

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ISHMAEL PETTY,

Defendant-Appellant.

Case No. 15-1421

On Appeal from the United States District Court
For the District of Colorado
The Honorable Phillip A. Brimmer
Case No: 15-cr-00029-PAB

**BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS AND THE COLORADO CRIMINAL DEFENSE BAR
AS *AMICI CURIAE* IN SUPPORT OF APPELLANT**

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RULE 29(c)(5) STATEMENT

Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* the National Association of Criminal Defense Lawyers and the Colorado Criminal Defense Bar state that (1) no party to this appeal or counsel for a party authored any portion of this brief, (2) no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief, and (3) no person, other than the *amici curiae*, contributed money that was intended to fund preparing or submitting the brief.

IDENTITY AND INTEREST OF THE *AMICI CURIAE*

This appeal concerns the constitutional standards for instructing juries regarding the meaning of the term “reasonable doubt” as applied to the prosecution’s evidentiary burden in a criminal case. This issue is of vital importance to both *amici*:

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL’s members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

The Colorado Criminal Defense Bar (CCDB) is Colorado’s only statewide organization devoted solely to the representation of persons accused of having committed crimes. It provides crucial services and support to private criminal defense practitioners, public defenders, paralegals, and investigators. It is committed to providing its members with the tools they need to better represent their clients, and to the improvement of Colorado’s criminal justice system.

Both NACDL and CCDB (collectively, “Amici”) are dedicated to advancing the proper, efficient, and just administration of justice. The Amici file numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. The Amici have a particular interest in this case because many defendants in the Tenth Circuit are affected by the pattern jury instruction on reasonable doubt. The Amici are dedicated to the principle that those accused of crimes are guaranteed due process of law by ensuring that all juries are instructed properly on the fundamental constitutional principle that the government must prove all elements of a charged offense beyond a reasonable doubt.

SUMMARY OF ARGUMENT

The prosecution’s burden to prove a defendant’s guilt beyond a reasonable doubt is a cornerstone of our system of criminal justice, protecting both individual defendants and society’s trust in the criminal justice system. But the Due Process right to have the prosecution held to the reasonable-doubt burden is not self-executing—it depends on the actions of the jury, who must be properly instructed as to the meaning of the term “reasonable doubt.” The reasonable doubt instruction delivered in this case does not meet the standards of Due Process, and

did not serve either of the two purposes of the reasonable-doubt burden. For that reason, this case should be reversed for a new trial.

ARGUMENT

I. THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT PROTECTS BOTH INDIVIDUAL DEFENDANTS AND SOCIETY’S FAITH IN THE CRIMINAL JUSTICE SYSTEM.

A. The Reasonable Doubt Standard Protects the Due Process Rights of Individual Defendants.

As both the Supreme Court and this Court have repeatedly observed, the requirement that the government prove each element of a criminal charge beyond a reasonable doubt is the cornerstone of our system of criminal justice. The reasonable doubt burden is “basic in our law and rightly one of the boasts of a free society.” *In re Winship*, 397 U.S. 358, 362 (1970); *see also United States v. Pepe*, 501 F.2d 1142, 1143 (10th Cir. 1974) (“[T]he reasonable doubt standard is a constitutional cornerstone of the criminal justice system.”). The burden was “developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.” *Winship*, 397 U.S. at 362 (quoting *Davis v. United States*, 160 U.S. 469, 488 (1895)).

In the most immediate sense, the burden operates to protect individual defendants from unjust and improper convictions: “It is a prime instrument for reducing the risk of convictions resting on factual error.” *Id.* at 363. There is no guarantee that a criminal jury will resolve every factual dispute correctly, and the

reasonable doubt standard operates to insulate defendants—on trial for their liberty or even life—from the danger of jury mistakes:

There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of *** persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.

Id. at 364 (quoting *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958)).

The Court’s concern in *Winship* regarding potential “dubious and unjust convictions” has proven prescient. Since its inception in 1992, the Innocence Project has chronicled the exoneration of 342 wrongfully-convicted defendants, 20 of whom were on death row, through DNA testing. *See* INNOCENCE PROJECT, <http://www.innocenceproject.org/all-cases/> (last visited June 9, 2016). Given this overwhelming evidence of the existence of factually-incorrect convictions in the United States, it is all the more imperative that courts protect the Due Process rights of individual defendants through robust reasonable-doubt jury instructions.

B. The Burden of Proof Beyond a Reasonable Doubt Also Ensures the Confidence of Society in the Outcomes of Criminal Trials.

The reasonable doubt standard does not merely protect the accused, however. It also maintains the confidence of society in the ability of the justice system to sort the guilty from the innocent. It “is indispensable to command the

respect and confidence of the community in applications of the criminal law.”

Winship, 297 U.S. at 364. The requirement of proof beyond a reasonable doubt maintains the “moral force of the criminal law” and ensures “that every individual going about his ordinary affairs ha[s] confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.” *Id.*

In his concurrence in *Winship*, Justice Harlan focused on this second purpose of the reasonable doubt standard, and cast it in terms of society’s fundamental value judgments concerning the risk of erroneous convictions:

In a civil suit between two private parties for money damages, ... we view it as no more serious in general for there to be an erroneous verdict in the defendant’s favor than for there to be an erroneous verdict in the plaintiff’s favor. A preponderance of the evidence standard therefore seems peculiarly appropriate...

In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.... I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that **it is far worse to convict an innocent man than to let a guilty man go free.**

Id. at 371-72 (Harlan, J., concurring) (emphasis added).

Similarly, in *Victor v. Nebraska*, 511 U.S. 1 (1994), Justice Blackmun, also in concurrence, observed that “[o]ur democracy rests in no small part on our faith

in the ability of the criminal justice system to separate those who are guilty from those who are not.” *Id.* at 28 (Blackmun, J., concurring). He located this faith in the reasonable doubt standard; it “springs fundamentally from the requirement that unless guilt is established beyond all reasonable doubt, the accused shall go free.” *Id.*

This second purpose of the reasonable-doubt standard—safeguarding society’s faith in the criminal justice system—also operates on the level of the psychology and moral sense of individual jurors. Some scholars have theorized that the purpose of requiring evidence of guilt beyond a reasonable doubt was originally a mechanism for providing “moral comfort” to the jury and allowing them to psychologically separate themselves from the accused and the act of judging. *See* Miller W. Shealy, Jr., *A Reasonable Doubt About “Reasonable Doubt,”* 65 Okla. L. Rev. 225, 277-90 (2013).

Thus the requirement of reasonable doubt—like the requirement of jury unanimity or, in another context, the practice of giving one member of a firing squad a blank cartridge rather than live ammunition—gives the jury “a kind of moral safe harbor in administering punishment.” *Id.* at 280. If jurors are not properly instructed regarding the meaning of reasonable doubt, however, and apply idiosyncratic or inconsistent definitions, the reasonable-doubt burden cannot serve this societal function.

II. JURY INSTRUCTIONS REGARDING THE MEANING OF “REASONABLE DOUBT” ARE ESSENTIAL IN ENSURING CRIMINAL TRIALS THAT COMPORT WITH DUE PROCESS.

For all its centrality to the American system of criminal justice, the reasonable doubt standard is not self-executing. Rather, its continued force demands that juries properly understand and apply it in their factfinding. It is thus virtually unique among individual constitutional rights in that defendants must depend on their peers, rather than judges, to protect their right to have their guilt determined beyond a reasonable doubt:

Judges, not juries, rule on questions of Fourth Amendment reasonableness, Sixth Amendment right to counsel, and Eighth Amendment cruel and unusual punishment. Relatively few factual questions considered by juries involve constitutional rights. . . . However, in criminal prosecutions juries must use the reasonable doubt standard as a filter to sift the evidence and determine whether to acquit or convict.

Robert C. Power, *Reasonable and Other Doubts: The Problem of Jury*

Instructions, 67 Tenn. L. Rev. 45, 47 (1999).

As Justice Blackmun recognized in *Victor*, the reasonable doubt standard “provides protection to the innocent only to the extent that the standard, in reality, is an enforceable rule of law.” *Victor*, 511 U.S. at 29 (Blackmun, J., concurring). This requires giving the term “reasonable doubt” “a tangible meaning that is capable of being understood by those who are required to apply it.” *Id.* If the court defines the term for the jury, “[i]t must be stated accurately and with the

precision owed to those whose liberty or life is at risk.” *Id.* It is not enough “for the jury instruction merely to be susceptible to an interpretation that is technically correct. The important question is whether there is a ‘reasonable likelihood’ that the jury was misled or confused by the instruction, and therefore applied it in a way that violated the Constitution.” *Id.*

But the meaning of the term “reasonable doubt” is not automatically self-evident to all jurors (or litigants, or even judges): “while the term itself is common and readily associated by most individuals with our criminal justice system, it is unlikely that two persons would supply the same characterization of its meaning.” *Pepe*, 501 F.2d at 1144. Therefore the precise content of a jury instruction defining “reasonable doubt” is of crucial importance in deciding whether a conviction comports with Due Process.

III. THE REASONABLE DOUBT INSTRUCTION GIVEN IN THIS CASE FALLS BELOW THE STANDARD REQUIRED BY DUE PROCESS.

By minimizing the weight of the prosecution’s burden of proving the defendant’s guilt beyond a reasonable doubt, the instruction defining reasonable doubt given in this case does not meet the standard of Due Process. Because such an error is structural, *see Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993), the defendant’s conviction must be vacated and the case remanded for a new trial.

A. Use of the Phrase “Firmly Convinced” Without a Sentence Distinguishing the Reasonable-Doubt Burden from Civil Evidentiary Burdens Risks Juror Confusion.

The jury in this case was instructed that proof beyond a reasonable doubt is that which “leaves you *firmly convinced* of the defendant’s guilt.” (Attachment 4 to Op. Br. (emphasis added).) The jury was also told it should convict if it was “*firmly convinced* that the defendant is guilty of the crimes charged. (*Id.* (emphasis added).) The instruction did not, however, contain any language distinguishing the prosecution’s reasonable-doubt burden from the evidentiary burdens in a civil action. This combination had the effect of increasing the probability of juror confusion between the reasonable-doubt standard and the burden of clear and convincing evidence in some civil actions.

The pattern instruction promulgated by the Federal Judicial Center, in contrast, does use the “firmly convinced” language, but immediately before informing the jury that they must be firmly convinced, the pattern instruction expressly distinguishes the reasonable-doubt burden from the burdens in civil cases:

Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government’s proof must be more powerful than that. It must be beyond a reasonable doubt.

(See Attachment 6 to Op. Br.) This prefatory language minimizes the possibility that any jurors would incorrectly apply a “clear-and-convincing” standard in evaluating the defendant’s guilt, due to prior service on a civil jury in certain matters.

Because the instruction given in this case used the “firmly convinced” language without distinguishing the prosecution’s burden from the burdens in a civil case, it does not meet the standards of Due Process.

B. Using the Word “Only” to Characterize the Prosecution’s Burden, Without Simultaneously Indicating that the Burden Is “Heavy,” Minimizes the Burden.

Next, the instruction given here told the jurors that “in criminal cases the law does not require proof that overcomes every possible doubt. It is *only* required that the government’s proof exclude any ‘reasonable doubt’ concerning the defendant’s guilt.” (Attachment 4 to Op. Br. (emphasis added).) The word “only” in this context could be read to mean, for example, “without going any further than necessary,” *Webster’s Third New International Dictionary* 1577 (definition 2a), or confused with its synonym, “merely.” *Id.* (definition 1a). Either conveys to the jury that the prosecution’s burden of proving guilt beyond a reasonable doubt is not an onerous one.

While some other circuits include the word “only” in their pattern instruction, they pair that use with an additional admonishment that the

prosecution's burden is a heavy one. For example, the Fifth Circuit's pattern instruction states: "While the government's burden of proof is a *strict or heavy burden*, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any 'reasonable doubt' concerning the defendant's guilt." Fifth Circuit Pattern Jury Instruction Criminal 1:05 (West 2015) (emphasis added). In this instruction, use of the word "only" does not minimize the government's burden, because the jury has just been told that that burden is "strict" and "heavy." In the absence of that admonishment, use of the word "only" impermissibly dilutes what is required of the government under the Due Process Clause.

C. Failing to Instruct the Jury that Reasonable Doubt May Be Based on a Lack of Evidence Unduly Heightens the Bar for Acquittal.

Finally, the reasonable-doubt instruction given to the jury included no statement that a reasonable doubt could be based on a lack of evidence, as well as upon the existence of particular evidence. In contrast, other circuits include in their instructions statements such as: "It [a reasonable doubt] may arise from the evidence, or from the lack of evidence, or from the nature of the evidence." Third Circuit Criminal Jury Instruction 1:13 (West 2009). Similarly, the instruction proffered by defendant would have instructed the jury that "[t]he presumption of innocence alone . . . is sufficient to acquit the Defendant" and that the reasonable-doubt burden "never shifts to a defendant for the law never imposes upon a

defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.” (Attachment 5 to Op. Br.) By failing to apprise the jury that a reasonable doubt could be based on a lack of evidence, the instruction fell below the standard required by Due Process.

D. Due to the Combination of Its Deficiencies, the Instruction Given in this Case Did Not Serve the Dual Purposes of the Reasonable-Doubt Burden.

Any of the three defects discussed above would be sufficient to render the reasonable-doubt instruction given in this case constitutionally infirm. However, the *combination* of the three defects prevents the instruction from serving either of the two dual purposes of the reasonable-doubt burden.

Put together, the instruction given by the district court could have been perceived by a reasonable juror as (1) allowing conviction based on a lower standard of proof that was merely “clear and convincing,” (2) characterizing the prosecution’s burden as minimal (i.e. “only” proof beyond a reasonable doubt), and (3) not allowing for the possibility of acquittal based on the absence of evidence, impermissibly shifting the burden of producing evidence of innocence onto the defendant. These defects created an unacceptably large “margin of error,” *Winship*, 397 U.S. at 364, and did not sufficiently protect the defendant from an erroneous conviction.

Beyond the defendant himself, the erroneous instruction also did not serve to protect society's confidence in the criminal justice system. Jurors confused by the instruction or misled into convicting based on a lower standard of proof would be deprived of the "moral comfort" that the reasonable doubt standard was intended to provide. *See Shealy, supra*, at 277-90. And by lowering the burden on the prosecution, the flawed reasonable-doubt instruction undermined the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Winship*, 397 U.S. at 372 (Harlan, J., concurring). It failed to give confidence to "every individual going about his ordinary affairs" that "his government cannot adjudge him guilty of a criminal offense" without convincing a factfinder of his guilt beyond a reasonable doubt. *Id.* at 364 (maj. op.).

The flaws in the reasonable-doubt instruction given in this case prevented it from serving either of the dual purposes of the reasonable-doubt burden, thus underlining that that instruction did not meet the standards of Due Process.

CONCLUSION

For the reasons stated herein and in Mr. Petty's principal brief, Mr. Petty's convictions should be reversed and his case remanded for a new trial.

Dated: June 10, 2016

Respectfully submitted,

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I hereby certify that a copy of the foregoing was served on June 10, 2016, electronically using the CM/ECF system which will send notification of such filing to the following email addresses:

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