles told you, he told you about the California Cures program for prescriptions, he would have said you're full of shit, all right, you don't give a damn about anybody, there's -- and that's what he tells him. Charles said no matter what he tells him, it's a lie.

It was a clear choice. Perpetrate the early inheritance, engage in a plot to commit murder, or figure out a way to get him drugs. Now I asked him, Charles, why didn't you call the police? He said his brother would find out and that he would be dead. I asked him did you believe that statement? He said a hundred percent.

Now, how do we -- why did Charles believe him? 'Cause MasterJoseph had sent him a picture of Mark, his brother, getting his plaque and a business card, and told him over the phone, you can run, but you can't hide. You can read the rest.

I asked him about his brother being a DEA agent, he said well, for a short period, only a year. I said had you sent Charles a copy of the business card? You sent Charles a copy of the business card, isn't that correct?

And I asked Special Agent Kadish whether he was a DEA agent. He said that's his understanding, and that he was assigned in Manhattan. And what did the DEA recover from the execution of the search warrant in Charles' home? The business card, that card (indicating), was recovered from Charles' home during the execution of the search warrant. Special Agent Mark A. MasterJoseph, New York Division. So I asked Mr. MasterJoseph, Paul MasterJoseph, so you're saying about the threats, you're saying you never threatened Charles that if he went to the authorities that your brother would know right away? What's his answer? Oh, ya know, 'cause he's worried about what the Government's gonna find out and he may lose his cooperation agreement, so he's tryin' to hedge the line there, he says I don't remember if I did or didn't, I'm not gonna say either way. Do you think that, and ask yourselves, folks, presumably I'm gonna take a small leap and assume that none of you ever threatened to kill anybody, but I assume that if you had, you'd know, you'd remember. But what's with this guy? He threatens people so much, he threatens people so much that what does he say up there? I'm not gonna say.

That's duress, folks. Charles was in reasonable fear for his life and the life of his wife, the life of his in-laws and the life of his mother. He couldn't go to law enforcement because of who MasterJoseph's brother was. I

asked him, you weren't gonna kill his mother if he didn't send you pills? What's his answer? He doesn't say no, absolutely not. I don't remember this. Remember living in a town in New Jersey, four exits away from Toms River, and a lot of other details. Maybe that was something he didn't share with the Government when he made this agreement. He realized he was in trouble up there, so I don't remember, 'cause he knows if he says yes, there's a legal defense for Charles, so he can't say yes, even though it's the truth, and we all know it's the truth, folks. So I clarified with him, so your answer is you don't remember saying this to him? While Charles was living on the west coast, his mother is still on the east coast, only a couple hours away from you, correct? That's correct.

The Government's gonna say, when I sit down, Ms. Rabe or Mr. Hanlon will get up and say that's unreasonable, folks, he should have gone to the police if he felt threatened. Easy for them to say. Their mother doesn't live near MasterJoseph, a short distance away. The Government wants you to accept that, that he wasn't under duress. Here you have their star witness admitting, saying, admitting that he did make these threats by saying I don't remember.

Charles told him, when did you want to do this? And how did he respond? Send me the fucking drugs. I asked

Charles did he make threats about anyone else? His mother, Beata's parents, he said I'll snap your neck. And you'll hear from Judge Sharpe about the law, the law of duress, and with the law of duress, there is a burden, the burden to prove this case beyond a reasonable doubt always stays with the Government, but with the law of duress, Mr. Sinek, us, the defense, has to put it forward, what's called -- we need to prove it to you by a preponderance of the evidence, a much lower standard. We have to show that it's more likely than not that these elements were met. So, one of the elements is the immediacy of the threat, and the Government's gonna argue that there was no immediate threat. Mr. Sinek, Charles, didn't tell you about any immediate threat. It was a constant threat. When it's constant and ever-going, it's immediate. At no point did he say no. 'Cause if he says no, it's either him, his wife, his in-laws or his poor mother sitting over there in court (indicating).

What did he say about your mother? Well, you don't want me to do anything to Beata's parents, I could always snap your mother's neck and no one would ever know, 'cause they would think that she just fell down the stairs. That's what I asked Charles. What does he say? I don't remember this. Not no, folks, I never said that, I never made a threat. I don't remember. Let's talk about Charles on the wires. And I apologize, folks, I know I'm goin' a

long time, but this is the only opportunity I have to speak to you, so please bear with me, it's my -- our client is sitting there, Mr. Charles Sinek (indicating), whose livelihood, his liberty is in your hands. I have to go on. Please forgive me, I'm just doin' my job. But I'm just showing you what was said during trial. They didn't do that (indicating).

So we asked Edward Sinek about this time, he's wanting to define him, as well as you can define him, a vicious sociopath. Now, why did I bring that up? 'Cause Ms. Rabe said during her closing, said to you does this man sound like somebody who is under duress? It sounds like he's laughing it out, he's talking to him, talkin' about money, giving you little snippets. If you listen to those calls carefully, he's saying most of the time, um-hum, um-hum, um-hum. Occasionally he would interject. And I asked him about that. And he says at times he had to do more because that's -- um-hum, um-hum is pretty much what he did. But he did that also for a reason, and this is how sad this story is, he was hoping that he would increase his exposure. She played a bit. When MasterJoseph says this could get me 30 years in Sing Sing, what did Charles say? Yes. He said it in a laughing way. Charles told you on the stand that that's what he hoped would happen to him, so he could get away. But if that happens to him while on the

east coast and it's not his doing, he'd be safe.

Now, prior to the recordings -- now, you heard some recordings. And I asked Charles, prior to the recordings -- this is -- let's put things in perspective here, folks. This is a 30-year history, and they were on the wires for 15 days, and they expect you to convict Charles, saying that those wires and the testimony of their star psychopath means that Charles should go to prison. That's what they're tellin' you. So I asked Charles, prior to these recordings, did he make numerous threats to you? Yes. Over the phone? And he said oh, yes. What did Special Agent Kadish tell you about the wiretaps? He said that they would -- if they're not discussing criminal conduct, they'd stop doing what's called spot checking, or minimizing, so they would stop listening for a period of time, they would return later. So I clarified, so I asked him, and during the period that the wire was up -- now, this is 15 days, this massive investigation with all these witnesses they called -- and I asked him so you're telling me there weren't people, agents, continuously listening to the wire, is that correct? Not all the time, no. Could you tell how long the wiretap was up for? Approximately three weeks. Special Agent Kadish tellin' ya how long that wire was for, and Ms. Rabe here, and the Government, wants you to believe that that's the entire thing. That if there's no

threat in the very end, when they got arrested, that there wasn't a threat. But you know there were. MasterJoseph confirmed it by his -- you want to call 'em denials? "I don't remember" is not a denial. I will tell you, you will hear this from Judge Sharpe, don't leave your common sense; when you go in that jury room, all your life experience, what you've learned in life is going to help you make a decision. Common sense does not get left at the door.

Charles, this is who he is, professional figure skater, Olympian, representing your country in the Salt Lake City games. Unfortunately for him, he got caught up with MasterJoseph.

Again, folks, you're gonna read the entire charge, Judge Sharpe is gonna give it to you. If it causes you to hesitate, if the evidence causes you to hesitate, that's a reasonable doubt, that means Charles is not guilty. This -- when I began, what did I say a little while ago? I know I said a lot and I apologize. I said if the wires told the whole story, what did that man get you? That's the Government's star witness.

I'll bring you back to two days ago when my colleague, Mr. Ring, he asked to leave you with one thought: He said if it weren't for MasterJoseph, would Charles be sitting there right now? If the answer is no, then you must acquit. Thank you very much.

THE COURT: Thank you. Miss Rabe, how long, approximately, is your rebuttal?

MR. HANLON: Your Honor, I will be doing the rebuttal, it will be less than ten minutes.

THE COURT: Let's do it. I know it's been awhile, but let's do it.

MR. HANLON: Well, good morning. We haven't been properly introduced. My name is Dan Hanlon and I'm an Assistant United States Attorney, and I guess, as you know, I'm Ms. Rabe's sidekick. Let's bring you back to this trial and to this defendant, Mr. Sinek. Mr. MasterJoseph's not on trial here, that's probably obvious, but I think it deserves restating.

Let's talk about, you know, what's really at issue here. I don't think you're gonna go back into that deliberation room and say, hmmm, I wonder why Charles Sinek sold drugs or mailed drugs to Paul MasterJoseph? I don't think that's really gonna be somethin' you guys have a struggle with. He's a drug dealer (indicating). He's a drug dealer, let's put it plain and simple.

And Mr. Sinek sits over there as the most interested person in this entire courthouse in the outcome of this case. And that is who Mr. Varghese is asking you to believe, when he says that he was under duress, because there's no proof, no proof whatsoever, that Mr. Sinek was

under duress, outside of what he tells you. And think about that. Just think about that for one minute. What weight are you gonna give to that evidence? And when you're thinkin' about that, think about this: He was caught red-handed. The DEA conducted an investigation, and they do what they do. They start with a little guy like Mashtare and they try to work their way up the chain. They get Mashtare to make some buys. Based on those buys, they get a wiretap on MasterJoseph's phone. And on the wiretap, they want to know who is supplying him with the drugs. Is there any question about who is doin' that now? No, not at all. Mr. Sinek is a drug supplier, end of investigation. He is caught red-handed. Yeah, it's 15 days, three weeks of a wiretap. Good thing for us we have that because that completely blows his defense outta the water. "I'm under duress."Now, I don't have any way to show you that I really was under duress 'cause I never called the police in the 25 years of scattered instances where I was threatened. I never told anybody I was under duress. But we have these nagging calls that show you he was under no duress whatsoever.

(Call played for the jury.)

MR. HANLON: Ms. Rabe didn't -- I am not gonna sit here and have you relive the entire trial in our closing argument, this was a two-day trial, and I will give you the

credit you deserve and assume you remember what happened in the last two days. But listen to the call; that is jubilance. My kids aren't that happy most of the time. I tell 'em we're goin' to Disneyland, they're not that ecstatic. That was a big shipment of drugs goin' to MasterJoseph, and he's waitin', 'cause if that shipment gets intercepted, guess who's in trouble? Charles Sinek. It's not MasterJoseph got 'em. He's ecstatic, because now they're gonna be able to sell the drugs. That's the reasonable way to look at that evidence, right? A drug dealer sends pills that can make a lot of money, they get to their destination, hallelujah. That's what you heard. You don't hear, you don't hear duress.

Now, why do we call someone like Paul MasterJoseph? Because that's who he dealt with. He makes it sound like, ya know, we thumb through a phone book, close your eyes and pointed to a name and it was Paul MasterJoseph and it happened to be a sociopath. Yeah, he's a sociopath, but that's who he was selling and distributing his drugs to, so that's why we called him. And do we try to hide from you that he's got all these problems? Absolutely not. That's why Ms. Rabe told you, before they did, what he had done.

What did we do to try to protect ourselves from him lying to you? We tell him if you lie, we'll take that cooperation agreement and tear it to pieces, forget any

potential cooperation credit you get. It's not tell us what we want to hear, that's not what the cooperation agreement says. You tell the truth or go to jail for the full amount of time you're goin' to jail for. That gives him an incentive to tell you the truth, doesn't it, because if we catch him in a lie, the cooperation agreement is torn up.

So, now you have the defense, caught red-handed. Like when you have small kids, if you remember when your kids were small, "I didn't do it." "Well, Johnny, I saw ya do it." "Okay, I did it, but." That's what this duress defense is, it's the "but, I was under duress." But he can't show you anything to corroborate his story. And here's a guy who you know, from his own testimony, makes things up to further his own ends. That story about his wife, I want MasterJoseph to believe, ya know, that I'm into this, machoism, whatever, he's tellin' you guys that he makes stories up and then he's asking you to believe that the story he's telling you now isn't made up. What he's doing is protecting his interests. Ya can't have it both ways. And I'm not askin' ya to choose which side is right. I'm askin' ya to look at the evidence to make that determination. If we just take those calls that Ms. Rabe played for you, there's no duress, there's absolutely no question there's no duress.

So I'm gonna end right now and I promise I'll be

brief, because I know, you don't see it, but Judge Sharpe has a hook and he's gonna use it on me, so I'm gonna finish right now.

You're gonna hear the Judge instruct you on duress. Now, when you hear that instruction, and you don't care what -- I am gonna tell you you don't have to care what I say, you don't have to care what Mr. Varghese says, you have to care what the Judge says about the law, but when you hear the instruction on duress, you'll know that a lot of what Mr. Varghese spent his closing argument on is completely irrelevant, completely irrelevant, 'cause he touched on it, there has to be an immediate harm to someone for the duress to apply. It cannot be some ongoing, you know, speculative threat. Duress is meant for someone who is in immediate danger of harm to himself or somebody he loves. And even if you take the 15 days of calls we played for you, he is not in any immediate threat. If he were, you'd know it.

He's into this, he's all in. When he sends that shipment, that's just the beginning. He keeps trying to say it, and, granted, Mr. MasterJoseph can't shut up during those calls, but Mr. Sinek keeps trying to tell him there's more comin', there's more comin'. This guy is more excited than MasterJoseph is. That's what a drug dealer does; he tries to increase his profit.

Now, where are the bank records? You're not gonna hear Judge Sharpe tell you at all during his instructions that we have to prove to you that Mr. Sinek made a profit. That's not an element of the crime, so don't be distracted by that. We have to prove that he conspired or agreed to possess with intent to distribute controlled substances. We don't have to prove that he made a profit or even that he sold any; just that he distributed 'em, gave 'em to Mr. MasterJoseph.

So, you're not gonna hear anything about profit, but to the extent you want an explanation, you have it. There's a phone call in there where MasterJoseph is essentially apologizing to the guy he's supposed to be coercing for not having all the money in Sinek's account, the $5,000 call you heard. There's money going into an account for Charles Sinek, you have that. But you don't need it to convict him of these charges.

I want ya to hold us to our burden, that's your job, and I hope ya do it, but I don't want ya to hold us to a burden that's higher than it should be.

Thanks, folks.

THE COURT: Thank you. All right, folks, we are gonna take a 20-minute break, until five after, and then I'm gonna instruct ya on the law. The attorneys are right, I'm gonna supply ya my instructions in writing, so that you

don't have to worry about note taking, and that you're free to if ya want to. So you can step aside and I'll provide ya the instructions. I am gonna give 'em to you orally, but then I'm gonna send 'em in to you. Go ahead.

(Jury excused at 10:45 AM.)

(Court reconvened at 11:05 AM.)

(Jury present.)

THE COURT: Folks, on behalf of the parties and the Court family, thank you for your service. As I said to ya earlier, I'll give you a copy of these instructions to use in your deliberations. If you have some question about the law that these instructions don't address, you have to ask me for a further explanation.

You've sworn to accept my instructions and apply them to the facts as you determine the facts to be. If any attorney has stated the law differently than as I now state it, my instructions control.

Your function is to decide the facts that have a material bearing on the issues in this case. You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence; you determine the credibility of the witnesses; and you resolve such conflicts as there may be in the testimony. The evidence before you consists of the answers given by the witnesses, the testimony they gave as you recall it, and the exhibits that were received in

evidence.

Because the important facts are yours to determine, you must rely on your common sense, your good judgment and your experience in deciding such questions. As judges of witness credibility and the weight and the effect of all evidence, carefully scrutinize all testimony, the circumstances under which each witness has testified and every matter in evidence that tends to show whether a witness is worthy of belief. Consider the witness' intelligence, motive, state of mind, demeanor and manner while on the stand. Consider the witness' ability to observe the matters as to which he or she has testified and whether he or she impresses you as having an accurate recollection of these matters and the extent to which each witness is either supported or contradicted by other evidence in the case. As I touched upon during the selection process, the testimony of law enforcement officers is entitled to no special treatment or consideration and should be weighed as the testimony of any other witness.

As I said during jury selection, the law makes no distinction between direct and circumstantial evidence. Direct evidence is what, for example, a witness personally sees or hears. Circumstantial evidence is a logical conclusion you reach based upon facts that you find exist. Such logical conclusions are perfectly permissible and, of

course, it's entirely up to you whether you draw such a logical conclusion. You're entitled to make inferences if you choose to do so. Thus, on the basis of your reason, experience and common sense, you may infer the existence of some fact from one or more other facts that you find exist. An inference is a reasoned, logical conclusion that a disputed fact exists on the basis of another fact that you know exists. Again, as you evaluate the evidence, there's no substitute for your collective experience and your common sense.

Remember, during the trial, the Government read to you the parties' stipulation regarding the testing of drugs. As I explained, a stipulation is an agreement among them that certain facts are true and you must accept those facts as true.

You must rely upon your own recollection of the evidence. What the lawyers said in their opening statements, in their closings, in their objections or in their questions is not evidence. Speaking of the attorneys, they've been professional and I applaud them for their conscientious efforts on behalf of their clients and work well done. I have no opinion as to what the facts or what your verdict should be, and my trial rulings have no bearing on either. As to those issues, you are the sole judges.

I want to comment on somethin' I call trial

dynamics. In most trials, it's inevitable that jurors can get caught up with the exchanges between the Court and the attorneys, the attorneys with one another or the personalities of everybody involved. Those things are all fluff, and they have absolutely nothing to do with your verdict. Furthermore, it's not the attorneys' fault that they've had to deal with an old irascible federal judge.

Ultimately, we operate under an adversarial system in which we hope the truth will emerge through the competing presentations of adverse parties. The attorneys must press as hard as they can for their respective positions. They have the right and the obligation to make objections to the introduction of evidence they feel is improper and, while interruptions caused by such objections may be irritating, the attorneys are not to be faulted because they have a duty to make objections that they think are appropriate.

The Rules of Evidence aren't always clear and lawyers often disagree. My job is to resolve those disputes. Ya have to realize, however, that my rulings on evidentiary matters have nothing to do with the ultimate merits of the case and they're not to be considered as points scored for one side or the other.

I want to remind you of several things I, again, told you during jury selection. Although the prosecution is brought in the name of the United States, the Government is

entitled to no greater consideration than Mr. Sinek, nor any lesser consideration. Everyone is equal in a courtroom. You may not consider any personal feelings about race, religion, national origin, sex or aiming. It would be equally improper for you to allow any feelings you might have about the nature of the crime charged to interfere with your decision making process. And finally, although I'm going to give you a copy of the indictment for your use during your deliberations, I remind you it's merely a statement of the charge and not, itself, evidence.

It does not matter, in terms of the indictment, that a specific act occurred on or about a certain date, and the evidence indicates that, in fact, it was some other date. The law only requires a substantial similarity between the date alleged in the indictment and the date established by testimony or exhibits.

The Government has offered evidence in the form of tape recordings of telephone calls with the defendant which were obtained without the knowledge of the parties to the conversation, but with the consent and authorization of the Court. These so-called wiretaps were lawfully obtained. The use of this procedure to gather evidence is perfectly lawful and the Government is entitled to use these wiretaps in this case.

The Government also offered evidence it obtained

during the execution of search warrants, which were obtained by authorization of the Court. The use of this procedure was, likewise, lawful and the Government is entitled to use the resulting evidence in this case.

Remember what I told you about the transcript of the tape recordings, they're an aid to your understanding of the recording itself, but it is your understanding of what's spoken in the recording which controls.

I want to talk for a second about accomplice testimony. In the prosecution of crime, the Government is frequently called upon to use persons who have been accomplices; often it has no choice. They are properly used. After all, the Government must rely on witnesses to transactions, whomever they are; otherwise, in many instances, it is would be difficult to detect and prosecute wrongdoers. This is particularly so in cases where a conspiracy is involved. Frequently it happens that only those on the inside of the venture can give evidence which is material and important to the case.

The law lays down several rules which govern your treatment of accomplice testimony. In the first place, it is no concern of yours or mine why the Government chose not to charge a certain person or to treat others with leniency. The decision of who should be prosecuted and to what degree is a matter which the Constitution and statutes of the

United States delegate solely to the Attorney General of the United States and the United States Attorneys who, acting under her authority, carry out his constitutional mandate. "He" and "her" changed during the course of the last administration. The Constitution and statutes of the United States do not give you or me any authority to supervise the exercise of this responsibility.

Further, if you come to the conclusion that an accomplice witness has given reliable testimony, you are required to act upon it exactly as you would act on the testimony you find to be reliable, even though you may thoroughly dislike the witness who provided that testimony.

However, it's also the case that accomplice testimony is of such a nature that it must be scrutinized with great care and viewed with particular caution when you decide how much of the testimony, if any, to believe. There's no requirement that the testimony of an accomplice be corroborated or supported by other evidence. A conviction may rest upon the testimony of the accomplice alone if you believe it and if all of the evidence satisfies you that the Government has proved the defendant's guilt beyond a reasonable doubt.

You should ask yourselves whether these so-called accomplices would benefit more by lying or by telling the truth. Was their testimony made up, in any way, because

they believed or hoped that they would somehow receive favorable treatment by testifying falsely? Or did they believe that their interests would be best served by testifying truthfully? If you believed that the witness was motivated by hopes of personal gain, was the motivation one which would cause him to lie or was it one which would cause him to tell the truth? Did this motivation color his testimony? In sum, you should look at all of the evidence in deciding what credence and what weight, if any, you will want to give to accomplice witnesses.

You've heard testimony from a Government witness who pled guilty to a charge arising out of the facts in this case. You're instructed that you are to draw no conclusions or inferences of any kind about the guilt of Mr. Sinek from the fact that a prosecution witness pled guilty to a similar charge. The decision of that witness to plead guilty was a personal decision about his own guilt. It may not be used by you in any way as evidence against or unfavorable to Mr. Sinek.

I'm sure ya managed to follow the rules of good conduct. In any event, your verdict must be based solely on the evidence presented in the courtroom according to my instructions. Completely disregard any report which you may have inadvertently seen outside the context of the courtroom, or heard. It would be unfair to consider any

such reports because they're not evidence and the parties have had no opportunity to contradict their accuracy or otherwise explain them.

In a criminal case, the defendant cannot be required to testify, but if he chooses to testify, he is, of course, permitted to take the witness stand on his own behalf. In this case, Mr. Sinek elected to testify. You should examine and evaluate his testimony just as you would the testimony of any witness with an interest in the outcome of the case.

As I told ya during jury selection, the law presumes that Mr. Sinek is innocent. Thus, he began the trial with a clean slate -- that is, with no evidence against him -- and the law permits nothing but legal evidence to be considered by you as you consider the charge. He cannot be convicted on the basis of conjecture or suspicion. It follows, then, that the presumption of innocence alone is sufficient to acquit him. The Government must prove his guilt and do so beyond a reasonable doubt. That burden always remains with the Government. Therefore, it must prove beyond a reasonable doubt that Mr. Sinek committed every element of the offense charged as I will define those elements for you. Since the burden never shifts to Mr. Sinek to prove his innocence, the law never imposes upon any defendant the burden of calling any

witnesses or producing any evidence. In this case, he's raised an affirmative defense, and I'll discuss that with you when I come to my instructions on duress, and I'll give ya some instructions on the burden of proof, which he carries, as to that defense.

The Government need not, however, prove guilt beyond all possible doubt; the test is one of reasonable doubt. A reasonable doubt is a doubt based on reason and common sense; it's a doubt that a reasonable person has, after carefully weighing all of the evidence. It is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act on it in the most important of his or her own affairs.

A reasonable doubt is not caprice or whim, it is not speculation or suspicion, it is not an excuse to avoid the performance of an unpleasant duty and it is not sympathy. If, after fair and impartial consideration of all the evidence, you have a reasonable doubt, it's your duty to acquit Mr. Sinek. On the other hand, if, after fair and impartial consideration of all the evidence, you're satisfied of his guilt beyond a reasonable doubt, you should vote to convict.

Let me turn to the indictment. As ya know, the indictment charges Mr. Sinek with one count of conspiracy to distribute or possess with intent to distribute controlled substances. In that regard, the indictment reads as follows:

Between in or about July 2011 and on or about September 4, 2012, in Clinton County, in the Northern District of New York, and elsewhere, Joseph Paul MasterJoseph and Charles Rainer Sinek, and others, known and unknown, conspired to knowingly and intentionally possess with intent to distribute and to distribute controlled substances, in violation of federal law. That violation involved oxycodone, hydromorphone, morphine and oxymorphone, all of which are Schedule II controlled substances, that all having occurred in violation of federal law.

As it relates to that charge, the conspiracy law reads as follows:

Any person who conspires to commit any narcotics offense shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the conspiracy. It can get complicated sounding; I'll simplify it in a second.

Section 841 of federal law describes the underlying narcotics offense, and that section reads:

It shall be unlawful for any person to knowingly

or intentionally possess with the intent to distribute or distribute a controlled substance.

As a matter of law, oxycodone, hydromorphone, morphine and oxymorphone are Schedule II controlled substances as that phrase is used throughout these instructions and in the indictment and the relevant statutes.

Let me now explain the law of conspiracy. Mr. Sinek is accused of having been a member of a conspiracy to violate certain federal narcotics laws. A conspiracy is a kind of criminal partnership, a combination or agreement of two or more persons to join together to accomplish some unlawful purpose. The crime of conspiracy to violate a federal law is an independent offense. It is separate and distinct from the actual violation of any specific federal laws, which the law refers to as substantive crimes. So an illegal agreement to commit a federal crime, the illegal agreement is, itself, criminal, and that's the conspiracy. The crimes that the agreement relates to are often referred to as the substantive crimes and, in this case, those crimes are the possession with the intent to distribute and the distribution of narcotics.

Indeed, you may find Mr. Sinek guilty of the crime of conspiracy to commit an offense against the United States even though the substantive crime, which was the object of

the conspiracy, was not actually committed. Moreover, you may find Mr. Sinek guilty of conspiracy, despite the fact that he, himself, was incapable of committing the substantive crime. In other words, you're not being asked whether the substantive crime, possession with the intent to distribute, or distribution, was even committed. You're being asked to decide whether there was a conspiracy.

Congress has deemed it appropriate to make conspiracy, standing alone, a separate crime even if the conspiracy is not successful. This is because collective criminal activity poses a greater threat to the public's safety and welfare than individual conduct and increases the likelihood of success of a particular criminal venture.

Let me turn then to the elements of the conspiracy charge. In order to prove Mr. Sinek guilty of conspiracy to distribute or possess with intent to distribute controlled substances, the Government must prove each of the following elements beyond a reasonable doubt:

First, the conspiracy, agreement or understanding to possess with the intent to distribute or to distribute controlled substances as described in the indictment was willfully formed, reached or entered into by two or more persons, and existed at or about the time alleged in the indictment;

Second, at some time during the existence or life

of the conspiracy, Mr. Sinek knew the purpose of the agreement and then knowingly and willfully became a member of the conspiracy;

And third, that the conspiracy involved the possession with the intent to distribute or the distribution of a mixture or substance containing oxycodone, hydromorphone, morphine or oxymorphone.

Before I provide a further explanation of each of these three elements in more detail, let me mention and define a few terms for you, in particular as they relate to state of mind. Questions of knowledge, willfulness and intent involve the state of a person's mind. It has often been said to juries that the state of one's mind is a fact as much as the state of his digestion. Accordingly, this is a fact you're being called upon to decide. Medical science has not yet devised an instrument that can record what was in one's mind in the distant pass. Rarely is direct proof available to establish the state of one's mind. This may be inferred from what he says or does, his words, his actions and his conduct, as of the time of the occurrence of certain events. A defendant's omissions -- that is, what he does not say or do -- may also serve as proof of his state of mind at a particular time.

The intent with which an act is done is often more clearly and conclusively shown by the act itself or by a

series of acts than by words or explanations of the act uttered long after its occurrence. Accordingly, intent, willfulness and knowledge are usually established by surrounding facts and circumstances as of the time of the acts you are considering or the events took place and the reasonable inferences to be drawn from them.

A person acts knowingly if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident or carelessness. Whether the defendant acted knowingly may be proven by the defendant's conduct and by all of the facts and circumstances surrounding the case. Willfully means to act with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say with a bad purpose to disobey or disregard the law. Conduct is not willful if it was due to negligence, inadvertence or mistake.

Some elements require the Government to prove that Mr. Sinek acted intentionally. Before you can find that Mr. Sinek acted intentionally, you must be satisfied beyond a reasonable doubt that he acted deliberately and purposefully; that is, his acts must have been the product of his conscious objective rather than the product of mistake or accident.

As to intent, let me explain that intent is not the same as motive. They are different concepts and should

never be confused. Motive is what prompts a person to act or fail to act. Intent refers only to the state of mind with which the act is done or not done.

Personal advancement and financial gain, for example, are two well-recognized motives for much of human conduct. These praiseworthy motives, however, may prompt one person to voluntary acts of good while prompting another person to voluntary acts of crime. Good motive alone is never a defense where the act done or omitted is a crime. The motive of Mr. Sinek is, therefore, immaterial, except insofar as evidence of motive may aid in the determination of state of mind or the intent of Mr. Sinek.

Now let me return to the three elements of conspiracy.

To prove the first element, the existence of a conspiracy, the Government must prove that two or more members positively or tacitly came to an understanding to accomplish the unlawful objective alleged in the indictment -- the distribution and possession and distribution of drugs.

In order for the Government to satisfy this element, you need not find that the alleged members of the conspiracy met together and entered into any express or formal agreement. Similarly, you need not find that the alleged conspirators stated, in words or writing, what the

scheme was, its object or purpose, or every precise detail of the scheme, or the means by which its object or purpose was to be accomplished.

What the Government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people to cooperate with each other to accomplish an unlawful act. You may, of course, find that the existence of an agreement to disobey or disregard the law has been established by direct proof. However, since conspiracy is, by its very nature, characterized by secrecy, you may also infer its existence from the circumstances of this case and the conduct of the parties involved. In a very real sense, then, in the context of conspiracy cases, actions often speak louder than words. In this regard, you may, in determining whether an agreement existed here, consider the actions and statements of all those you find to be participants as proof that a common design existed on the part of the persons charged to act together to accomplish an unlawful purpose.

As to the second element, the Government must prove beyond a reasonable doubt that Mr. Sinek knowingly, willfully and voluntarily became a member of the conspiracy. If you're satisfied that the conspiracy charged in the indictment existed, you must next ask yourselves who the members of that conspiracy were. In deciding whether

Mr. Sinek was, in fact, a member of the conspiracy, you should consider whether he knowingly and willfully joined the conspiracy. Did he participate in it with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective? In that regard, it has been said that in order for a defendant to be deemed a participant in a conspiracy, he must have had a stake in the venture or its outcome. You are instructed that while proof of a financial interest in the outcome of the scheme is not essential, if you find that Mr. Sinek had such an interest, that is a factor which you may properly consider in determining whether or not he was a member of the conspiracy charged in the indictment.

As I mentioned a moment ago, before the defendant can be found to have been a co-conspirator, you must find that he knowingly created or joined in the unlawful agreement or plan. The key question, therefore, is whether Mr. Sinek joined the conspiracy with an awareness of at least some of the basic aims and purposes of the unlawful agreement. It's important for you to note that Mr. Sinek's participation in the conspiracy must be established by independent evidence of his own acts or statements, as well as those of the other alleged co-conspirators and the reasonable inferences which may be drawn from them.

Mr. Sinek's knowledge is a matter of inference

from the facts proved. In that connection, I instruct you that to become a member of the conspiracy, Mr. Sinek need not have known the identities of each and every other member, nor need he have been apprised of all their activities. Moreover, Mr. Sinek need not have been fully informed as to all of the details or the scope of the conspiracy in order to justify an inference of knowledge on his part. Furthermore, Mr. Sinek need not have joined in all of the conspiracy's unlawful objectives.

The extent of a defendant's participation has no bearing on the issue of his guilt. A conspirator's liability is not measured by the extent or duration of his participation. Indeed, each member may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles while others play minor parts in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw the defendant within the ambit of the conspiracy. I want to caution you, however, that Mr. Sinek's mere presence at the scene of the alleged crime does not, by itself, make him a member of the conspiracy. Similarly, mere association with one or more members of the conspiracy does not automatically make Mr. Sinek a member. A person may know or be friendly with a criminal without being a criminal himself. Mere similarity of conduct or the fact that they may have

assembled together and discussed common aims and interests does not necessarily establish membership in the conspiracy.

I also want to caution you that mere knowledge or acquiescence, without participation in the unlawful plan, is not sufficient. Moreover, the fact that the acts of a defendant, without knowledge, merely happened to further the purposes or objectives of the conspiracy does not make a defendant a member. More is required under the law. What is necessary is that Mr. Sinek and at least one other person must have knowingly and deliberately arrived at some type of agreement or understanding that they, and perhaps others, would violate federal law by means of a common plan or course of action as alleged in the superseding indictment; namely, the distribution or possession with the intent to distribute narcotics.

It is proof of this conscious understanding and deliberate agreement by the alleged members that should be central to your consideration to a conspiracy charge. In sum, Mr. Sinek, with an understanding of the unlawful character of the conspiracy, must have intentionally engaged, advised or assisted in it for the purpose of furthering the illegal undertaking. He, thereby, becomes a knowing and willing participant in the unlawful agreement, that is to say, a co-conspirator.

As to the third and final element, the Government

must prove beyond a reasonable doubt that Mr. Sinek conspired to distribute or possessed with the intent to distribute a mixture or substance containing a detectable amount of those drugs I referenced earlier. As I said to you earlier, they're all controlled substances. Thus, the knowing and intentional possession of these substances, with the intent to distribute them, violates the law, as does the knowing and intentional distribution itself. Possessing them with the intent to distribute is a violation, the actual distribution is a violation. Therefore, if you find beyond a reasonable doubt that the conspiracy involved the possession with the intent to distribute or the distribution of the substances alleged in the indictment, then the third element has been proven.

Actual possession is what most of us think of as possession; that is, having physical custody or control of an object. For example, if an individual had drugs on his person, you may find that he had possession of the drugs. However, a person need not have actual, physical custody of an object in order to be in legal possession of it. If an individual has the ability and intent to exercise substantial control over an object that he does not have in his physical custody, then he has possession of that item. An example of this from every day experience would be a person's possession of items he keeps in a safety deposit

box in the bank. Although he does not have physical custody of those items, he exercises substantial control over them and, so, has legal possession.

The law also recognizes that possession may be sole or joint. If one person alone possesses something, that's sole possession. However, it's possible that more than one person may have the power and intention to exercise control over drugs. This is called joint possession.

The word "distribute" means to deliver a controlled substance. "Deliver" is defined as the actual, constructive or attempted transfer of a controlled substance. Simply stated, the words "distribute" and "deliver" mean to pass on or to hand over to another, or to cause to be passed on or handed over to another, a controlled substance.

Distribution does not require a sale. Activities in furtherance of the ultimate sale, such as vouching for the quality of the drugs, negotiating for or receiving the price and supplying or delivering the drugs may constitute distribution. In short, distribution requires a concrete involvement in the transfer of drugs.

In summary, if you find beyond a reasonable doubt that the conspiracy involved the distribution of or the possession with the intent to distribute a mixture of the substances I read to you earlier, then the third element has

been proven.

While it may not have always been clear, nonetheless, I admitted into evidence acts and statements of others because these acts and statements were committed by persons who the Government charges were also confederates or co-conspirators with Mr. Sinek. The reason for allowing this evidence to be received against Mr. Sinek has to do with the nature of the crime of conspiracy. A conspiracy is often referred to as a partnership in crime. Thus, as in other types of partnerships, when people enter into a conspiracy to accomplish an unlawful end, each and every member becomes an agent for other co-conspirators in carrying out the conspiracy. Accordingly, the reasonably foreseeable acts, declarations, statements and admissions of any member of the conspiracy and in furtherance of the common purpose of the conspiracy are deemed, under the law, to be the acts of all members of the conspiracy and all members are responsible for such acts, declarations, statements and omissions. If you find beyond a reasonable doubt that Mr. Sinek was a member of the conspiracy charged in the indictment, then any acts done or statements made in furtherance of the conspiracy by other persons who you find to have also been members of the conspiracy, those acts and declarations may be considered against Mr. Sinek. This is so, even if such acts were done and statements were made in

Mr. Sinek's absence and without his knowledge.

However, before you may consider the statements or acts of a co-conspirator in deciding the issue of a defendant's guilt, you must first determine that the acts and statements were made during the existence and in furtherance of the unlawful scheme. If the acts were done or the statements made by someone whom you do not find to have been a member of the conspiracy, or if they were not done or said in furtherance of the conspiracy, then you may not consider them as evidence against Mr. Sinek.

That concludes the instruction on conspiracy. I did not create that law, so I apologize to ya, I know it's tough to follow, which is why I will supply it to you in writing.

Now we turn to the defense of duress. In plain English, the Government accuses Mr. Sinek of engaging in a conspiracy to distribute drugs or possessing them with the intent to distribute them. The Government bears the burden of proving his guilt of the conspiracy, as I have just defined it, beyond a reasonable doubt of all the elements that that pertains. In turn, Mr. Sinek says that even if he committed the crime, he did so because he was under duress.

As to that, Mr. Sinek bears the burden of proving duress to you, but doing so by a preponderance of the evidence, not beyond a reasonable doubt as I have defined

that. So I'm now turning to the defense of duress, which Mr. Sinek has the burden of proving as I've just described it.

He has introduced evidence that he committed the acts charged in the indictment because he was acting under duress. If you conclude that the Government has proved beyond a reasonable doubt that Mr. Sinek committed the crime as charged, then you will consider, and only then, whether his actions were justified by duress.

To find that his actions were justified, and, therefore, that he is not guilty, he must establish the following elements by a preponderance of the evidence:

First, that he was under an unlawful, present, imminent and impending threat. The phrase "unlawful, present, imminent and impending" excludes both prior threats and threats of future harm;

Second, that the threat was of such a nature as to induce a reasonable fear of death or serious bodily injury to himself or others;

Third, that he lacked a reasonable opportunity to escape harm, other than by engaging in the illegal activity; that is, that he had no reasonable opportunity to avoid the threatened harm without committing the crime. This is an objective test, measured from the viewpoint of a reasonable person. A subjective belief by Mr. Sinek that going to the

police would not alleviate the threat is not sufficient to satisfy this element.

As I told you, Mr. Sinek has the burden of proving this defense by a preponderance of the evidence. To prove something by a preponderance of the evidence means to prove only that it is more likely true than not true. It is determined by considering all of the evidence in deciding which evidence is more convincing. In determining whether Mr. Sinek has proved this defense, you may consider all of the testimony and evidence, regardless of who produced it. It's important to remember that the fact that Mr. Sinek has raised this defense does not relieve the Government of proving all of the elements of the conspiracy crime as I've defined it beyond a reasonable doubt.

If you unanimously agree, given this is the flow, if you unanimously agree that Mr. Sinek has proven the affirmative defense of duress by a preponderance of the evidence, then you must find him not guilty. If you unanimously agree that the Government has proven each element of the offense beyond a reasonable doubt, and you unanimously agree that the defendant has not proven this defense by a preponderance of the evidence, then you must find Mr. Sinek guilty. If you unanimously agree that the Government has proven each element of the conspiracy beyond a reasonable doubt, but you cannot unanimously agree on

whether Mr. Sinek has established this affirmative defense, then you cannot return a verdict on any charge.

Now let me see if I can't retrace that in plain English. You must be unanimous in whatever verdict you return on any of these issues that I've defined for you, all 12 of you must agree. So, if you all 12 agree that the Government has satisfied its burden of proving beyond a reasonable doubt the conspiracy charge, then you will have found that Mr. Sinek is guilty of the crime of conspiracy. You'll then consider his burden of proof on the duress defense. If you find by a preponderance of the evidence that he has established the duress offense, then that's a defense to the crime of conspiracy and you would return a verdict of not guilty. If you were to find that the Government satisfied its burden of proof on the crime of conspiracy, but you could not reach a unanimous conclusion on the affirmative defense, then you would report that you cannot reach a verdict.

Okay. When you begin your deliberations, you should first select a foreperson, who will preside over your deliberations and speak on your behalf in court. The foreperson's vote is entitled to no greater weight than anybody else. Your verdict must be unanimous, as I just said. Your verdict must also represent the considered judgment of each of you. Each of you has to decide the case

for yourself, but it's your duty to consult with one another and deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. No fistfights are allowed during deliberation.

There's nothing peculiarly different in the way a jury should consider the evidence in a criminal case from that in which all reasonable persons treat any question that depends on an evaluation of evidence presented to 'em. You're expected to use your good sense, to consider the evidence in the case only for the purposes for which it's been admitted, and give it a reasonable and fair construction in light of your common knowledge of the natural tendencies and inclinations of human beings. Consider the charge against Mr. Sinek carefully. If you find that the Government has proved the case as I have defined it for you, then you should return a verdict of guilty. If you find that they have failed to prove it beyond a reasonable doubt, or that Mr. Sinek has proved his defense of duress, then you should return a verdict of not guilty.

If you find that the law as I have explained it to you has not been violated, don't hesitate, for any reason, to return a verdict of not guilty. If, on the other hand, you find it has been violated, you should not hesitate, because of sympathy or any other reason, to render a verdict

of guilty.

Remember, punishment for the offense charged in the indictment is not a subject you should consider whatsoever. That is an issue that's exclusively within the province of the Court.

During you're deliberations, don't hesitate to re-examine your views as you discuss this case with one another. Remember, you're not partisans; your obligation is to seek the truth from the evidence that's been presented to ya.

In the course of your deliberations, if your recollection should fail, and you wish to have something further from me by way of instructions or to review some testimony, send a note out to me, put it in writing as to what it is you want. If it's testimony, be as specific as ya can. She's the best in the world, but it's also helpful and expeditious if she knows, within parameters, as best ya can what it is you want to hear.

Once you've reached your verdict, your foreperson should fill out a verdict form, which we'll send in with you, date and sign it, give it to the marshal and let us know you've reached a verdict and we'll bring ya back. If at any time you want to communicate with me with a note as I described it, never indicate on the note any numerical division you may have, if one exists. That's none of the

business of anybody out here, that's exclusively your province as jurors.

Any objections or additions from the Government?

MS. RABE: No, your Honor.

THE COURT: Any objections or additions from the defendant?

MR. VARGHESE: Yes, your Honor.

THE COURT: What I've got to do, folks, is I've got to ask you to step aside and don't begin your deliberations until I hear from the defendant and make a ruling on what it is they're requesting. I'll then bring you back out and either give you some further instructions at that point or send you back to begin your deliberations. Jury may step aside, please.

(Jury excused at 1152 AM.)

THE COURT: Mr. Varghese, please.

MR. VARGHESE: Your Honor, yesterday, when we had the conference regarding the defense of duress, you indicated that you would submit a charge based upon Sands Modern Federal Jury Instructions, which is what I interpreted, at least that's what I believe you had said. I don't have a transcript of that portion of it, but that was my understanding that you would give us the instruction.

Upon further review last night, obviously you saw the hours which we spent on this thing, we were working, I

will be honest with you, we haven't slept, so we worked through the morning, and we submitted something because we realized, as we were preparing our summations, which we didn't anticipate doing today, that the law in the Second Circuit is defined by *Zayac* and I initially submitted something based on *Zayac*, but didn't have the standard language it says.

Subsequently, and the record shows, it was around 3:00 AM, a little after 3:00 AM, we submitted a proposed jury charge that incorporated both *Zayac* and Sands Modern Federal Jury Instructions. This morning, Mr. Hanlon submitted a letter asking to use the standard charge in Sands Modern Federal Jury Instructions, which does not, if you look at the notes of it, does not concern any Second Circuit case law as far as the charge of duress, in the standard form. There are, within Sands, there are different practice forms based on Circuits, Second Circuit does not have that. Mr. Hanlon cited to some cases out of the Circuit for the proposition. We had a discussion about this, Mr. Hanlon and I, about what your rulings would be and, ya know, we presumed it would be consistent with what it was yesterday, which means that --

THE COURT: What is it I've said that's inconsistent with what I said yesterday? Get to the point. Mind you, I'm not happy with you in the first place. Number

one, you never submitted to me any proposed jury instruction whatsoever in advance of trial. Number two, you failed to raise, at any time before trial, your intended reliance on the defense of duress. You, instead, spun it as a trap on the Government. But, more importantly, sprung it as a trap on me so I have to deal with these things.

You think you can file things throughout the night and I'm waiting with baited breath at the computer for your charges? What I've charged the jury is an amalgamation of the case and what's contained in Sand & Siffert. What is it you object to and what language is it you're asking me to charge? I don't want to hear anything other than that. Go ahead.

MR. VARGHESE: In terms of what I object to is the language which was included, which Mr. Hanlon submitted this morning, particularly the language regarding a prior threat or future threat. The language in *Zayac* is clear. It's a an imminent, pending that we put that in the letter. It doesn't use that additional language, and that's the objection, your Honor, because, obviously, that creates a problem for us, in terms of how we argued in summation and, obviously, your Honor, you've told me not to say anything else. I do object to your characterization of things. We'll leave it at that.

THE COURT: First, if Mr. Sinek was under an

unlawful, present, imminent and impending threat. Do you disagree that that's actually what *Zayac* says and what Sand & Siffert says?

MR. VARGHESE: May I, your Honor?

THE COURT: Go ahead.

MR. VARGHESE: Thank you.

(Pause in proceedings.)

MR. VARGHESE: What *Zayac* says, and it's at 765 F.3d 112, at 120, says, "a defendant invoking a duress defense must establish at the time of his criminal conduct, one, he faced a threat of force; two, sufficient to induce a well-founded fear of impending death or serious bodily injury; and three, he lacked a reasonable opportunity to escape harm other than by engaging in illegal activity.

THE COURT: Um-hum. And what's inconsistent in what I said with that?

MR. VARGHESE: Well, I believe you combined one and two. I don't have a problem so much with that, your Honor, it's --

THE COURT: Isn't it your view that whatever threats your client claims to have created duress were ongoing by virtue of the conduct that had occurred between he and MasterJoseph? In other words, he's saying as a result of both those, in the main it was difficult, much of what you adduced, there was no testimony by him that he was

even aware of it, it was more designed as cross-examination material with MasterJoseph, but, that having been said, it's the combined impact of all of that that you argued to the jury currently impacted his view of the criminal conduct that's charged in the indictment. That's your view. That's your argument, right?

MR. VARGHESE: That it's an ongoing threat.

THE COURT: That's right.

MR. VARGHESE: That's correct, your Honor. But I believe the second part, if -- I don't have a copy of your instruction. The second part of it, which was added by -- that's not in Sands, that was not in the instruction that's used in the standard Sands' instruction on duress that was added by Mr. Hanlon this morning.

THE COURT: Right.

MR. VARGHESE: And I believe that creates confusion and that's inconsistent with what I -- it can be interpreted as inconsistent with what I argued during summation.

THE COURT: Right.

MR. VARGHESE: And what I'm saying --

THE COURT: That's the nature of your objection, and so you want me to do what?

MR. VARGHESE: I'm asking that you submit what we submitted, which is exactly, word for word, what *Zayac* says

and does not include that language about past threats or future threats, because while I argued, I said imminent and it was constant, but when you -- a jury can interpret that and say, well, ya know, we knew about these past threats --

THE COURT: I understand that. Stop wandering on me. I asked ya what you objected to, you told me. Now I'm tellin' ya is there anything more you want me to tell 'em? What you want me to do is to tell 'em to disregard the sentence that I followed that with, that's what you want me to do, right?

MR. VARGHESE: I believe so, your Honor, I just need to hear the rest of it, if your Honor could just read the four elements.

THE COURT: The phrase "unlawful, present, imminent and impending" excludes both prior threats and threats of future harm. That's the portion you object to.

MR. VARGHESE: The "excludes" part going forward.

THE COURT: Right.

MR. VARGHESE: I don't have an issue with impending --

THE COURT: Listen to me. I've got a jury sittin' out there waitin' and I'm done listenin' to ya. So listen to me. You've told me what you object to and what you're asking me to do is to direct the jury's attention to that sentence and tell 'em to disregard it, am I right?

MR. VARGHESE: Yes. Or remove it when you give 'em the charge.

THE COURT: Whatever. That's what you object to. Anything else?

MR. VARGHESE: Your Honor, I just want to make sure I heard you correctly. I believe elements three and four --

THE COURT: Do you have any other objection beyond what we're talkin' about?

MR. VARGHESE: I don't believe so.

THE COURT: All right. Sit down. Let me hear the Government on this issue.

MR. HANLON: Your Honor, I would start by saying *Zayac*, the case Mr. Varghese is referring to and quotes from, comes from an earlier Second Circuit case, and conveniently, Mr. Varghese is leaving out the "immediate" portion, of course the most damaging part of the defense to his client. Because it's clearly established there has to be some immediate threat, there's absolutely nothing inappropriate about a charge to expound on what immediate means. And I didn't go searching through the archives to find something, that was in the notes and those notes specify past conduct, past threats, future threats don't count. And there's a reason for that, because otherwise every defendant in the world could claim duress. So that's

why I oppose that second, you know, cause as inappropriate. And again, the case I'm citing to, the first Second Circuit case that started this whole discussion, is *United States versus Villegas*, 899 F.2d 1344.

I don't know that there's more to say than that, your Honor.

THE COURT: There isn't. I find that what I told the jury is a fair statement of the law, nor does it discount, necessarily, the argument the defense is making. While the Government's application and the language it employs is supported by its citation to authority and its submission to me, which is why it's incorporated in the charge I've given, it does not necessarily exclude the argument the defense is making. It is a clear statement of the law as to what the threat has to relate to, but it's also consistent with any argument that prior -- future conduct, obviously, is irrelevant in the context of this case, but prior conduct could create present results, which is the essence of the defense argument and it's not necessarily excluded by the instruction I provided to the jury. That having been said, I decline to make any changes.

MR. VARGHESE: Judge, there's one more aspect in which I again looking at Mr. Hanlon's memo, that's why I asked you --

THE COURT: I'm done listening to you.

MR. VARGHESE: Judge, I need to make a record.

THE COURT: I'm done listenin' to ya, put it in writing and you can file it as part of the record. I am not gonna argue with you. Keep it up and you're gonna get sanctioned. Enough is enough. You're incapable of answering a clear question.

John, bring the jury in.

(Pause in proceedings.)

(Jury present at 12:05 PM.)

THE COURT: You're free to retire to your deliberations, folks, but I do want to tell you one thing I neglected to tell ya. Remember, the note takers are entitled to no greater weight in their vote than anybody else. Other than that, you're free to begin your deliberations. We've got to swear the Marshal in, first.

John, please.

(Marshal duly sworn.)

THE COURT: You may retire to your deliberations, folks. Thank you.

(Jury excused to commence deliberations at 12:06 PM.)

THE COURT: Within reason, I'll now offer you a few more minutes to go ahead and complete your record. Go ahead.

MR. VARGHESE: Judge, you know, as an advocate,

I'm in a difficult position here. I have utmost respect for you and the Court, I -- at the same time, I'm tryin' to advocate for my client here. And you know, it's my practice, I realize I don't regularly practice in this courthouse, but I practice federally in a good portion of this country, and it's -- you are the first Judge to not allow us, as the parties, to see your jury instruction sheet before it's sent to the jury. We have yet -- you were the first Judge I'm in front of in federal court that has not allowed us to see the jury verdict sheet. And I understand what you're saying about submitting things, but I object to the characterizations that you have made of my efforts throughout this trial.

THE COURT: Were you under a pretrial order to submit any requests to charge to me? Were you under my order to do so?

MR. VARGHESE: Yes.

THE COURT: Did you comply with that order?

MR. VARGHESE: I did not.

THE COURT: All right.

MR. VARGHESE: There's reason for it.

THE COURT: What is it?

MR. VARGHESE: Very simply that as a defense, two things: One, we're not exactly sure, as we're going forward, what we're going to argue, so to give you jury

instructions are premature, until we get to trial. This is a question of -- I understand why you have it, but this is a question -- it's the United States Government versus Charles Sinek. These are not parties at arm's length, your Honor. So when you're asking us to --

THE COURT: Posture for somebody else. Go ahead, what's your next point?

MR. VARGHESE: I'm sorry?

THE COURT: Posture for somebody else, don't do it for me, what's your next point.

MR. VARGHESE: I'm saying, Judge, you were asking us to do something, I'm giving you -- your Honor, you called the jury in and then asked us in front of the jury, you didn't ask us before you called the jury whether there's an issue, but you called us in -- sorry, you asked us in front of the jury in open court to tell you whether we had an objection. Every other judge that I've been in front of has called us inside.

THE COURT: Well, you might better ask those judge to take a look at the federal rules. Do you know what the federal rule provides? Have you ever read it?

MR. VARGHESE: On objections?

THE COURT: No. No. On instructions, requests to charge. What does the rule provide? The rule provides that I do exactly what I did: I inquire of the parties, once I

have advised the jury of the instructions, whether there are any additions to or exceptions to the instructions. That's exactly what I asked both sides. You had an objection, therefore, I removed the jury from the courtroom, we considered the objections, I told 'em not to begin their deliberations, we bring them back, I either provide them additional guidance or I rule on your objections, which is exactly what I did. That's the way I read the federal rule. I don't know how you read it, but that's the way I read it. I don't know what federal judges you've appeared before, I don't know how they read the federal rule. Don't care. Go ahead.

MR. VARGHESE: I have not been placed in a situation to have to make a record in front of a jury.

THE COURT: You didn't have to make a record in front of the jury.

MR. VARGHESE: No, but to indicate there is an objection in front of the jury is not something -- it's not a good position for us.

THE COURT: Do you have anything else on the issue at bay here that you want to make a record of?

MR. VARGHESE: The additional language, which is why I asked you if there was a copy that we can see, because the additional language, and that's why I asked it be reread, that you also submitted to the jury was a subjective

belief by the defendant that goin' to the police will not alleviate the threat is not sufficient to satisfy this element. You -- that is not in the standard --

THE COURT: Do you believe that the test that's employed in duress is an objective one or a subjective one? Ya understand the difference?

MR. VARGHESE: Yes. And I believe that --

THE COURT: Would a reasonable person in the shoes of the defendant, that's the gist of an objective test, versus what was specifically on the defendant's mind, which is a subjective test.

MR. VARGHESE: These are not tests that have been laid out by the Second Circuit. The test -- cases cited by Mr. Hanlon are Eighth Circuit and DC Circuit, and the issues about that and whether it's a -- I am not disagreeing with you, with what you're saying, your Honor, but there's a question of asking a subjective belief by the defendant, you know, really says that, well, what Mr. Sinek believed is irrelevant because I think that creates confusion with the objective test. When you include that language, it makes it seem like it's an anti subjective test, but it's not so clear that it is a reasonable person test. And that's the problem with that language, which has not been adopted, was not, you know -- *Zayac* had a three-prong test. I just included that and just took the normal language that's

involved in duress -- I'm sorry, involved that it doesn't alleviate the burden from the Government for proving the case beyond a reasonable doubt. That's all I did was just put *Zayac* into Sands. And it's also, as I said, the opportunity to be heard about it. And I understand what Your Honor is saying, and it's not about the idea that the pretrial order -- your Honor, things develop, things change. There was, as we anticipated, not --

THE COURT: Of course they do; naturally, I understand that. I also make a factual finding you intended to raise this defense all along, ya came out with it in response to a question, ya did exactly what I said ya did on the record. That's the way you practice law.

MR. VARGHESE: There's no surprise here, your Honor. We raised it in the affidavit, Mr. Sinek's affidavit. Whether we asked for the instruction, I had not made --

THE COURT: Stick to the issue. The issue is whether there's any additional instructions I should bring the jury back to give, in light of the second component that you object to, which it took ya 20 minutes messin' around with earlier and ya couldn't reach.

Let me find out what the Government's view is as to the second element. Do ya agree or disagree?

MR. HANLON: I disagree with Mr. Varghese. The

second component --

THE COURT: Never mind. I agree with what the Government's submitted to me on the issue, which is why I instructed the jury as I did. I believe the test is an objective one and I believe the instruction I supplied the jury is sufficient to communicate that to 'em. It's not a subjective test, it's an objective test.

MR. HANLON: I would just add, your Honor, I did cite a Second Circuit case in support of that proposition as well.

THE COURT: I know ya did. All right, thank you.

MR. VARGHESE: Your Honor, can we see the verdict sheet?

THE COURT: That should have been supplied to you. Did you give 'em a verdict sheet?

THE CLERK: I have to get a copy from Marie.

THE COURT: Here, you can have this one (indicating), give that to 'em, it's guilty or not guilty.

THE CLERK: I'll get a second one to you, too.

THE COURT: Hang on. While we're on the record, take a look at the verdict sheet, see if ya got an objection to that.

MR. HANLON: May I be heard, your Honor?

THE COURT: Yes.

MR. HANLON: I researched this just this morning,

and I actually find myself in agreement with Mr. Varghese on that point. It appears the safe course of action is to have, in essence, what they've asked for, a two-level verdict sheet. Based on the research I've done, it will make clear for the record whether there's unanimous decision on the duress defense.

THE COURT: I disagree with ya because I gave the instruction you asked me to and I spent about five minutes explaining to 'em exactly how they had to go through that, so in my view, the instruction itself communicates that, but if you want somethin' different and both sides agree, I'm fine with that.

What's the defendant's view on the verdict sheet? You want a second question asked about duress?

MR. VARGHESE: That is what we submitted. Mr. Hanlon's already referenced it and we believe that it conveys to -- puts on paper what Your Honor --

THE COURT: The verdict sheet has not gone to the jury at this point.

MR. HANLON: I understand.

THE COURT: We'll alter the verdict sheet. Everybody sit still 'til we do it, we'll give ya a copy and then let ya be heard on that.

THE CLERK: In the meantime, if the Government would prepare their exhibits and defense counsel, you have

Exhibit D-1.

(Pause in proceedings.)

THE CLERK: Here's the revised verdict form, take a look at it, say objections, no objections, and then I'll get the Judge.

(Pause in proceedings.)

MR. HANLON: No objection on our end.

THE CLERK: The Judge is gonna come out either way.

MR. HANLON: Oh, okay.

THE CLERK: Are you guys fine?

MR. VARGHESE: Yes.

THE COURT: All right. I'll get the Judge then.

(Pause in proceedings.)

THE COURT: I've supplied the parties with a verdict form, they've indicated to my courtroom deputy that they're both satisfied with the verdict form. Is that so from the Government?

MR. HANLON: Yes, your Honor.

THE COURT: From the defendant?

MR. VARGHESE: Yes.

THE COURT: All right. That's the form we use. Thank you.

(Court recessed to await the jury's verdict at 12:36 PM.)

Verdict

(Court reconvened with a verdict at 2:21 PM.)

THE COURT: All right. We have a verdict. John, bring the jury in, please.

(Jury present.)

THE COURT: Be seated, please. Ladies and gentlemen, your foreperson has reported your verdict on the verdict form as follows:

In response to question one, has the Government -- as to Count I, has the Government proven beyond a reasonable doubt that Mr. Sinek conspired to possess with the intent to distribute or distribute a controlled substance? Your answer is "yes." As to question two, has Mr. Sinek proven by a preponderance of the evidence that he committed the crime under duress? Your answer is "no." And as to the finding thereafter, your finding is guilty of the offense charged in Count I of the indictment. Is that your verdict, so say you all?

(All respond affirmatively.)

THE COURT: Does the defendant wish the jury polled?

MR. VARGHESE: No, your Honor.

THE COURT: Ladies and gentlemen, that concludes your service. Again, you have the absolute appreciation of everybody involved in this case, including the court family.

You're free to go. If you want to hang out for a coupla minutes, I am gonna come back and thank ya personally. But if you don't wait on me, I don't blame ya; if you want to go, you're free to go. But you're free to step aside. Thank you.

(Jury excused at 2:24 PM.)

THE COURT: I'll request that Probation prepare a presentence report, and we'll set sentencing for when, Mr. Law?

THE CLERK: Sentencing is scheduled for January 17, 2017, at 9:00 AM.

THE COURT: That's a control date, for purposes of sentencing, and depending upon when the presentence report is done and the availability of the parties, we'll adjust it accordingly.

MR. VARGHESE: Thank you.

THE COURT: What's the Government's position with respect to bail?

MR. HANLON: Your Honor, I guess I'm -- there's two things at issue here: One is the law, I think, dictates that Mr. Sinek be remanded at this point, given the offense and the maximum penalties. However, it is clear to me that he's here, he's not a risk of flight, so I would acknowledge that.

THE COURT: And I don't know any -- I don't note

any mandatory minimum that was associated with the charge that's contained in the conspiracy count.

MR. HANLON: That's true, your Honor, that's true.

THE COURT: So the Guidelines are advisory as it relates to that. And I don't know what his criminal history is.

MR. HANLON: That's correct, your Honor.

THE COURT: All right, thank you. I will not revoke bail. I will keep you out on bail, but be seated a minute and let me have a conversation with you. When I talk about things like this, Mr. Sinek, I talk directly to a defendant. I know other people are listening, but I don't care. What's important is that you understand the conversation we are about to have. The conditions of bail, I got a bail report from pretrial services, they supply me one every time in advance of a proceeding like this, and you have obeyed the conditions of bail, there have been no reports of any violations by you, so that poses me no problems at all.

But what's gonna happen now is I am substituting me for the prior Judge that issued the bail report, so I'm gonna continue ya on the same conditions of bail that you've been living with since the charge was filed, but I'm now the Judge issuing it, which means if there are any violations, those violations will be reported to me. If there are any

violations, I am gonna send the Marshals to come get ya and you'll sit until sentencing. Do you understand?

THE DEFENDANT: (Nods head.)

THE COURT: As long as there are no violations, you will not have any problem with me. And the second thing you want to think about is what's left now is sentencing, you don't want to do anything between now and then that would cause me to escalate any sentence. Do you understand that?

THE DEFENDANT: I understand.

THE COURT: Okay. Anything further on the part of the Government?

MS. RABE: No, your Honor.

THE COURT: Anything further on the part of Mr. Sinek?

MR. VARGHESE: No, your Honor, thank you.

THE COURT: All right. Thank you.

(Court adjourned at 2:27 PM.)

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CERTIFICATION OF OFFICIAL REPORTER

I, THERESA J. CASAL, RPR, CRR, CSR, Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 21st day of December, 2016.

/s/ THERESA J. CASAL

THERESA J. CASAL, RPR, CRR, CSR

FEDERAL OFFICIAL COURT REPORTER

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September 20, 2016

VIA ECF
The Honorable Gary L. Sharpe
US District Court
Northern District of New York
James T. Foley Courthouse
Suite 509
445 Broadway
Albany, NY 12207

Re: *United States v. Charles Sinek*
12 Cr. 448 (GLS)

Dear Judge Sharpe:

Mr. Sinek respectfully submits his proposed duress jury instruction below. Preliminarily, in United States v. Zayac, the Second Circuit held the following:

> A defendant invoking a ***duress*** defense must establish that, at the time of his criminal conduct, (1) he faced a threat of force (2) "sufficient to induce a well-founded fear of impending death or serious bodily injury," and (3) he lacked a "reasonable opportunity to escape harm other than by engaging in the illegal activity."

United States v. Zayac, 765 F.3d 112, 120 (2d Cir. 2014) (internal citations omitted and emphasis in original).

Accordingly, Mr. Sinek submits the following instruction to the jury with the elements from Zayac.

> Mr. Sinek argues that he committed the acts charged in the indictment, only because he was forced to commit the crime. If you conclude that the Government has proved beyond a reasonable doubt that Mr. Sinek committed the crime as charged, you must then consider whether he should nevertheless be found "not guilty" because his actions were justified by duress.
>
> To excuse a criminal act, the Defendant must prove by a preponderance of the evidence, that at the time of his criminal conduct:

- First: he faced a threat of force;
- Second: sufficient to induce a well-founded fear of impending death or serious bodily injury to himself or another person; and
- Third: he lacked a reasonable opportunity to escape harm to himself or another person, other than by engaging in the illegal activity.

A "preponderance of the evidence" is enough evidence to persuade you that the Defendant's claim is more likely true than not true.

If you find that the Defendant has proven each of these elements by a preponderance of the evidence, you must find the Defendant not guilty.

Thank you.

Respectfully submitted,

Varghese & Associates, P.C.

/s/
By: Vinoo P. Varghese

Attorneys for Mr. Charles Sinek

cc: Mr. Charles Sinek
Mr. Dennis Ring, Esq.
Assistant United States Attorneys Daniel Hanlon & Elizabeth Rabe

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United States v. Zayac, 765 F.3d 112, 120 (2d Cir. 2014) (internal citations omitted and emphasis in original).

Accordingly, Mr. Sinek submits the following instruction to the jury with the elements from Zayac supra.[1]

> Mr. Sinek has introduced evidence that he committed the acts charged in the indictment because he was acting under duress. If you conclude that the government has proved beyond a reasonable doubt that the defendant committed the crime as charged, then you must consider whether his actions were justified by duress.

[1] Mr. Sinek's version filed yesterday did not encapsulate standard language of a jury charge contained in Judge Sand's Modern Federal Jury Instructions. This version does so. See 1-8 Modern Federal Jury Instructions-Criminal P 8.06.

To find that the defendant's actions were justified, and therefore, that he is not guilty, the defendant must establish the following elements by a preponderance of the evidence:

1. he faced a threat of force;

2. sufficient to induce a well-founded fear of impending death or serious bodily injury to himself or others; and

3. he lacked a reasonable opportunity to escape harm to himself or others, other than by engaging in the illegal activity.

As I told you, the defendant has the burden of proving this defense by a preponderance of the evidence. To prove something by a preponderance of the evidence means to prove only that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more convincing. In determining whether the defendant has proved this defense, you may consider all of the testimony and evidence, regardless of who produced it.

It is important to remember that the fact that the defendant has raised this defense does not relieve the government of the burden of proving all of the elements of the crime, as I have defined them, beyond a reasonable doubt.

Thank you.

Respectfully submitted,

Varghese & Associates, P.C.

/s/
By: Vinoo P. Varghese

Attorneys for Mr. Charles Sinek

cc: Mr. Charles Sinek
Mr. Dennis Ring, Esq.
Assistant United States Attorneys Daniel Hanlon & Elizabeth Rabe

September 21, 2016

Filed via ECF

Hon. Gary L. Sharpe
Senior U.S. District Judge
Northern District of New York
James T. Foley U.S. Courthouse
445 Broadway, 1st Floor
Albany, NY 12207

Re: United States v. Charles Sinek
Criminal No. 12-CR-448 (GLS)

Dear Judge Sharpe:

As the Court is aware, very early this morning, the defendant filed a proposed jury instruction for the duress defense. As the government recalls, the Court indicated to the parties that it did not require submission on a proposed duress instruction, and indicated instead that it would likely use the instruction set forth in the Modern Federal Jury Instructions.

Should the Court elect to charge duress, the government respectfully requests that the Court use Model Federal Jury Instruction 8-6. That charge reads as follows:

The defendant has introduced evidence that he committed the acts charged in the indictment because he was acting under duress (or necessity). If you conclude that the government has proved beyond a reasonable doubt that the defendant committed the crime as charged, then you must consider whether the defendant's actions were justified by duress.

To find that the defendant's actions were justified, and therefore, that he is not guilty, the defendant must establish the following elements by a preponderance of the evidence:

First, that the defendant was under an unlawful, present, imminent and impending threat of such a nature as to induce a reasonable fear of death or serious bodily injury to himself or others;

Second, that the defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be put into the position of having to choose to engage in criminal conduct;

Third, that the defendant had no reasonable legal alternative to violating the law; that is, that he had no reasonable opportunity to avoid the threatened harm without committing the crime; and

Fourth, that the defendant reasonably believed that by committing the criminal acts he would avoid the threatened harm;

As I told you, the defendant has the burden of proving this defense by a preponderance of the evidence. To prove something by a preponderance of the evidence means to prove only that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more convincing. In determining whether the defendant has proved this defense, you may consider all of the testimony and evidence, regardless of who produced it.

It is important to remember that the fact that the defendant has raised this defense does not relieve the government of the burden of proving all of the elements of the crime, as I have defined them, beyond a reasonable doubt.

In addition to that charge, and consistent with the comments to Model Federal Jury Instruction 8-6, the government requests that the Court instruct the jury that:

- The phrase "unlawful, present, imminent and impending" excludes both prior threats and threats of future harm. *United States v. Harper*, 466 F.3d 634, 648 (8th Cir. 2006) (prior threat by deputy sheriff not sufficient to justify cur-rent possession of weapon).

- A subjective belief by the defendant that going to the police would not alleviate the threat is not sufficient to satisfy the third element. *United States v. Morales*, 684 F.3d 749, 756-757 (8th Cir. 2012) (subjective belief that police would not help him be-cause he was an illegal alien was not sufficient); *United States v. Nwoye*, 663 F.3d 460, 463-465 (D.C. Cir. 2011) (subjective belief that codefendant in extortion case had FBI contacts was not sufficient given that defendant had many opportunities to contact local police particularly while codefendant was away for two weeks during scheme); *United States v. Beckstrom*, 647 F.3d 1012, 1016-1017 (10th Cir. 2011) (subjective belief that authorities could not protect him from Mexican drug cartel was insufficient); *United States v. Gonzalez*, 407 F.3d 118, 122 (2d Cir. 2005) (element not satisfied despite defendant's testimony that she did not report threat to police because she believed they would not listen to her); *United States v. Shryock*, 342 F.3d 948, 987-988 (9th Cir. 2003) (assertion that defendant could not "escape the reach of the Mexican Mafia" did not justify failure to contact police); *United States v. Salga-do-Ocampo*, 159 F.3d 322, 327 (7th Cir.

1998) (this element not met even though defendant was concerned that going to police would lead to discovery that he was illegal alien). *Compare United States v. Kuok*, 671 F.3d 931, 949-950 (9th Cir. 2012) (alleged threat by agent of foreign government that defendant's wife would disappear into a secret prison if defendant did not cooperate with illegal export scheme would not have been alleviated by defendant notifying U.S. authorities, so trial court should have submitted duress issue to jury).

The government also requests the Court charge the jury with Model Federal Jury Instruction 9-7.2 which reads as follows:

Unanimity as to Affirmative Defense

If you unanimously agree that the defendant has proven the affirmative defense of duress by a preponderance of the evidence, then you must find the defendant not guilty. If you unanimously agree that the government has proven each element of the offense beyond a reasonable doubt and you unanimously agree that the defendant has not proven this defense by a preponderance of the evidence, then you must find the defendant guilty. If you unanimously agree that the government has proven each element of the offense beyond a reasonable doubt but you cannot agree unanimously on whether the defendant has established this affirmative defense, then you cannot return any verdict on this charge.

Respectfully submitted,

RICHARD S. HARTUNIAN
United States Attorney

BY: /s/ *Daniel Hanlon*

Daniel Hanlon
Assistant U.S. Attorney
Bar Roll No. 514103
Cc: Vinoo Varghese, Esq. Via ECF