No.

In the Supreme Court of the United States

JOHN DOE, A/K/A CHEYENNE MOODY DAVIS,
PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a trial court in criminal proceedings must, upon request from the jury, explain the meaning of the "beyond a reasonable doubt" standard to the jury.

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Petitioner John Doe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is unreported at 753 Fed. Appx. 166.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2019. On May 8, 2019, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including July 15, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law[.]

STATEMENT

The requirement that the government prove a defendant's guilt "'beyond a reasonable doubt'" is "an ancient and honored aspect of our criminal justice system [that] defies easy explication." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). This case presents the question what a trial court is to do when the jury indicates to the court that it does not understand this "ancient and honored" standard.

The federal courts of appeals and state courts of last resort have answered that question differently, with the result being that one of the foundational protections of our criminal justice system is dispensed differently depending on where, and in what court, defendants find themselves prosecuted. In petitioner's case, the answer to this question was particularly important. Just hours into its deliberations, the jury asked the district court to provide a definition of the "beyond a reasonable doubt" standard and, when the court would not provide one, the jury's deliberations lasted longer than petitioner's entire trial. The petition for certiorari should be granted.

1. At the time the government started investigating him, petitioner was living in Maryland as Cheyenne Moody Davis. He held a valid U.S. Virgin Islands birth certificate, Social Security card, and Maryland identification card in that name. C.A. App. 129-37. He used these forms of identification to obtain a United States passport in 2001. He also used them to register to vote in Maryland in 2013, and to vote in the 2016 national election. C.A. App. 168-77.

In 2006, State Department agents began investigating petitioner after receiving a report that the identity of an incarcerated man in Antigua named "Cheyenne Moody Davis" might have been used to obtain a U.S. passport. C.A. App. 56-59. The 2006 investigation did not result in any action against petitioner because the United States Attorney's Office declined to prosecute and the State Department was unable to determine the true identity of petitioner. C.A. App. 266. Nonetheless, State Department agents reopened the investigation several years later and interviewed petitioner in 2015. They later testified at trial that, in his interview, petitioner asserted that, although his parents were Ena George and Mackie Moody Davis, he had been raised by an aunt in St. Thomas in the U.S. Virgin Islands until he was a young teenager. C.A. App. 206, 209, 257. The agents asked him to provide documents supporting that he was Cheyenne Moody Davis, such as a high-school yearbook, which he was unable to do by a later meeting. C.A. App. 213-14.

2. Petitioner was subsequently charged in the United States District Court for the District of Maryland with passport fraud pursuant to 18 U.S.C. § 1542, social security account number fraud pursuant to 42 U.S.C. § 408(a)(7)(B), aggravated identity theft pursuant to 18 U.S.C. § 1028A(a), and two counts of voter fraud pursuant

to 52 U.S.C. § 10307(c).[1] He pleaded not guilty to all charges, and a jury trial commenced on November 13, 2017.

a. The government's case centered on the testimony of four fact witnesses, in addition to the State Department agents who had conducted the investigation and interviewed petitioner. The first witness was the man that the government maintained was the only U.S. citizen named Cheyenne Moody Davis, who had been released from prison in Antigua. He testified that he had never applied for a U.S. passport and had never been to Maryland. C.A. App. 59-67. He also claimed to have lost his wallet containing his Social Security card, birth certificate, and other identification paperwork in 1997 at a festival in St. Thomas. C.A. App. 54-56. In connection with that testimony, the government presented evidence suggesting that petitioner obtained a Florida driver's license in the name of Cheyenne Moody Davis in 1997, and a Maryland state identification card in the same name in 1998. C.A. App. 67, 261. Mr. Davis also testified that he had been arrested, and in some instances, convicted of multiple offenses including assault, drug possession, armed robbery, grand larceny, and escape from prison and had spent around a decade incarcerated in Antigua. *See* C.A. App. 74-77, 282.

The government also emphasized the testimony of Vanetta Ena George and Kimberly Lento (the former partner of Moody Mackie Davis). *See* C.A. App. 282-83. Both Ms. George and Ms. Lento identified the government's witness as Cheyenne Moody Davis; neither was able to identify petitioner. Testimony elicited from these witnesses showed, however, that Moody Mackie Davis had at least six children with four different women.

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[1] Each of the charges was also brought under 18 U.S.C. § 2.

The government's last principal witness was Tawania Williams, who had been in a past romantic relationship with petitioner. She testified that he had introduced himself to her as Cheyenne Davis, but that his nickname was Richie. C.A. App. 239. She and petitioner had a son together, who they named Isaiah Cheyenne Davis as a "compromis[e]," because he wanted the child to be named Cheyenne Moody Davis but she wanted the child to have a biblical name. She also testified that she thought petitioner had a Jamaican accent, and that he had told her he had split time in his youth between Jamaica and St. Thomas. C.A. App. 233, 241-43. She further testified that petitioner had indicated that he had a troubled relationship with his father. The government noted that statement in closing, because facts about petitioner's life seemingly conflicted with his statements to a State Department agent. For example, Ms. Williams claimed that petitioner had told her that he had a troubled relationship with his father, but he had not been able to identify Moody Mackie Davis, whom he said was his father, in a picture.

b. The government's case suffered, however, from three significant problems, in addition to the inconsistencies and other grounds used to impeach the aforementioned witnesses.

The first was that the government still did not have a theory of who petitioner was — only that he was not Cheyenne Moody Davis. *See* C.A. App. at 299 (beginning of government rebuttal closing: "Who is the defendant? The government doesn't know."). Second, the government claimed that Cheyenne Moody Davis lost his identifying information in St. Thomas in 1997, but had no explanation for how petitioner (who the government insinuated was Jamaican) acquired Mr. Davis's identity and then began using that identity in Florida that same year.

Third, and perhaps most significantly, the government

was unable to explain why two Social Security cards were validly issued in the 1970s to a "Cheyenne Moody Davis" born in 1973 in St. Thomas. C.A. App. 148-60. The application for the first card was submitted in 1976 by "Ena Vannetta Davis," and the second application was submitted in 1979 by "Christina Bastion." That is, both applications had been filed a few years after the 1973 birth year for Cheyenne Moody Davis and more than twenty years before 1997, which is when the Mr. Davis who testified for the government asserted that he had lost much of his identification information. Both applications stated that they were the first application for a Social Security card for Cheyenne Moody Davis. A field office manager from the Social Security Administration confirmed that both of these applications resulted in cards being properly issued by the U.S. government. C.A. App. 154-65.

The government argued that the second application — the one from 1976 — was the proper one. Ms. George, whose full name is Vanetta Ena George, testified that her name was never "Ena Vannetta Davis," which was the name on the 1973 application, and that the signature on the application was not hers. *See* C.A. App. 291. By contrast, the Mr. Davis who testified for the government testified that the person listed on the 1976 application — "Christina Bastion" — was his grandmother who had also been primarily responsible for raising him. C.A. App. 50. And Ms. George corroborated that testimony by identifying the signature on the 1976 application as being that of her mother. C.A. App. 87. Aside from suggesting a possible mistake by the Social Security Administration, however, the government did not offer any explanation as to who applied for the first card or why it was issued to a different Cheyenne Moody Davis.

The inability to establish an identity for petitioner and

the 1973 Social Security application gave rise to an inference that, whether petitioner was correct that he had been born to Ms. George as Cheyenne Moody Davis, it was entirely possible that he had lived his life under that belief. *See* C.A. App. 292-94. Accordingly, the central theme of the defense's closing was that the government had not met its burden of proving beyond a reasonable doubt that petitioner had met the intent requirements for the charges. The defense argued that the crimes with which petitioner had been charged required that the jury find that he had acted "willfully, knowingly, and with the intent to defraud." The crux of the argument on intent was the government's burden of proving guilt beyond a reasonable doubt. Towards the end of his argument, petitioner's counsel reminded the jury:

> The government has the burden of proof. It is their burden to prove beyond a reasonable doubt that my client, Cheyenne Davis, did not believe that he was Cheyenne Davis. Beyond a reasonable doubt is the highest burden that our legal system creates.

C.A. App. 298.

3. On November 15, 2017, two days after the trial began, the district court instructed the jury and it retired to deliberate. The district court instructed the jury that "[t]he crucial, hard-core question" was "[h]as the government proven the guilt of the defendant as to each charge beyond a reasonable doubt?" App., *infra*, 6a. But the district court never provided an instruction explaining the reasonable-doubt standard to the jury.

Less than three hours into its deliberations, the jury submitted two questions to the district court, the first of which was: "Can we have the proper legal definition of 'beyond a reasonable doubt'?" App., *infra*, 11a. The district court discussed the issue with counsel for the government and defense. Petitioner's counsel noted that the jury

"specifically asked [for] help on a legal issue," and requested the reasonable doubt instruction provided in *Modern Federal Jury Instructions—Criminal*, 4-02, authored by Judge Leonard Sand, John S. Siffert, Walter P. Loughlin, & Steven A. Reiss. App., *infra*, 12a-13a. The district court relied on and quoted from the Fourth Circuit's decision in *United States v. Walton*, 207 F.3d 694, 699 (4th Cir.) (en banc) (per curiam), *cert. denied*, 531 U.S. 865 (2000), in which the en banc court held that it was not error for a district court to refuse to define reasonable doubt even upon request from the jury. App., *infra*, 13a-16a. After an extended discussion with counsel and a recess during which the district court identified additional authority from the Fourth Circuit consistent with *Walton*, the district court concluded that it would not provide an instruction explaining the reasonable-doubt standard. App., *infra*, 27a. Defense counsel reiterated petitioner's objection to the failure to instruct. The district court responded to the jury's question by telling it, "[y]ou have received the Court's instructions as to the law. The instructions as to the law govern this case."

The jury continued its deliberations. At approximately 2:00 pm on the second day of deliberations, the jury sent a note to the district judge indicating that it was deadlocked and could not reach a unanimous verdict. App., *infra*, 30a. The court observed that the jury had been deliberating for a period almost equal in length to the entire trial. App. *infra*, 30a-31a. After hearing from counsel, the judge provided an instruction based on this Court's decision in *Allen v. United States*, 164 U.S. 492 (1896). App., *infra*, 34a-36a.

On November 17, 2017, after having deliberated for longer than the length of the trial, the jury found petitioner guilty of all charges.

4. The court of appeals affirmed petitioner's conviction. App., *infra*, 1a-4a. As relevant here, it rejected petitioner's argument that the district court had erred in not explaining the meaning of the reasonable-doubt standard "after the jury requested further instruction." App., *infra*, 4a. Reasoning that "attempting to explain the words 'beyond a reasonable doubt' is more dangerous than leaving a jury to wrestle only with the words themselves," the court held that "district courts are not required to define reasonable doubt to the jury so long as the jury was instructed that the defendant's guilt must be proven beyond a reasonable doubt." *Ibid.* (alterations omitted) (quoting *United States v. Hornsby*, 666 F.3d 296, 310-11 (4th Cir. 2012)). The court further noted that, in the absence of a ruling from this Court, it was bound by a prior panel's precedent. *Ibid.* (citing *United States v. Bullard*, 645 F.3d 237, 246 (4th Cir.), *cert. denied*, 565 U.S. 925 (2011)).

REASONS FOR GRANTING THE PETITION

This case involves a longstanding division among the federal and state courts regarding whether a court must explain the meaning of "beyond a reasonable doubt" to a jury that requests an explanation. The answer to whether a court should provide an explanation to the jury in that specific instance is simple: The court should, because the note from the jury means that there is confusion in the jury room on the meaning of one of the bedrocks of the criminal justice system. In that circumstance, there arises a pronounced risk that the jury will convict based on a constitutionally deficient burden of proof—a risk that this Court has repeatedly held requires a new trial. That is, regardless whether an explanation of the standard is required in the mine run of cases, a note from the jury means that an explanation is required in the particular case at hand.

This case readily satisfies the criteria for certiorari. The question presented speaks to a foundational issue in our criminal justice system. And there is no impediment to the Court's consideration and resolution of that question. The petition should be granted.

A. The Decision Below Contributes To A Longstanding Conflict Among The Courts Of Appeals And State Courts Of Last Resort

The Fourth Circuit's decision contributes to a conflict among the courts of appeals and state courts of last resort regarding whether an instruction on the meaning of "beyond a reasonable doubt" must be given upon request from the jury. That conflict warrants this Court's review.

1. Although the reasoning differs between jurisdictions, several state courts of last resort and federal courts of appeals have indicated that a trial court must instruct on the meaning of the "beyond a reasonable doubt" standard when the jury requests a definition. In Connecticut, for example, the Supreme Court of Connecticut has stated that it "agree[s] entirely with the view" that a failure to instruct on the meaning of the reasonable-doubt standard "deprived the defendant of a fair trial in violation of his constitutional rights." *State v. Fletcher*, 540 A.2d 370, 371-72 (Conn. 1988), *affirming* 525 A.2d 535, 540 (Conn. App. Ct. 1987).[2]

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[2] Both the Supreme Court and the Appellate Court in their *Fletcher* opinions referred to a provision of the Connecticut Practice Book which dealt with addressing questions from the jury. *See* 540 A.2d at 372 (Supreme Court opinion); 525 A.2d at 537-40 (Appellate Court opinion). As the Appellate Court made clear, however, the Practice Book was merely the means by which "[t]he defendant's fundamental rights to due process and a fair trial are implemented * * * ."

Five of the federal courts of appeals and numerous state courts of last resort have strongly indicated that they agree, although the reasoning of those courts places them in two distinct camps.

a. The Courts of Appeals for the Ninth Circuit and the District of Columbia Circuit have both indicated that a court should instruct on the meaning of "beyond a reasonable doubt" when the jury requests it, even though both have expressed concerns about the effectiveness of such an instruction in run-of-the-mill cases. In *United States v. Nolasco*, 926 F.2d 869 (9th Cir.) (en banc), *cert. denied*, 502 U.S. 833 (1991), an en banc panel of the Ninth Circuit held that it is not automatically erroneous to not define reasonable doubt. *Id.* at 872-73. Instead, the court reasoned, it would apply an "abuse of discretion standard," and find an abuse of discretion "when under the circumstances of the case the instructions fail to articulate the heavy burden intended by the reasonable doubt standard." *Ibid.* The court indicated, however, that a request from the jury would be such a circumstance. Specifically, it stated that "a supplemental instruction may be helpful or even necessary in a few cases where, for example, the jury through questions submitted to the judge suggests it may be confused or uncertain as to the meaning of 'reasonable doubt.'" *Id.* at 872.

Two years later, in *United States v. Taylor*, 997 F.2d 1551 (D.C. Cir. 1993), the District of Columbia Circuit

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Fletcher, 525 A.2d at 540. And "[t]he defendant's fundamental constitutional rights to due process and a fair trial are implicated by [a] court's failure * * * to respond to the inquiries of the jury, especially as those inquiries were directed * * * to the requisite 'beyond a reasonable doubt' standard for conviction." *Ibid.*

reached essentially the same conclusion. The court observed that "[t]he purposes of having juries may be best served if juries, in the first instance, bear the responsibility for defining reasonable doubt." *Id.* at 1558. But it also recognized that the principal exception to that general practice is the situation posed by this case: "Ordinarily," it stated, "a district judge may be best advised to attempt no definition of reasonable doubt *unless the jury requests it*." (emphasis added).

b. In contrast to the District of Columbia and Ninth Circuits, the Third, Eighth, and Tenth Circuits have held that a reasonable doubt instruction is required in *all* instances, regardless of whether the jury requests an instruction. In *Blatt v. United States*, 60 F.2d 481 (3d Cir. 1932), the Third Circuit found prejudicial error where the jury was given "no instruction upon the meaning in the law of the term 'reasonable doubt.'" *Ibid.* Similarly, in *Friedman v. United States*, 381 F.2d 155 (8th Cir. 1967), the Eighth Circuit described a district court as having a "duty to instruct on the meaning of 'reasonable doubt,' * * * and failure to do so upon request would constitute error." *Id.* at 160 (citation omitted); *see Nanfito v. United States*, 20 F.2d 376, 379 (8th Cir. 1927) (holding "the accused is entitled to a clear and full instruction as to what is meant by the term reasonable doubt" and that the "failure to instruct upon request constitutes error"). The Tenth Circuit takes the same position. In *United States v. Pepe*, 501 F.2d 1142 (10th Cir. 1974), the court held that the defense "is entitled to have the meaning of reasonable doubt explained to the jury." *Id.* at 1143; *see Holland v. United States*, 209 F.2d 516, 523 (10th Cir.) *aff'd*, 348 U.S. 121 (1954) ("Under the federal rule, * * * the accused

is entitled to a definition of the term 'reasonable doubt,' and failure to instruct upon request has been held to constitute error.").

To be sure, in evaluating the adequacy of instructions on the meaning of "beyond a reasonable doubt," decisions in these circuits have pointed to language from this Court's decision in *Victor v. Nebraska*, 511 U.S. 1 (1994), that "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Id.* at 5; *see, e.g.*, *United States v. Petty*, 856 F.3d 1306, 1309 (10th Cir.), *cert. denied*, 138 S. Ct. 410 (2017); *United States v. Clay*, 618 F.3d 946, 953 (8th Cir. 2010) (per curiam), *cert. denied*, 562 U.S. 1222 (2011); *United States v. Hernandez*, 176 F.3d 719, 727 (3d Cir. 1999).[3] But, just as in *Victor* itself, that language is dicta because those cases did not involve instances in which no instruction on the meaning of the reasonable-doubt standard was given. *See Victor*, 511 U.S. at 26 (Ginsburg, J., concurring in part and concurring in the judgment).

Accordingly, in the Third Circuit, it remains "imperative that the trial judge accurately define the government's burden of proof and the meaning of 'beyond a reasonable doubt.'" Third Circuit Model Criminal Jury Instructions § 3.06 cmt. (Oct. 2017). That is also the rule in the Eighth and Tenth Circuits. *See* Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit § 3.11 comm. cmt. (2017 ed.) (quoting

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[3] Additionally, in *LaFevers v. Gibson*, 182 F.3d 705 (10th Cir. 1999), the Tenth Circuit relied on the language in *Victor* to hold that it was not contrary to, or an unreasonable application of, clearly established federal law for a state to not *sua sponte* instruct on the meaning of the reasonable-doubt standard. *Id.* at 716.

Friedman, 381 F.2d at 155); Tenth Circuit Criminal Pattern Jury Instructions § 1.05 cmt. (updated 2018) (quoting *Pepe*, 501 F.2d at 1143).

As such, those courts have not had occasion to consider an instance where the jury is not instructed on the meaning of the standard in the first instance and then requests an instruction. But given those courts' adherence to always instructing on the meaning of the reasonable-doubt standard, it follows that they would require instruction when the jury specifically requests one. *See Walton*, 207 F.3d at 702 (King J., dissenting).

The Supreme Courts of Rhode Island and Pennsylvania similarly have held that an instruction on the meaning of the reasonable-doubt standard is required. In *State v. Desrosiers*, 559 A.2d 641 (R.I. 1989), the Supreme Court of Rhode Island held that "[i]n charging the jury, a trial justice must explain the definition of proof beyond a reasonable doubt." *Id.* at 645; *see also State v. Thorpe*, 429 A.2d 785, 789 (R.I. 1991). And in *Commonwealth v. Young*, 317 A.2d 258 (Pa. 1974), the Pennsylvania court held that the jury must "be given a positive instruction fully and accurately defining reasonable doubt. * * * In the absence of a proper reasonable doubt charge, an accused is denied his right to a fair trial." *Id.* at 262-263. In those jurisdictions, like the Third, Eighth, and Tenth Circuits, it is reasonable to conclude that trial courts would also be required to provide a supplemental instruction explaining the "beyond a reasonable doubt" in response to a request from the jury.

Deepening the confusion on the issue, numerous other state courts of appeals have held that as a matter of state

law, defendants are entitled to an instruction on the meaning of the reasonable-doubt standard in the ordinary course. Those courts include the Supreme Court of Washington, the Court of Appeals of Maryland, the Supreme Court of Arizona, and the District of Columbia Court of Appeals. *See, e.g.*, *State v. Bennett*, 165 P.3d 1241, 1243 (Wash. 2007); *Ruffin v. State*, 906 A.2d 360, 373 (Md. 2006); *Smith v. United States*, 709 A.2d 78, 79 (D.C.), *cert. denied*, 525 U.S. 864 (1998); *State v. Portillo*, 898 P.2d 970, 974 (Ariz. 1995) (en banc).

2. On the other side of the split are the Fourth and Seventh Circuits, which have held that district courts are not required to provide the jury with an explanation of the reasonable-doubt standard even when the jury requests it, as well as the highest courts of Illinois and Kansas. In *Walton*, the opinion of the court[4] began from the premise that "the term reasonable doubt has a self-evident meaning comprehensible to the lay juror which judicial efforts to define generally do more to obscure than to illuminate." 207 F.3d at 698 (citation and quotation marks omitted). Yet, it acknowledged that the general rationale against instructing is undermined by the jury requesting clarification, reasoning that "when a jury specifically requests a definition of reasonable doubt during deliberations, there is a risk that [it] may be confused over what standard of

[4] The opinion of the en banc court in *Walton* was a per curiam opinion authored by Judge Ervin before he passed away while the case was under submission. 207 F.3d at 695. His passing resulted in the court having twelve members, and the remaining court was evenly divided. The per curiam opinion was joined by five of the twelve members, however, as Judge Motz concurred only in the judgment. *Ibid.*

proof to apply in a criminal case." *Ibid.* But it was nonetheless "convinced that attempting to explain the words 'beyond a reasonable doubt' is more dangerous than leaving a jury to wrestle with only the words themselves." *Ibid.* That is because, in the eyes of the court, "[j]urors differ in their own conceptions of reasonable doubt," and that difference should be sorted out through deliberations. *Id.* at 699. That is, "the jury itself defines reasonable doubt and applies its own definition to the specific case before it." *Ibid.*

The Seventh Circuit reaches a similar conclusion but for a different reason. In *United States v. Glass*, 842 F.2d 386 (7th Cir. 1988), the court implicitly rejected the notion that jurors come in with different conceptions of reasonable doubt; it reasoned that "[j]urors know what is 'reasonable' and are quite familiar with the meaning of 'doubt.'" *Id.* at 387. In other words, "'[r]easonable [d]oubt' must speak for itself" in the Seventh Circuit, even if the jury requests an instruction as it did in *Glass*, *ibid.*, and again in *United States v. Blackburn*, 992 F.2d 666, 668 (7th Cir.), *cert. denied*, 510 U.S. 949 (1993).

The state courts of last resort in Illinois and Kansas agree with the Fourth and Seventh Circuits. In *People v. Downs*, 69 N.E.3d 784 (Ill. 2015), the Supreme Court of Illinois held that it was "unquestionably correct" for a trial court to refuse to provide a meaning of the term in response to a jury note asking for the meaning of the reasonable-doubt standard. *Id.* at 789; *see also People v. Tokich*, 734 N.E.2d 117, 122 (Ill. App. Ct. 2000) (same). The Supreme Court of Kansas concluded in *State v. Walker*, 80 P.3d 1132 (Kan. 2003), that the trial court should use Kansas's model jury instructions (which do not

define reasonable doubt) and "resist requests for a more expansive definition." *Id.* at 1143. The court reasoned that this advice "applies even where the request for a more expansive definition comes from the jury." *Ibid.*

Accordingly, the federal courts of appeals and state courts of last resort have reached different conclusions on the question whether a trial court must provide an explanation of the reasonable-doubt standard in response to a request from the jury to do so. The conflict is particularly significant because courts with overlapping geographic jurisdiction take opposite views on this issue. This case is a prime example. A criminal defendant tried in state court in Maryland is entitled to a full definition of reasonable doubt, albeit as a matter of state law. *See Ruffin*, 906 A.2d at 365-66. As the district court observed in this case, the rule in the Maryland federal courts is "the complete opposite." App., *infra*, 18a. The district court's description of the state of the law was correct. This Court's intervention is necessary to resolve that conflict.

B. The Decision Below Is Erroneous

This case also warrants this Court's intervention because the Fourth Circuit's conclusion is both incorrect and inconsonant with this Court's precedents. Under those precedents, a trial court may not allow a jury to be instructed in a manner that presents a reasonable likelihood that the jury's understanding of the "beyond a reasonable doubt" standard is less than that required by the Due Process Clause. When the jury suggests that there is confusion about the standard, a reasonable likelihood exists. The Fourth Circuit's contrary conclusion warrants this Court's review and correction.

1. The due process clauses of the Fifth and Fourteenth Amendments require the prosecution in federal

and state criminal cases to prove guilt beyond a reasonable doubt of every element of a charged offense. *See In re Winship*, 397 U.S. 358, 363 (1970). "A doctrine establishing so fundamental a substantive constitutional standard" requires "more than simply a trial ritual." *Jackson v. Virginia*, 443 U.S. 307, 316-17 (1979). It "must also require that the factfinder will rationally apply that standard to the facts in evidence." *Id.* at 317.

Accordingly, a jury instruction that incorrectly explains the concept of the "beyond a reasonable doubt" standard constitutes reversible error. *Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (per curiam), *disapproved of on other grounds by Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991); *see Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (disapproving of same instruction). In *Cage*, for example, this Court held that the jury had been given a constitutionally deficient instruction because the court's language "equated a reasonable doubt with a 'grave uncertainty' and an 'actual substantial doubt.'" 498 U.S. at 41. A few terms later, in *Victor v. Nebraska*, 511 U.S. 1, the Court considered two other instructions explaining the concept of "beyond a reasonable doubt," and concluded that, although the instructions contained flaws, each instruction taken as a whole "impress[ed] upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused." *Id.* at 15 (quoting *Jackson*, 443 U.S. at 315); *see id.* at 20-22 (addressing second petitioner's instruction); *see Winship*, 397 U.S. at 364 (referring to "subjective state of certitude" (internal quotation marks and citation omitted)).

The Court in *Victor* asked whether, under the reasonable-doubt instructions at issue, a "reasonable likelihood" existed "that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." *Victor*, 511 U.S. at 6. Under that standard, an

instruction is not constitutionally deficient if there is "only a possibility" of juror misunderstanding, but a defendant "need not establish that the jury was more likely than not" to have applied the wrong standard. *Boyde v. California*, 494 U.S. 370, 380 (1990).

When a jury requests an explanation of the meaning of the "beyond a reasonable doubt" standard, and that request is not granted, a court can have no confidence that the jury did not "allow conviction" based on something less than an accurate understanding of the "beyond a reasonable doubt" standard. There is simply no way to know whether the prevailing view of reasonable doubt in the jury room was the misapprehension that the jurors must have a "grave uncertainty" or an "actual substantial doubt" that this Court found unconstitutional in *Cage*, 498 U.S. at 41, and *Sullivan*, 508 U.S. at 281. If judges charged with accurately instructing a jury on the meaning of the term have failed to do so, how can one have confidence that lay jurors without legal training understand the term? *Cf. Victor*, 511 U.S. at 23 (Kennedy, J., concurring) (noting the "great difficulty" of the task before jurors "even when the instructions are altogether clear").

2. Indeed, the main rationale for not instructing a jury on the meaning of the "beyond a reasonable doubt" standard evaporates when the jury has requested guidance. Courts hostile to an instruction often consider the term to have "a self-evident meaning comprehensible to the lay juror." *Walton*, 207 F.3d at 698; *see, e.g.*, *Glass*, 842 F.2d at 386. *But see* 1 L. Sand, J. Siffert, W. Loughlin, & S. Reiss, *Modern Federal Jury Instructions—Criminal*, Instruction 4-02, p. 4-11 (2018) ("With deference to those courts that disapprove of defining reasonable doubt, the better practice is to spend some time with the jury discussing the government's burden of proof in order to clarify the meaning of the term * * * ."). Whatever the

wisdom of that claim, it no longer applies when a jury asks for an instruction on the meaning of the standard. The jury's request for guidance means that, for that jury, the term does not have a "self-evident meaning." Henry A. Diamond, Note, *Reasonable Doubt: To Define, Or Not To Define*, 90 Colum. L. Rev. 1716, 1723-1724 (1990) ("A jury's request for a definition of reasonable doubt must be an indication that it does not understand what the term means.")

Instead, when the jury has requested an instruction on the meaning of "beyond a reasonable doubt," one natural inference is the one to which the *Walton* court ultimately resorted. Whether or not jurors share the same view of reasonable doubt in most cases, a note from the jury could mean that, in the case at issue, the "[j]urors differ in their own conceptions of reasonable doubt." *Walton*, 207 F.3d at 699. The result of that difference is that "the jury itself defines reasonable doubt and applies its own definition to the specific case before it." *Ibid.*

Contrary to the views of the majority in *Walton*, however, that is a vice, not a virtue—because there cannot be any confidence that the jury applied the burden of proof mandated by the Constitution. *Cf. Bollenbach v. United States*, 326 U.S. 607, 613 (1946) ("A conviction ought not to rest on an equivocal direction to the jury on a basic issue"). That is why even scholars otherwise skeptical of the efficacy of reasonable-doubt instructions agree that they should be given when "the jury itself asks for a fuller explanation." 2 George Dix, *et al.*, *McCormick on Evidence* § 341 (7th ed. 2016).

3. The secondary rationale behind not instructing on the meaning of "beyond a reasonable doubt" — that fur-

ther explanation would only "obscure" the phrase's meaning — similarly loses force in the face of a jury request for clarification. *Walton*, 207 F.3d at 698; *see Blackburn*, 992 F.2d at 668.

To be clear, this Court has never suggested that "the concept of reasonable doubt is undefinable." *Victor*, 511 U.S. at 26 (Ginsburg, J., concurring in part and concurring in the judgment). To the contrary, this Court has "repeatedly approved" the popular instruction equating a reasonable doubt with one that would cause people to hesitate to act in their own life, observing that the standard "gives a common sense benchmark" for what constitutes a reasonable doubt. *Id.* at 20 (opinion of the court). And federal and state courts across the country routinely include explanations of reasonable doubt in their model jury instructions. *See, e.g.*, pp. 13-14, *supra* (noting pattern instructions from the Third, Eighth, and Tenth Circuits); Pennsylvania Suggested Standard Criminal Jury Instructions § 7.01 (2016); Fifth Circuit Pattern Jury Instructions (Criminal Cases) § 1.05 (2015); Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit § 3.5 (2010); Eleventh Circuit Pattern Jury Instructions (Criminal Cases) § 3 (2010); Maryland Criminal Pattern Jury Instruction § 2:02 (2006); 1 L. Sand, J. Siffert, W. Loughlin, & S. Reiss, *Modern Federal Jury Instructions—Criminal*, Instruction 4-02; K. O'Malley, J. Grenig, & W. Lee, *Federal Jury Practice and Instructions*, § 12.10 (6th ed. 2008).

But any concern about the risk of confusing the jury about the meaning of the "beyond a reasonable doubt" standard must give way when a jury has indicated its confusion about the standard. In that circumstance, in the jury room, the meaning of the term is likely already "obscure[d]," *Walton*, 207 F.3d at 698, and action by the trial court will ameliorate the confusion and return the jury to

considering the defendant's guilt under the standard required by the Constitution.

4. As the foregoing demonstrates, although *Victor* prefaced its analysis of the instructions under consideration with the observation that an explanation of reasonable doubt need not be given "as a matter of course," 511 U.S. at 5, a jury's request for a definition removes a case from the ordinary course at least as to the question of the burden of proof. The facts of this case confirm that the jury was confused about the reasonable-doubt standard. Lengthy jury deliberations, especially after a short and uncomplicated trial, reflect juror uncertainty. *See*, *e.g.*, *Parker v. Gladden*, 385 U.S. 363, 365 (1966) (per curiam) (noting that juror deliberation for twenty-six hours "indicat[ed] a difference among them as to the guilt of petitioner"). Here, after a trial that lasted fewer than two days, the jury deliberated for fewer than three hours before raising its question. App., *infra*, 11a. After the judge declined to answer the jury's question, the jury continued to deliberate for an additional two days—resulting in total deliberations longer than the length of the trial itself. App., *infra*, 36a-37a. The most likely cause of that delay was the jury's struggle with the meaning of proof "beyond a reasonable doubt."

At bottom, the Constitution—and common sense—does not allow a court to presume that a jury understands the meaning of reasonable doubt when it has asked what the standard means. And a jury that does not understand the meaning of reasonable doubt cannot render a constitutional verdict.

C. The Question Presented Is An Important One, And This Case Is An Ideal Vehicle To Address It

1. The question of whether the Constitution requires explanation of the meaning of "beyond a reasonable doubt" upon jury request is a self-evidently important one. Time and again, this Court has lauded the "ancient and honored" role the reasonable-doubt standard plays in "our criminal justice system." *Victor*, 511 U.S. at 5. It "provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Winship*, 397 U.S. at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). It also underlies vital norms of our government. "[B]y impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." *Jackson*, 443 U.S. at 315.

Juries request clarification on the meaning of the "beyond a reasonable doubt" standard not infrequently. The issue has resulted in numerous appellate decisions by courts around the country. *See, e.g.*, *Holt v. United States*, 218 U.S. 245, 254 (1910); *Walton*, 207 F.3d at 698; *United States v. Brooker*, 238 F.3d 415, 2000 WL 1875871, at *1 (4th Cir. 2000) (per curiam) (unpublished table decision); *United States v. Pleasants*, 182 F.3d 911, 1999 WL 401651, at *1 (4th Cir.) (per curiam) (unpublished table decision), *cert. denied*, 528 U.S. 977 (1999); *United States v. Mahabir*, 114 F.3d 1178, 1997 WL 297498, at *2 (4th Cir. 1997) (per curiam) (unpublished table decision); *United States v. Wills*, 99 F.3d 1132, 1996 WL 623229, at *2 (4th Cir. 1996) (per curiam) (unpublished table decision); *United States v. Brown*, 78 F.3d 579, 1996 WL 85127, at

*1 (4th Cir. 1996) (per curiam) (unpublished table decision); *United States v. Reives*, 15 F.3d 42, 467 (4th Cir.), *cert. denied*, 512 U.S. 1207 (1994); *Blackburn*, 992 F.2d at 668; *Glass*, 846 F.2d at 387; *Whiteside v. Parke*, 705 F.2d 869, 872 (6th Cir.), *cert. denied*, 464 U.S. 843 (1983); *Fletcher*, 540 A.2d at 371-72; *Downs*, 69 N.E.3d at 789; *Tokich*, 734 N.E.2d at 122; *Walker*, 80 P.3d at 1143; *Mauricio v. State*, 293 S.W.3d 756, 759 (Tex. Ct. App. 2009). And the question no doubt has arisen in numerous trial courts without resulting in consideration on appeal.

When the issue arises, it implicates a right as fundamental as any guaranteed by our Constitution, in a circumstance that this Court has not addressed. Whether or not an instruction on the meaning of the "beyond a reasonable doubt" standard is always necessary, *compare Victor*, 511 U.S. at 5, *with id.* at 26 (Ginsburg, J., concurring in part and concurring in the judgment), when the jury indicates that it does not understand the standard, the principles underlying the reasonable-doubt standard are particularly imperiled. For in that circumstance, a court can have no confidence that the jury correctly understands its obligation to "reach a subjective state of near certitude of the guilt of the accused" before levying a criminal sanction. *Jackson*, 443 U.S. at 315.

Additional percolation in the lower courts is unlikely to assist the Court in reviewing this question. When the Fourth Circuit spoke en banc on this issue in *Walton* almost two decades ago, the courts of appeals already had laid out starkly different positions on whether a definition is required in the ordinary course. *See, e.g.*, *Walton*, 207 F.3d at 702 (King, J., dissenting) (collecting cases). There is no prospect of the conflict resolving itself without the Court's intervention, as the courts comprising the broader split have considered the question on multiple occasions and maintained their positions. *See*, *e.g.*, *id.* at 695

(agreeing with *Reives*, 15 F.3d at 46); *Blackburn*, 992 F.2d at 668 ("We have reiterated time and again our admonition that district courts should not attempt to define reasonable doubt."). The value of further percolation on the question presented is thus exceedingly slim.

2. This case also presents a suitable vehicle for this Court to consider the question presented. The issue was cleanly presented and ruled upon in the trial court and the court of appeals. There are no threshold obstacles for this Court to address before reaching the question presented. And the juxtaposition of the jury's request for an explanation of the reasonable-doubt standard with the length of the jury's deliberations eliminates any doubt as to the centrality of the question presented to the verdict in this case. This case provides the Court with an excellent opportunity to consider and resolve the issue.

* * * *

The jury's note to the district court requesting a "proper legal definition of 'beyond a reasonable doubt'" marked a critical juncture in petitioner's trial. The jury was asking the judge about a fundamental question — not only in petitioner's trial, but in our criminal justice system. Yet the court essentially remained silent. That is not a criticism of the court; it applied established law in the Fourth Circuit.

But the court would have had to answer that fundamental question in the district courts of other courts of appeals and the trial courts of other states. And the court should have had to respond in petitioner's case too, because there was no other way to make sure that the jury applied a standard of proof consistent with the requirements of due process. The Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2019

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN DOE, A/K/A CHEYENNE MOODY DAVIS,

Defendant-Appellant.

No. 18-4338

Appeal from the United States District Court for the District of Maryland, at Baltimore.

District Judge Ellen L. Hollander

Decided: February 15, 2019

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* * *

Before: FLOYD, THACKER, and RICHARDSON, *Circuit Judges.*

Opinion

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Appellant appeals from his convictions for passport fraud, social security number fraud, aggravated identity theft, and voter fraud. On appeal, he challenges the jury instructions on the "lawful authority" element of aggravated identity theft. He also asserts that the district court erred by failing to further define "reasonable doubt" after the jury asked for a legal definition. We affirm.

"'The decision to give or not to give a jury instruction is reviewed for an abuse of discretion.'" *United States v. Hurwitz*, 459 F.3d 463, 474 (4th Cir. 2006) (quoting *United States v. Moye*, 454 F.3d 390, 398 (4th Cir. 2006) (en banc)). "'We review a jury instruction to determine whether, taken as a whole, the instruction fairly states the controlling law.'" *Id.* (quoting *Moye*, 454 F.3d at 398). We apply "'harmless-error analysis to cases involving improper instructions.'" *United States v. White*, 810 F.3d 212, 221 (4th Cir. 2016) (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). An error is harmless if "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Id.* (quoting *Neder*, 527 U.S. at 18, 119 S.Ct. 1827 (brackets omitted)).

Appellant does not dispute that the challenged instruction correctly stated the controlling law. Instead, he argues that the portion of the court's instruction stating that consent does not convey legal authority was improper, because there was no evidence to support a conclusion that Appellant acquired an identity with

consent. Thus, Appellant contends that the court's instruction improperly injected a possible fact.

However, in *Moye*, we specifically distinguished between an instruction that misstates the law and one that presents a theory of conviction not supported by the evidence. 454 F.3d at 400. We noted that, although "[j]urors are not generally equipped to determine whether a particular theory of conviction ... is contrary to the law," jurors are "well equipped to analyze the evidence" and recognize factually inadequate theories. *Id.* Thus, we found the specific error in *Moye* – an aiding and abetting instruction that was not supported by the evidence – to be harmless, as it was "extremely doubtful," given the instructions as a whole, that the jury would have based its verdict on an aiding and abetting theory in the absence of factual support. *Id.* at 402.

Here, the evidence showed that Appellant first used another's identity around the same time that that person lost his identification paperwork. Thus, the jury could reasonably infer that Appellant obtained the identification around that time. However, there is no evidence as to whether Appellant found or stole the identification, whether someone else found or stole the identification and transferred it to Appellant, or whether there was some other scenario. Accordingly, the court was appropriately concerned that the jury might draw improper conclusions about the lack of evidence as to how Appellant acquired another person's identity. The instruction correctly informed the jury that evidence of theft or misappropriation was not required and that even consent from the "real" person would not constitute "lawful authority." *See United States v. Ozuna-Cabrera*, 663 F.3d 496, 500 (1st Cir. 2011). Given the inferences a reasonable

juror might make from the evidence, or the lack thereof, we find that the instruction was not an abuse of discretion. Moreover, even if there was error, we find that any error was harmless beyond a reasonable doubt.

Appellant next contends that, although this court has held that district courts need not and should not define reasonable doubt, the district court should have defined the term for the jury, after the jury requested further instruction. We have held that "district court[s] [are] not required to define reasonable doubt to the jury so long as the jury was instructed that the defendant's guilt must be proven beyond a reasonable doubt," because "attempting to explain the words 'beyond a reasonable doubt' is more dangerous than leaving a jury to wrestle with only the words themselves." *United States v. Hornsby*, 666 F.3d 296, 310-11 (4th Cir. 2012). Further, where the Supreme Court has not ruled on an issue, a panel of this court is bound by its own precedent. *See United States v. Bullard*, 645 F.3d 237, 246 (4th Cir. 2011).

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

Criminal Case No. ELH 17-054

UNITED STATES OF
AMERICA

v.

JOHN DOE, AKA
CHEYENNE MOODY DAVIS,
Defendant

(VOLUME III – TRIAL ON THE MERITS)
Wednesday, November 15, 2017
Baltimore, Maryland

Before: Honorable Ellen L. Hollander, Judge
And a Jury

Appearances:

On Behalf of the Government:
Zachary A. Myers, Esquire
Philip A. Selden, Esquire

On Behalf of the Defendant:
David J. Walsh-Little, Esquire
Laura G. Abelson, Esquire

Reported by:
Mary M. Zajac, RPR, FCRR
Fourth Floor, U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

* * *

THE COURT:

* * *

Anything you may have seen or heard about this case outside the courtroom is not evidence and must be entirely disregarded.

You should consider the evidence in light of your own common sense and experience and, as I will explain, you may also draw reasonable inferences from the evidence.

It is your recollection of the evidence that controls. If any references by the Court or by counsel to matters of testimony or exhibits do not coincide with your own recollection of the evidence, it is your recollection that controls during your deliberations, not the statements of the Court or of counsel.

The crucial, hard-core question that you must ask yourselves as you sift through the evidence is this: Has the government proven the guilt of the defendant as to each charge beyond a reasonable doubt? It is for you alone to

decide whether the government has proven beyond a reasonable doubt that the defendant is guilty of the crimes charged, and you are to do so solely on the basis of the evidence and in accordance with my instructions as to the law. Under your oath as jurors, as I have said, you are not to be swayed by sympathy, bias, or prejudice. It must be clear to you that once you let fear or prejudice or bias or sympathy interfere with your thinking, there is a risk that you will not arrive at a true and just verdict.

If you have a reasonable doubt as to the defendant's guilt, you should not hesitate for any reason to render a verdict of not guilty. On the other hand, if you should find that the government has met its burden of proving the defendant's guilt beyond a reasonable doubt, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

It is the duty of the lawyers to object when the opposing side offers testimony or other evidence that the attorney believes is not properly admissible. The lawyers also have the right and the duty to ask the Court to make rulings of law and to request conferences at the bench out of your hearing. Questions of law must be decided by the judge. You should not show any prejudice against any attorney or his client because the attorney objected to the admissibility of evidence or asked for a conference out of your hearing or asked the Court to make a ruling on the law. You must not be influenced by the fact that objections were made, regardless of how I may have ruled on them.

At times on cross examination a lawyer may have incorporated into a question a statement that assumed certain facts to be true and asked the witness if the statement was true.

If the witness denied the truth of the statement, and if there is no evidence proving the assumed fact to be true, then you may not consider the fact to be true simply because it was contained in the lawyer's question. In other words, a lawyer's question is not evidence. It is the answers of the witnesses that are evidence.

You'll recall I told you on Monday that there are two types of evidence that you may properly consider in deciding whether a defendant is guilty or not guilty. And I'm going to review that with you again.

One type of evidence is called direct evidence. Direct evidence is where a witness testifies to what he or she saw, heard or observed. In other words, when a witness testifies about what is known to him of his own knowledge by virtue of his own senses, what he sees, feels, touches, or hears, that is called direct evidence.

Circumstantial evidence is evidence that tends to prove a disputed fact by proof of other facts. I gave you a simple example on Monday. I'm going to give you that same example now.

Assume that when you came into the courthouse this morning the sun was shining and it was a nice day, or is a nice day. Assume that the courtroom blinds were drawn and you couldn't see outside. As you were sitting here, someone walked in with an umbrella which was dripping wet. Someone else then walked in with a raincoat and it, too, was dripping wet. Now, you can't see for yourself outside the courtroom. You can't see whether or not it actually is raining. So you have no direct evidence of that fact. But on the combination of facts that I have asked you to assume, it would be reasonable and logical for you to conclude that it had been or is raining.

That's all there is to circumstantial evidence. You infer on the basis of reason and experience and common sense from an established fact, such as the observance of the dripping raincoat and the umbrella, the existence or the non-existence of some other fact.

Please note that this is not a matter of speculation or guess. It is a matter of logical inference. The law makes no distinction between direct and circumstantial evidence, and circumstantial evidence is of no less value than direct evidence. You may consider either or both, and you may give them as much weight as you conclude is warranted. The law simply requires that before convicting a defendant, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt based on the evidence in the case.

I just discussed the concept of inference. I want to give you a little bit more of an explanation. You may have heard the lawyers use that term in their arguments. I just used it in explaining circumstantial evidence.

So when the lawyers ask you to infer on the basis of reason, experience, and common sense from one or more established facts the existence of some other fact, they are not asking you to guess. An inference is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact that you know exists.

There are times when different inferences may be drawn from the facts, whether proved by direct or circumstantial evidence. The government asks you to draw one set of inferences, while the defense asks you to draw another. It is for you and you alone to decide what inferences you will draw.

The process of drawing inferences from facts in evidence, as I said, is not a matter of guesswork or speculation. An inference is a deduction or conclusion which you, the jury, are permitted to draw, but not required to draw, from the facts which you, which have been established by either direct or circumstantial evidence. In drawing inferences, you should exercise your common sense and draw such reasonable inferences as would be justified in light of your experience.

Let me remind you that whether based upon direct or circumstantial evidence or upon the logical, reasonable inferences drawn from such evidence, you may not convict the defendant unless you are satisfied of his guilt beyond a reasonable doubt.

As you know, the defendant has pleaded not guilty to all of the charges lodged against him in the superseding indictment. I remind you that the law presumes the defendant to be innocent of all of the charges against him. Therefore, I instruct you that the defendant is presumed by you to be innocent and this presumption remains with the defendant throughout your deliberations until such time, if ever, that you as a jury are satisfied that the government has proven the guilt of the defendant beyond a reasonable doubt.

To convict the defendant as to a particular charge, the burden is on the prosecution to prove his guilt as to each element of that charge beyond a reasonable doubt. The burden never shifts to the defendant to prove his innocence. Indeed, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

The presumption of innocence was with the defendant when the trial began and remains with him even now as I speak to you, and will continue with the defendant into your deliberations unless and until you, as jurors, are unanimously convinced that the government has proven the defendant's guilt beyond a reasonable doubt.

The presumption of innocence alone is sufficient to acquit the defendant unless you, as jurors, are unanimously convinced beyond a reasonable doubt of the defendant's guilt after a careful and impartial consideration of all of the evidence in the case. If the government fails to sustain its burden, you must find the defendant not guilty.

* * *

(Recess at 12:49 p.m.)

(Proceedings at 2:25 p.m. Jury not present. Defendant is present.)

THE COURT: I have two notes from the jury. I'll read them in the order I got them. They came about four minutes apart.

The first is: Can we have the proper legal definition of "beyond a reasonable doubt?" Thank you.

Question two: Was there a hospital named Charlotte Amalie in St. Thomas USVI in 1973.

So I always, of course, entertain your views, counsel.

As far as the second question is concerned, I think my suggestion, and I'll hear you if you disagree with me, that they have to rely on the evidence that was presented and their memory of it. Something to that effect. Anybody have a better thought?

MR. MYERS: Your Honor, that's exactly what the government was going to suggest.

THE COURT: Any disagreement?

MR. WALSH-LITTLE: No, Your Honor, not on that request.

THE COURT: So let me make a note. Okay. Now let's turn to the reasonable doubt request. I'll start with the government.

MR. MYERS: Your Honor, I believe that Your Honor has properly instructed the jury on the law. And just as for an evidentiary question, the Court should direct the jury that they have to rely on the evidence as they heard it, remember it. I think the jury needs to be instructed that they have to rely on the instructions as you've read them to them and have been provided to them.

I think Your Honor's aware of the peril to the case that would be created as an appellate issue should there be a reasonable doubt instruction, which is disfavored.

MR. WALSH-LITTLE: Your Honor, on behalf of the defendant, the jury is the finder of fact, but they have specifically asked Your Honor to help them on a legal issue. I think that this is different than your initial instructions. I would ask that Your Honor instruct them on the reasonable doubt instruction that's in Sand/Siffert. I think that's 4.2. I could be mistaken about that.

Additionally, I would ask that, consistent with your other instructions, that a written copy of that instruction be sent to the jury so they can discuss it and analyze it. I believe that this is a very different situation from not simply giving that instruction at your initial conclusory instructions to the jury. They're specifically requesting

help from Your Honor on a legal question and I think that the Court should do its best to help them resolve the factual issues that they have but, of course, consistent with the law in the case.

THE COURT: Well, of course, we didn't have much notice about the question, but it's always been my understanding that in this circuit the practice is for the judge not to define "reasonable doubt" or "beyond a reasonable doubt", and that it is a matter largely in the discretion of the trial judge. In fact, if the judge were to attempt to define "reasonable doubt" or "beyond a reasonable doubt", it would create peril, if you will, because it's so difficult to fashion an appropriate definition. And that's the problem.

So in the few minutes that we had -- I was at the bench meeting when the note, when I was alerted to the note -- I pulled a few cases. And I'll just mention them. I haven't studied the facts of each one carefully.

U.S. v. Walton, 207 F.3d 694, is a per curiam decision of the Fourth Circuit from 2000, written by Judge Ervin. And in that case, the jury did request -- this is why I'm citing this one, even though it's not the most recent -- it was en banc, actually. But the question was whether a district court must comply with a jury's request for a definition of "reasonable doubt." And the Fourth Circuit said: Our current practice is well established. We have never required a district court to define "reasonable doubt" to a jury. He cites cases.

During its deliberations -- so this is why, again, factually it seems so helpful -- the jury in the present case asked the district court for a definition of "reasonable

doubt." In accordance with our long-standing practice, the District Court refused.

A panel affirmed, of the Fourth Circuit. And then when it was heard en banc, the Fourth Circuit en banc affirmed.

Then citing -- now I'm at Page 697 of the opinion. The Court says: "The issue before this Court is whether a District Court should be required to give an instruction defining reasonable doubt when requested by a jury." They considered this a legal question, which the Court reviewed de novo.

And the Court says, quote: "There's no constitutional requirement to define reasonable doubt to a jury. The Supreme Court has never required trial courts to define the term." And then it goes on to cite *Victor v. Nebraska*.

And then it also continues on the same page, the Fourth Circuit, by saying, quote: "As the panel observed in its original opinion, the well established rule of this circuit is that although the district court may define reasonable doubt to a jury, upon request", continue on page -- if I said 697, I think I misstated that. I was on 696. Now 697. So I'll start over.

"As the panel observed in its original opinion, the well-established rule of this Circuit is that although the district court may define reasonable doubt to a jury upon request, the district court is not required to do so."

And then it continues: "The rationale behind this rule is our belief that efforts to define reasonable doubt are likely to confuse rather than clarify the concept", citing another Fourth Circuit case for that proposition.

"We are convinced that the term reasonable doubt has a self-evident meaning comprehensible to the lay juror which judicial efforts to define generally do more to obscure than illuminate," again quoting another case. Now, that is on Page 698 of *Walton*.

Goes on to say: "This rationale is challenged when, as in the present case, a jury specifically requests a definition of reasonable doubt. We understand that when a jury specifically requests a definition of reasonable doubt during deliberations, there is a risk that the jury may be confused over what standard of proof to apply in a criminal case. At the same time, we also appreciate the constitutionally-mandated importance of the reasonable doubt standard in a criminal trial." That was a quote, but I'm skipping ahead.

"Nevertheless, we remain convinced that attempting to explain the words "beyond a reasonable doubt" is more dangerous than leaving the jury to wrestle with only the words themselves."

Now, Page 696, the Court says: "In the end, only a jury can truly define reasonable doubt. Reasonable doubt cannot be divorced from its specific context any more than the concepts of "reason" or a "reasonable person." Jurors differ in their own individual conceptions of reasonable doubt." And it continues. And it affirmed.

I also looked at *U.S. v. Lighty*, 616 F.3d 321, which is a 2010 decision of the Fourth Circuit. And there it says: "Although the district court may define reasonable doubt to a jury, the district court is not required to do so."

And, also, I looked at the *Hornsby* case, *U.S. v. Hornsby*, 666 F.3d 296. And in this case the defendant claimed the district erred in not giving a jury instruction

that defined reasonable doubt. So it's not the same factual scenario. That's why I think the *Walton* case is the best I can find in the few minutes I had.

But the Court does reiterate in *Hornsby* that, and this is at Page 310, a district Court's refusal to give a specific jury instruction is reviewed for abuse of discretion.

So my concern, to be quite candid, among others, is I think the *Walton* case is well reasoned. I don't think it's been overruled. And my concern is that the instruction would cause a confusion possibly that the *Walton* court seemed concerned about, and would not be a clarification and would run the risk of, frankly, incorrectly defining the term.

I think the safer course is for me not to give them the instruction. But then the question is what, instead, do I tell them?

MR. WALSH-LITTLE: Your Honor, could I just be heard on what you just said?

THE COURT: Sure.

MR. WALSH-LITTLE: If I understood, and, obviously, we haven't had a chance to research it, if I understood what Your Honor was indicating what the *Walton* holding is, the *Walton* holding is it's not an abuse of discretion not to give the instruction, but it would be in your discretion to give the instruction.

THE COURT: Right. But the rationale of the *Walton* case that I just read to you is what's leading me in the exercise of my discretion to think it would be imprudent to give the instruction.

MR. WALSH-LITTLE: And I understand that, Your Honor. But I just would like to say in response that there

is a pattern federal instruction that gives it. As Your Honor knows, state courts give it in this state all the time. I mean, I understand the logic of it. But it's also in Your Honor's discretion to do it. And in this circumstance, I mean, the collective fact-finder is asking for some clarity.

So I just, I would, that would be our request, that you give a reasonable doubt instruction, a pattern instruction, in using your discretion. To me, that would be consistent with *Walton*.

I understand what Your Honor is saying about the logic of it, but that would be the defense request.

MR. MYERS: Your Honor, I think you highlighted exactly why *Walton* suggests, in its logic, and affirms a district court in not giving this instruction, because it runs the risk of confusing the jury, and that it is a self-evident term, as the Fourth Circuit has approved again and again. I think that the Court should instead respond to this question just as the jury's asking questions about facts and you're directing them to the evidence they heard, I think that for the question of law, Your Honor should direct them to the law as they've been instructed and as has been provided to them to consider in their deliberations.

THE COURT: I'm happy to pull out that instruction, Mr. Walsh-Little, but what concerns me is that my overarching sense that the instruction will not elucidate, it will confuse. And you're right. Believe me, I'm fully familiar with what happens in the state system. In fact, it's the opposite. If you didn't give it, it would be plain error.

MR. WALSH-LITTLE: Yes, Your Honor.

THE COURT: But that isn't the way it's viewed here, in this district or in this circuit.

MR. WALSH-LITTLE: Yes, Your Honor. But again --

THE COURT: I understand. Your point is I can.

MR. WALSH-LITTLE: Yes. That is our only point. And that would be -- again, if I could just clarify. I mean, Your Honor defined "willfully." Your Honor defined "intentionally." I mean, what is so special about "reasonable doubt" that somehow if you instruct them on a pattern instruction, that somehow that issue they will be confused upon? But we define all these other complicated elements.

THE COURT: I've always understood it to be that it's almost impossible to come up with an appropriate definition, and therefore we count on the common sense and the words themselves for the jury to figure it out. And that's at least been my understanding, which may be imperfect.

I'm very familiar with, at least from my state experience, that that is the practice. And the complete opposite here. You know, any good lawyer can make an argument for either side. But at the end of the day, it is discretionary. At least that's the way I'm reading this.

What I thought was so important about *Walton*, at least it's from this millennium. And it does, I think, offer some sound arguments for what the concerns would be.

MR. MYERS: Your Honor, I believe you also raised the issue of potentially re-instructing the jury orally. And, Your Honor, as the oral instructions were provided, I think we counted a number of times where the Court

again, in its discretion, added the term "reasonable doubt" beyond what was in the instructions provided to the government. And I think that given how often they've already heard the term "reasonable doubt" in their instructions, and how it's been provided to them in the instructions that they have back there in the jury room, that directing them to the instructions without going back over them again, as if to emphasize that instruction, would be the best response to this question.

THE COURT: I am hesitant -- what I'd like to tell them is that the term "reasonable doubt" is for them to determine. But the words are self-evident. But I'm not even comfortable saying that because I think that would be, somebody would argue that that was inappropriate.

MR. MYERS: Yes, Your Honor.

THE COURT: But then I have to tell them something in answer to their question. If I tell them -- if I'm not going to define it, what am I going to tell them?

MR. MYERS: And, Your Honor, what the government would suggest is to direct them to the instructions they've been provided and to remember the instructions as they were provided to them when they were in court, and to leave it at that.

THE COURT: That's not an answer to the question.

MR. MYERS: It's not a direct answer to the question but it's not a direct answer to the question to the fact question to tell them to remember the facts as they heard them in trial and rely on that.

THE COURT: Right. But it is an answer to say you have to remember the evidence and it's their memory that controls. But it's not an answer when you're specifically

asked "what's the definition", to say you've heard all the instructions you're going to hear. That's the most I can tell them.

MR. MYERS: And I think, Your Honor, that that's the safest course; that the instructions that the parties agreed on were the completion of the instructions and the instruction on the law, just as the close of the case was the close of evidence. And the government would just ask that you ask the jury to rely on the law as they've been instructed, without further elaborating.

THE COURT: I'm happy to get that definition and at least let the record reflect that we've actually looked at it, if you want me to. I know the government doesn't want me to.

MR. WALSH-LITTLE: Your Honor, I think it's 4.2. But I think --

THE COURT: Let me see if anyone's listening, if they can find from Sand & Siffert Instruction 4.2.

MS. ABELSON: Your Honor, I have it in my e-mail. I can e-mail it to the chambers e-mail.

THE COURT: That's good. Okay. Or I could get it up on the screen, then. Maybe or maybe not.

MS. ABELSON: The only way that I could get it was the entire chapter. So there's several other instructions in the PDF. And I just e-mailed it you, Mr. Myers.

MR. MYERS: With the Court's indulgence, the government would like to step out and contact our appellate chief to make it correct that we have the correct advice from our office on it.

THE COURT: That sounds like a good idea. Shall we answer question -- should we wait for both?

MR. MYERS: I would like to wait for both, Your Honor. I think that only answering one would highlight to them there's some distinction between the two.

THE COURT: Okay. So why don't we all take a recess and let me find that instruction?

MR. MYERS: Thank you, Your Honor.

(Recess at 2:43 p.m. Resume at 2:58 p.m. Jury not present in courtroom. Defendant is present.)

THE COURT: We had a short recess, a few more minutes to ponder the initial question of whether to instruct at all. I suspect that if a decision were made to instruct, we could reach an agreement on what that instruction should be. The more vexing question is whether to give the instruction.

What did you want to tell me, Mr. Myers?

MR. MYERS: Your Honor, I'd like to direct Court's attention to *United States v. Smith*. This is 44 F.3d 254. And the pin cite I think that is most relevant is at 270 to 271.

THE COURT: I'm sorry we didn't send that citation in while we were pulling cases. Hopefully, someone's listening. Could you repeat it? What did you say? 44 --

MR, MYERS: It is 44 F.3d --

THE COURT: 44 F.3d --

MR. MYERS: -- 254.

THE COURT: -- 254.

MR. MYERS: It's Fourth Circuit case from 2006. And if the Court would like, I think that the snippet that I have is particularly relevant here, which is that during his closing argument, Reep's counsel gave the jury four definitions of reasonable doubt. During the fourth definition, the district court interjected, saying, I hate to interrupt you, but not even the Court is permitted to define "reasonable doubt" in the Fourth Circuit for the jury so, respectfully, do not attempt to define it for them. The Court then referred to counsel's definition of reasonable doubt while instructing the jury.

Instructing the jury, and I quote: "Now, ladies and gentlemen, let me say one more word about reasonable doubt. You've heard the concept of reasonable doubt. During the closing arguments, counsel for Reep attempted to define the word reasonable doubt. The law for the Court is simple. The Court is not permitted to define the word reasonable doubt . . . And that is because the courts have found that the definition that is a self-evident definition and there is no better way of explaining the concept. All efforts to explain reasonable doubt simply lead to more confusion. So you're not bound to accept counsel's definitions of reasonable doubt. So not even the Court is going to attempt to give you that definition. So we're telling you to rely on your reasonable understanding of concept of the word reasonable doubt. It's a self-evident definition."

THE COURT: Does it have anything to do with our case in which a request has been made specifically?

MR. MYERS: There are other cases, Your Honor, that the Court directed --

THE COURT: I have some more that I found.

MR. MYERS: -- where the Fourth Circuit affirmed. But here, where the district court instructed the jury specifically that the Court is not permitted to attempt to define it, the Fourth Circuit then held that it is well settled in this circuit that the district court should not attempt to define the terms reasonable doubt in a jury instruction. And it says here "absent a specific request for a definition from the jury," but it also says that the district court may also restrict counsel from defining the phrase.

THE COURT: Okay. That's not pertinent. What the issue is here is the general posture, I think we can all agree, in the Fourth Circuit, the courts are admonished not to give the instruction. There is an offshoot of cases that arise from those circumstances, as is the case here, where, during deliberations, the jury specifically makes a request for a definition of reasonable doubt. That's where we are now. And those cases that speak to that are what would be helpful to the Court. So that case is just, it seems to me, nothing different from what I've already reviewed in general before we took that very short recess to see what else we could all find and for you to confer with your appellate counsel.

Did you learn anything from conferring with appellate counsel?

MR. MYERS: We haven't learned anything further at this point, Your Honor. But I would point you back to the case that you brought to our attention, the *Walton* case.

THE COURT: Yes, *Walton* is very helpful. Here's another one that I just read that I think is very helpful. I read a few very quickly, of course, because the recess was pretty short.

One case that is not the most recent of cases, but I think the facts are important, is *U.S. v. Reives*, R-E-I-V-E-S, at 15 F.3d 42, which is a 1994 decision of the Fourth Circuit. And in this case there is a discussion of, of course, the general issue. The Court in this case was analyzing the question in the context of, I believe this was the one where there was a request by the jury.

The Court starts out -- well, first of all, it doesn't, not really quite right to say it starts out, but in its discussion says: It's difficult to distill a rule from our cases. We have never found a refusal of a party's request for a clarifying instruction to be error. Then they talk about cases where if the definition was given, those cases leading to review as to the propriety of the instruction. And then it talks about, in general, courts have favored giving a definition, and how they get there.

Then it goes on to discuss the reasons for discouraging definitions of "reasonable doubt." And in this regard, I'm at Page 45. And they are that the term has a self-evident meaning comprehensible to a lay juror, and attempts at defining the term will probably lead to unnecessary confusion. And it adds that the reason for not giving a definition is that there is no need to and no better way of explaining the concept.

And then it goes on to say: While we have consistently and vigorously condemned the attempts of trial courts to define reasonable doubt -- and I'm leaving out citations -- we have hedged a bit -- this is the Court's words -- we have hedged a bit and suggested that an exception exists when a jury asks for a definition. So this is why I thought this case was important.

And it cites to an earlier Fourth Circuit case in which it condemned a trial court's attempts to define reasonable doubt. The Court explains -- it was citing a case called *Murphy* -- that it is, "we added that it is wisest to avoid a definition unless specifically requested to do so by the jury." But it noted that that reference that I just quoted, which is a quote from another case, so it's *Reives* quoting *Murphy*, that this observation was made without citation to any authority.

And the Court continues, and this is Page 45: "Nevertheless, and despite our vigorous disapproval of such instructions in all other situations, we have repeated this jury-request exception to the general rule" -- spilling on now to Page 46 – "so often that it has virtually achieved the status of circuit precedent." And it cites the cases that would lead to that belief.

But then it goes on to say: "We reject Reives' invitation to breathe precedential light into this long line of dicta."

Now I quote again from Page 46: "The underlying premise in all of our cases is that trying to explain things will confuse matters, and we cannot see why a jury request should change this premise. If there is a definition that can clarify the meaning of reasonable doubt, common sense suggests that such a definition be offered to all juries, even those that do not venture a request. But until we find a definition that so captures the meaning of 'reasonable doubt' that we would mandate its use in all criminal trials in this circuit, we cannot hold that it is error to refuse to give some definition." And that, I thought, was very informative, although it's from 1994. And it was Judge K.K. Hall.

I also read the case of *United States v. Mahavir*, M-A-H-A-V-I-R, 114 F.3d 1178, also a decision from the '90s, a little more recent, Fourth Circuit decision from 1997. Again, the Court reiterates: We have consistently instructed district courts not to define reasonable doubt because of its self-evident meaning, comprehensible to the lay juror, and judicial effort to define it would do more to obscure than to illuminate. So the Court does say that.

I also looked at the *Adkins* decision, 1991, 937 F.2d. 947, in the Fourth Circuit. And there the Court does say this Court -- and now I'm at Page 950 – "This circuit has repeatedly warned against giving the jury definitions of reasonable doubt because definitions tend to impermissibly lessen the burden of proof." Then it goes on to say: "The only exception to our categorical disdain for definition is when the jury specifically requests it." But subsequent to that was the *Reives* decision in which the Court was suggesting there's no precedent in giving it just because of a request.

What I found really informative about the *Reives* decision, what I thought was so logical was that if it's good enough upon a request, it would be good enough in the first instance. And the message from the Fourth Circuit is clear in the first instance, don't give it. I'm not sure anything changes.

So I have the instruction out here it. I said I would bring it out and I did. I have that instruction, plus I have the instruction that I think comes possibly from Justice Ginsburg's concurrence in *Victor v. Nebraska*.

The instruction arguably could cut both ways. It certainly tells the jury that proof beyond a reasonable doubt is not proof beyond all doubt. If somebody is sitting

there thinking it means that, this would tell them it doesn't. But at the end of the day I think the prudence, in the exercise of my discretion, I think the message, as I glean it -- the law could change tomorrow, but right now I have to interpret the law as it is -- and I think that the reasons offered for why the Court shouldn't give the instruction in the first place resonate even when the request comes from the jury during its deliberations. So for that reason, I'm not going to give the instruction. But I do have it in case you want me to look at it or put it in the record or do something.

MR. WALSH-LITTLE: No, Your Honor. The defendant respectfully takes exception to Your Honor's ruling.

THE COURT: Absolutely. Okay. So now I'm going to just tell the jury with regard to question one that they must rely on the instructions as I have delivered them.

MR. MYERS: Thank you, Your Honor.

THE COURT: Okay. Let's bring in the jury.

(Jury enters the courtroom at 3:12 p.m.)

THE COURT: Members of the jury, I've received two notes from you. I will read them into the record.

The first one, quote: "Can we have the proper legal definition of beyond a reasonable doubt?" Close quote. Thank you.

Members of the jury, you have received the Court's instructions as to the law. The Court's instructions as to the law govern this case.

The second note, which I will also quote: "Was there a hospital named Charlotte Amalie in St. Thomas, USVI in

1973?" Close quote. Members of the jury, you received the evidence in the case. You must rely on the evidence as it was presented to you and your memory of the evidence.

The jury is discharged to resume its deliberations.

(Jury exit the courtroom at 3:13 to resume deliberations.)

THE COURT: Madam Clerk, I would ask that you file the notes. Okay. Counsel, I would say don't wander too far.

MR. MYERS: Thank you very much, Your Honor.

THE COURT: We'll stand in recess awaiting the call of the jury.

(Recess at 3:13 p.m.)

(Proceedings at 4:50 p.m. The defendant is present. The jury is not present.)

THE COURT: Please be seated. Counsel, I wanted to convene for two reasons. One is I have a conference call at five with about, I think there are 11 defendants and, obviously, also, the government's lawyer or lawyers. So that's quite a number of lawyers. I've got to take that call. It's been scheduled. So I don't want it to conflict with whatever else we have for today.

The question I have for you is how long would you like to allow me to allow the jury to deliberate?

MR. MYERS: Your Honor --

THE COURT: Today, I mean. Obviously, if they don't finish today, they come back tomorrow. . . .

* * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

Criminal Case No. ELH 17-054

UNITED STATES OF
AMERICA

v.

JOHN DOE, AKA
CHEYENNE MOODY DAVIS,
Defendant

(VOLUME IV – TRIAL ON THE MERITS)
Thursday, November 16, 2017
Baltimore, Maryland

Before: Honorable Ellen L. Hollander, Judge
And a Jury

Appearances:

On Behalf of the Government:
Zachary A. Myers, Esquire
Philip A. Selden, Esquire

On Behalf of the Defendant:
David J. Walsh-Little, Esquire

Laura G. Abelson, Esquire

Reported by:
Mary M. Zajac, RPR, FCRR
Fourth Floor, U.S. Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

* * *

(Jury starts deliberating at 9:30 a.m.)

(The following occurred at 2:08 p.m. The defendant is present. The jury is not present.)

THE COURT: Okay. Counsel, as I know you are aware, I have received a note from the jury, and it is dated today at 1:45 p.m. And it's the second day of jury deliberations.

And the note reads: We cannot reach a unanimous -- well, I think they mean to say "unanimous," it's misspelled -- verdict. Vote has not changed since yesterday. We are, quote, "dead locked," close quote. The whole thing I read was a quote but that's the quote within the quote.

So counsel, they've been out somewhat less than the length of the trial, but almost as long as the trial. Let's see. We started the evidence production on the afternoon of Monday and we concluded Tuesday around 3:30. And they got the case yesterday about 11:30, and they deliberated until I discharged them at about 5:35. And now it's 10 after 2.

So I'm going to invite both sides to tell me what you would like me to do. And then we'll take it from there. Starting with the government.

MR. MYERS: Your Honor, we'd like to ask the Court to give the jury the pattern *Allen* charge at Sand 9.11. I'd cite to *United States v. Burgos*, 55 F.3d 933. It's a 1995 Fourth Circuit case, just affirming the use of that pattern instruction. We believe in this case, where they haven't quite had the case as long as the evidence was presented --

THE COURT: Not quite as long. Close.

MR. MYERS: Not quite as long, but close. And I know that's not really a hard and fast rule on the law or anything. But I think that given only less than a full work day, or maybe a little more, a little more than one full work day's of deliberation, that given the importance of the charges to both sides, that further consideration by the jury is advisable still at this stage.

MR. WALSH-LITTLE: Your Honor, the defense would concur with that request.

THE COURT: Okay. So I don't happen to have an *Allen* charge. I imagine no one -- do you have one with you?

MR. MYERS: We do have a copy of 9.11 from *Sand*. We're happy to show it to the defense and then bring it up to you.

THE COURT: Sure. Thank you.

(Pause in proceedings.)

MR. WALSH-LITTLE: We're fine with the government's proposed instruction, Your Honor.

THE COURT: All right. If it's acceptable to both sides, then let me take a look. Thank you, counsel.

MR. MYERS: You're welcome, Your Honor.

(Pause in proceedings.)

THE COURT: So, counsel, to make sure there's no misunderstanding, there are some sections where it says in the Third Circuit omit, in the First Circuit add. Those are two examples. What is your request with respect to some of these portions? Do you wish me to include the part that the Third Circuit omits?

MR. WALSH-LITTLE: Your Honor, I guess, I think from the defense side --

THE COURT: I'm sorry?

MR. WALSH-LITTLE: From the defense perspective at least, Your Honor, we would just ask you to apply those portions that apply to the Fourth Circuit. So if it's only applicable to either, I think there's references to either the DC Circuit or the Third Circuit or the First Circuit, we would ask that those not be read.

THE COURT: Not be read?

MR. WALSH-LITTLE: Not be read. If they're only applicable to those individual circuits.

THE COURT: It's only in the Third Circuit that one portion is omitted. Only the Third Circuit. So everywhere else it's included.

MR. WALSH-LITTLE: And again, in those circumstances, I think it would be our request that you then read, instruct them on those.

THE COURT: Oh, I should include it, is what I'm trying to verify?

MR. WALSH-LITTLE: Yes, Your Honor.

THE COURT: I didn't want to read what you don't want me to read, is what I was concerned about.

And then there's -- so I would end it with "there is no hurry." I don't know if you remember it. Because there's a section where, in the District of Columbia and the Seventh Circuit, something is substituted. But we're not in either one of those circuits. So it seems to me it ends with "there is no hurry."

MR. WALSH-LITTLE: Fine with the defense, Your Honor.

THE COURT: Okay. Is that acceptable to the government?

MR. SELDEN: Yes, Your Honor. If I'm tracking Mr. Walsh-Little's reading, and I believe it is correct, it's essentially the DC Circuit and the other circuits cull out or remove certain sections. Those should not be removed here in the Fourth Circuit. I was actually an Assistant US Attorney in the DC Circuit. In that district, we had culled out certain components. But here, they should all be read, including the references to the Third and the Seventh and the First Circuit.

THE COURT: Okay. So where it says "omit if you're in the Third Circuit", I'm not going to omit it. Where it says substitute for the District of Columbia and Seventh Circuits, I'm not substituting.

MR. SELDEN: Yes, Your Honor.

THE COURT: So the last paragraph on this will not be read --

MR. SELDEN: Yes.

THE COURT: -- just to make sure I've got the marching orders here.

MR. WALSH-LITTLE: Yes, Your Honor.

MR. SELDEN: Yes, Your Honor.

THE COURT: Okay. Let's bring in the jury.

(Jury enters the courtroom at 2:17 p.m.)

THE COURT: And good afternoon, ladies and gentlemen. I have received your note indicating that you believe you are deadlocked.

I told you in my original instructions that this case is an important one and it's important to both sides. It's important to the government and it's equally important to the defendant. It is desirable if a verdict can be reached, but your verdict must reflect the conscientious judgment of each juror. And under no circumstance may any juror yield his or her conscientious judgment.

It is normal for jurors to have differences. This is actually quite common. Frequently, jurors, after extended discussions, may find that a point of view which originally represented a fair and considered judgment might well yield upon the basis of argument and upon the facts and the evidence. However, and I emphasize this, no juror must vote for any verdict unless, after full discussion and consideration of the issues and exchange of views, it does represent his or her considered judgment. Further consideration may indicate that a change in original attitude is fully justified upon the law and all of the facts.

I want to read to you a statement contained in a Supreme Court opinion which is well known to the bench and bar, and it is this: That although a verdict must be the verdict of each individual juror, and not a mere

acquiescence in the conclusion of his fellows, yet they should examine the questions submitted with candor and with a proper regard and deference to the opinions of each other; that is, with their duty to decide the case if they could conscientiously do so. That they should listen with a disposition to be convinced to each other's arguments. That if the much larger number were for a conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression on the minds of so many equally honest, equally intelligent with himself or herself.

If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

I do not mean to suggest that a position is necessarily correct merely because a greater number of jurors agree with it. Those in the majority should also consider all reasonable arguments and opinions of those in the minority.

You are reminded that the prosecution bears the burden of proving each element of each offense beyond a reasonable doubt. Do not ever change your mind just because the other jurors see things differently or just to get the case over with. As I told you before, in the end your vote must be exactly that -- your vote. As important as it is for you to reach unanimous agreement, it is just as important that you do so honestly and in good conscience. If you cannot agree, it is your right to fail to agree.

What I have just said is not meant to rush or pressure you into agreeing on a verdict. Take as much time as you need to discuss things. There is no hurry. But I am not

yet prepared to accept your conclusion that you are deadlocked.

Therefore, I'm going to ask that you return to the jury room and continue your deliberations. The jury is discharged for further deliberations.

(Jury exits the courtroom to continue deliberations at 2:22 p.m.)

THE COURT: Okay. Anything else?

MR. MYERS: Nothing from the government, Your Honor.

MR. WALSH-LITTLE: No.

THE COURT: All right. We'll continue to wait.

(Recess at 2:22 p.m. Resume at 4:58 p.m. Defendant is present. The jury is not present.)

THE COURT: Counsel, I wanted to bring to your attention, I have the following note: We are happy to report we are gradually making progress towards a unanimous decision. While we are making progress, we would like to be dismissed at 5 p.m. if we have not yet reached said unanimous decision, given commitments we each have. We appreciate your consideration to this matter.

It's three minutes to five. I obviously am going to let them go for the evening. And I have a conference call at five in another matter, so I wanted to accomplish it before we actually hit five, which we're just about to do.

Anyone have a problem with my discharging them and bringing them back tomorrow, where I believe they will actually begin deliberations that exceed the length of the trial?

MR. MYERS: No problem at all, Your Honor.

MR. WALSH-LITTLE: None from the defense, Your Honor.

THE COURT: All right. Let's bring in the jury. Of course, I asked the clerk to file the note.

THE CLERK: Yes.

(Jury enters the courtroom at 5:00 p.m.)

THE COURT: Ladies and gentlemen, I have received your note in which you indicate that you would like to be discharged at 5:00. Of course, I'm happy to do that.

So it is now 5:02, but pretty close to the mark. And I want to remind you of what you, I know by now, can recite for yourselves. . . .

* * *