NO. 15-1421

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

V.

ISHMAEL PETTY,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
HONORABLE PHILLIP A. BRIMMER
D.C. NO. 15-CR-00029-PAB

ANSWER BRIEF OF THE UNITED STATES

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ORAL ARGUMENT IS NOT REQUESTED

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STATEMENT OF RELATED CASES

Counsel is not aware of any prior or related appeals.

CITATION CONVENTION

This brief cites to the record on appeal by volume and page number: e.g., "I: 123" refers to volume I, pages 123 of the record.

STATEMENT OF JURISDICTION

After a two-day jury trial, Petty was convicted on three counts of assaulting, resisting, and impeding a federal officer in violation of 18 U.S.C. § 111(a)(1) & (b). I: 123-24, III: 238, 267.

The district court had jurisdiction under 18 U.S.C. § 3231. This court has jurisdiction under 28 U.S.C. § 1291. Final judgment was entered on November 2, 2015. I: 123. Petty filed a timely notice of appeal the next day. I: 133.

STATEMENT OF THE ISSUE

Does the Tenth Circuit's pattern instruction on the criminal burden of proof violate the Due Process Clause?

STATEMENT OF THE CASE

Ishmael Petty killed his cellmate while serving a sentence for armed bank robbery. II: 70 (¶ 60). He received life in prison. *Id.*

Twelve years later, Petty attacked two educational technicians and a case manager at the ADX prison in Florence, Colorado. II: 60-61 (¶¶ 5-10), III: 118-19, 139-43, 181-85, 195-96. He hid in the sally port between the two doors to his cell, holding a homemade shank and wearing homemade body armor. III: 183, 201-03. When the outer door opened, he sprayed hot sauce in the face of one technician and proceeded to beat the other technician with his fists and a baton that he wrestled away from the case manager. III: 139-43, 183-85. One technician suffered severe injuries. III: 196-97.

After a jury found Petty guilty on three counts of assaulting federal officers, he was sentenced to 720 months in prison (240 months consecutive on each count). I: 123-25. He now appeals.

SUMMARY OF ARGUMENT

The Due Process Clause requires that a jury be informed of the reasonable doubt standard. An instruction that correctly conveys that standard will not be reversed unless there is a "reasonable likelihood" that the instruction could mislead a jury into a guilty verdict despite the existence of reasonable doubt. *Victor v. Nebraska*, 511 U.S. 1, 6, 22-23 (1994); *Holland v. United States*, 348 U.S. 121, 140 (1954). Because the Tenth Circuit's pattern instruction correctly conveys the reasonable doubt standard and Petty has failed to show a reasonable likelihood that the instruction could mislead a jury on the correct standard, his conviction should be affirmed.

ARGUMENT

The Tenth Circuit's pattern instruction on reasonable doubt affords due process.

Issue raised and ruled upon: Petty offered his own reasonable doubt instruction. I: 18-19. The court rejected it and gave the Tenth Circuit's pattern instruction. I: 88. Petty objected to the court's reasonable doubt instruction. III: 136, 222-23. The court overruled his objection. III: 225-26.

Standard of review: Whether a reasonable doubt instruction satisfies due process is reviewed de novo. *Tillman v. Cook*, 215 F.3d 1116, 1123 (10th Cir. 2000). A reasonable doubt instruction that violates due process is structural error that cannot be considered harmless. *Sullivan v. Louisiana*, 508 U.S. 275, 281-282 (1993).

Argument: Petty argues that the Tenth Circuit's pattern instruction on reasonable doubt, which was used in his case, violates the Due Process Clause. He is mistaken.

The only due process requirement for the criminal standard of proof is that the court informs the jury that a defendant's guilt must be proven beyond a reasonable doubt. *Victor*, 511 U.S. at 5. This requirement comes from the Supreme Court's *Winship* decision where it held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

Beyond that, "the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." *Victor*, 511 U.S. at 5*; Musacchio v.*

United States, 136 S. Ct. 709, 715 (2016) ("if the jury instruction requires the jury to find those elements 'beyond a reasonable doubt,' the defendant has been accorded the procedure that this Court has required to protect the presumption of innocence"). The lone requirement is that the instructions "taken as a whole . . . correctly convey the concept of reasonable doubt." *Victor*, 511 U.S. at 5.

The Tenth Circuit's pattern instruction does correctly convey the concept of reasonable doubt. In its first paragraph,[1] it twice states that the government has the burden of proving guilt beyond a reasonable doubt. In between, it explains that the defendant does not have to prove anything:

> The government has the burden of proving the defendant guilty beyond a reasonable doubt. The law does not require a defendant to prove his innocence or produce any evidence at all. The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must find the defendant not guilty.

10th Cir. Crim. Pattern Jury Instruction No. 1.05 (2d. ed. 2011, updated Sept. 2015).

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[1] The pattern instruction consists of two paragraphs, but the instruction used at trial includes the language in three. ROA I: 88. The government uses three paragraphs here.

The second paragraph of the instruction then reflects that criminal due process does not require proof of guilt "beyond all doubt." *Addington v. Texas*, 441 U.S. 418, 430 (1979). The paragraph elaborates on the "compromise" that the reasonable doubt standard makes "between what is possible to prove and what protects the rights of the individual." *Id.*

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are few things in this world that we know with absolute certainty, and 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. A reasonable doubt is a doubt based on reason and common sense after careful and impartial consideration of all the evidence in the case.

10th Cir. Crim. Pattern Jury Instruction No. 1.05.

Finally, the instruction's third paragraph reflects that, like other standards, the reasonable doubt standard is a "probabilistic" standard. *Victor*, 511 U.S. at 14. It tells the jury that reasonable doubts accrue to the defendant's benefit, so where "a real possibility" exists that he or she is not guilty, the jury must acquit:

> If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime

> charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

10th Cir. Crim. Pattern Jury Instruction No. 1.05.

A reasonable doubt instruction need not be perfect to be upheld. The question is "whether there is a *reasonable likelihood* that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." *Victor*, 511 U.S. at 6; *see Tillman*, 215 F.3d at 1123. Put another way, is there a reasonable likelihood that the instruction was "of the type that could mislead the jury into finding no reasonable doubt when in fact there was some[?]" *Holland*, 348 U.S. at 140.

It is hard to differentiate the subtleties of the different standards of proof, particularly the differences between the clear and convincing standard and the reasonable doubt standard. *See Addington*, 441 U.S. at 425 (differences between clear and convincing standard and other two standards are not well understood). But so long as the criminal instruction includes the basic recitation that proof must be beyond a reasonable doubt (as the instruction here

does), it is Petty's burden to show a reasonable likelihood that the instruction would mislead a jury. *Victor*, 511 U.S. at 6, 22-23, *Holland*, 348 U.S. at 140.

Petty has not met that burden.

A. The instruction's "firmly convinced" language does not equate to a "clear and convincing" standard.

Petty first argues that the instruction's "firmly convinced" language is "materially equivalent" to "clear and convincing evidence," which is a lower burden of proof than beyond a reasonable doubt. But he offers no support for this claim.

This court has stated that "a preferred reasonable doubt instruction is one couched in the Supreme Court's 'hesitate to act' language." *United States v. Barrera-Gonzales*, 952 F.2d 1269, 1273 (10th Cir. 1992). But this court also foreclosed Petty's challenge when it agreed that (1) "the phrase 'proof that leaves you firmly convinced' requires more persuasion" than the "hesitate to act" language and (2) arguably, "a person who is 'firmly convinced' has no reasonable doubt":

> The government, while recognizing that this court, in *United States v. Leaphart*, 513 F.2d 747, 750 (10th

> Cir.1975), encouraged the trial courts to employ the "hesitation to act" language suggested by the United States Supreme Court, argues that the phrase "proof that leaves you firmly convinced" requires more persuasion and that, arguably, a person who is "firmly convinced" has no reasonable doubt. (Brief of Appellee, pp. 9-11). We agree.

Barrera-Gonzales, 952 F.2d at 1271. Moreover, Justice Ginsburg has added that the firmly convinced language more accurately conveys the reasonable doubt standard in understandable terms. *Victor*, 511 U.S. at 24-27 (Ginsburg, J. concurring).[2]

Despite its preference for the "hesitate to act" charge, this court "has rarely held that other definitions of reasonable doubt . . . constitute reversible error." *Barrera-Gonzales*, 952 F.2d at 1272. "We must be mindful of the difficulties inherent in any attempt to define the term (reasonable doubt) in great detail or to characterize precisely what sort of doubt might be reasonable." *Id.* (quoting *United States v. Pepe*, 501 F.2d 1142, 1143-44 (10th Cir. 1974)).

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[2] The law review article cited by Petty criticizes the "hesitate to act" language that he advocates. *Compare* I: 18 and Br. at 11 with Miller W. Shealy, Jr. *A Reasonable Doubt About "Reasonable Doubt,"* 65 Okla. L. Rev. 225, 292 (2013) (identifying "hesitate to act" among the "phrases that have caused problems in recent years" and advocating a return to using "moral certainty").

Petty's challenge to the "firmly convinced" language appears to rely solely on the fact that "firmly convinced" and "clear and convincing" both contain the verb "convince" as a root word. But using a derivative of "convince" cannot be the basis for finding that an instruction incorrectly conveys the reasonable doubt standard. *See Victor*, 511 U.S. at 14-15 (taken in context, moral certainty definition of "resting upon *convincing* grounds of probability" satisfied beyond a reasonable doubt standard).

All standards of proof are based on various levels of "convincing." The purpose of a standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington*, 441 U.S. at 423 (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J. concurring)). The standard of proof sets out how convinced the factfinder must be of facts to rule in their proponent's favor. The word "convince" means "to bring (as by argument) to belief, consent, or a course of action: [to] persuade." Merriam-Webster's Collegiate Dictionary, Eleventh Edition, online at www.m-w.com.

Indeed, the main difference between the various standards of proof is the level of convincing required to satisfy them. *See In re Winship*, 397 U.S. at 370 (Harlan, J. concurring) ("all the fact-finder can acquire is a belief of what probably happened. The intensity of this belief—the degree to which a factfinder is convinced that a given act actually occurred— can, of course, vary."). With the clear and convincing standard, the factfinder must be convinced that something is "highly probable," *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984), while beyond a reasonable doubt requires convincing at a "very high level of probability." *Victor*, 511 U.S. at 14.

This court has rightly recognized that it is "difficult to articulate the subtle differences between these standards of proof." *United States v. Schell*, 692 F.2d 672, 676 (10th Cir. 1982). But the firmly convinced language in the Tenth Circuit's instruction plainly goes beyond the highly-probable belief required to meet the clear-and-convincing standard.

The tenses and modifiers in the different formulations matter.

The convincing in "clear and convincing evidence" is a present participle being used as an adjective. A present participle is a verb

form that "signal[s] the progressive aspect." BRYAN GARNER, GARNER'S MODERN AMERICAN USAGE 909 (3d Ed. 2009) (defining "present participle"). That means the verb action —in this case, persuading or causing belief— is "unfinished" at the referenced time. *Id.* at 883 (defining "progressive aspect"). But "convinced" —used in the Tenth Circuit instruction— is a past participle that signals "a perfective aspect," expressing that the act of convincing is complete. *Id.* at 883, 909 (defining "past participle" and "perfective aspect").

The Tenth Circuit's instruction also modifies the word "convinced" by adding the adverb firmly, which is taken from the root word "firm" meaning "not weak or uncertain," "vigorous," "not subject to change or revision," "not easily moved or disturbed," and "steadfast." Merriam-Webster's Collegiate Dictionary, Eleventh Edition, online at www.m-w.com (defining "firm").

The past participle form indicates that the juror must have enough confidence to reach a completed belief. And the modifier "firmly" reinforces that the completed belief must be a strong, unwavering one. Together, the words "firmly convinced" convey that

the juror must be convinced to the "very high level of probability" required of proof beyond a reasonable doubt.

The Tenth Circuit instruction provides further meaning to the phrase "firmly convinced" by directly contrasting the phrase with "the real possibility that [the defendant] is not guilty." *See Victor*, 511 U.S. at 27 (Ginsburg, J. concurring) ("The 'firmly convinced' standard for conviction, repeated for emphasis, is further enhanced by the juxtaposed prescription that the jury must acquit if there is a 'real possibility' that the defendant is innocent."). By ordering the jury to "give [the defendant] the benefit of the doubt" where there is a real possibility that he is not guilty, the instruction conveys the high confidence required to convict beyond a reasonable doubt. *See Tillman*, 215 F.3d at 1125-26 (contrasting real, substantial doubt with mere possibility avoided error in reasonable doubt instruction).

The firmly convinced language comes from the Federal Judicial Center's instruction that this court has previously endorsed. *United States v. Conway*, 73 F.3d 975, 980 (10th Cir. 1995). While amicus notes that the instruction here does not also include the Federal Judicial Center's distinction of the civil standard from the criminal

standard, Amicus Br. at 10, they fail to note that the civil standard discussed there is the preponderance standard of "more likely true than not true." That language is unlikely to help distinguish the criminal standard from the intermediate standard of clear and convincing evidence. Given the rarity with which jurors must actually face the clear and convincing standard (and the infrequency with which people must serve as jurors), a criminal instruction that did reference the clear and convincing standard only to distinguish it would more likely create confusion where none exists.

Petty claims some courts have criticized the firmly convinced formulation. But criticism does not trigger a Due Process violation. *See Victor*, 511 U.S. at 16 (not condoning use of phrase "moral certainty" in reasonable doubt instruction but affirming conviction because the phrase was not reasonably likely to suggest to the jury a burden of proof lower than due process requires).

When the Tenth Circuit's pattern instruction is viewed as a whole, there is not a reasonable likelihood that Petty's jurors thought they could convict him on anything less than *Winship*'s reasonable doubt standard. That is all that is required to withstand Petty's

challenge. *Victor*, 511 U.S. at 6, 22-23 (applying reasonable likelihood test).

B. Taken in context, the use of the word "only" does not suggest a low burden of proof.

Petty next pulls a sentence out of context from the middle of the pattern instruction's second paragraph. He claims the burden of proof is lowered when the instruction states: "It is *only* required that the government's proof exclude any 'reasonable doubt' concerning the defendant's guilt." Br. at 12. He argues that replacing the word only with its synonym "merely" treats the reasonable doubt standard as if it "is not much of a requirement at all." Br. at 12.

The use of the word only will not mislead a jury into convicting someone where a reasonable doubt existed. First of all, reading only to mean merely in the challenged sentence ignores context. The sentence in question and the sentence preceding it are contrasting reasonable doubt with the notion of absolute certainty:

> There are few things in this world that we know with absolute certainty, and 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.

Tenth Circuit Criminal Pattern Jury Instruction No. 1.05. In that context, only does not suggest merely. Instead, it means "alone in a class or category: sole," Merriam-Webster's Collegiate Dictionary, Eleventh Edition, online at www.m-w.com (defining "only"), such that excluding any reasonable doubt is the government's lone burden. It correctly states the law to recognize that this high burden is also a solitary one.

Even if only did suggest a lower burden in the challenged sentence, it would accurately state the law. The burden to which reasonable doubt is being compared in the paragraph —absolute certainty overcoming every doubt— is a higher burden of proof than proof beyond a reasonable doubt.

C. The instruction conveys that reasonable doubt may arise from a lack of evidence.

Finally, Petty criticizes the instruction for not explaining that reasonable doubt can also arise from a lack of evidence by the prosecution. It is true that a "reasonable doubt" is one "based on reason which arises from the evidence or lack of evidence." *Jackson v. Virginia*, 443 U.S. 307, 318 n.9 (1979) (quoting *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972)).

But the Tenth Instruction reflects as much. It instructs the jury (1) that "[t]he law does not require a defendant to prove his innocence or produce any evidence at all," and (2) "[a] reasonable doubt is a doubt based on reason and common sense after careful and impartial consideration of all the evidence." Taken as a whole, this language conveys that reasonable doubt can arise from the lack of evidence. Due process does not require any specific formulation of the standard. *Victor*, 511 U.S. at 5 ("the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof").

CONCLUSION

This court should affirm Petty's conviction.

DATED this 9th day of September, 2016.

Respectfully submitted,

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Acting United States Attorney

/s/ J. Bishop Grewell
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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that the attached brief contains 3,001 words.

DATED: September 9, 2016

/s/ J. Bishop Grewell
J. BISHOP GREWELL
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit, using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ J. Bishop Grewell

J. BISHOP GREWELL
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s/ *Dorothy Burwell*
Dorothy Burwell
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