No. 19-78

In the Supreme Court of the United States

John Doe, a/k/a Cheyenne Moody Davis,
Petitioner,

v.

United States of America,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

Clark M. Neily III
Jay R. Schweikert
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1461
jschweikert@cato.org

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Cato's concern in this case is safeguarding the presumption of innocence and ensuring that jurors are appropriately informed on how to put the state to its burden in criminal prosecutions.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

Under our Constitution, and within the Anglo-American legal tradition generally, the twin pillars of criminal adjudication are the presumption of innocence and the jury trial. Independent citizen jurors putting the state to its burden of proof are supposed to be *the* manner in which criminal justice is rendered in our country. The Constitution itself commands that "[t]he Trial of all Crimes . . . shall be by Jury." U.S. CONST. art. III, § 2. And while the Constitution does not explicitly use the phrase "proof beyond a reasonable doubt," the heavy burden reflected in that standard has long been understood to be constitutionally compelled, as a fundamental component of due process under both the Fifth and Fourteenth Amendments. *See In re Winship*, 397 U.S. 358, 362 (1970).

The rule of decision used by the Fourth Circuit below—and also by the Seventh Circuit, and the highest courts of Illinois and Kansas—puts a major crack in both of these pillars. Though the sacred and historic nature of the "beyond a reasonable doubt" standard is well known to members of the legal profession, it will not always be intuitively obvious or self-evident to the average juror. Refusing to provide clarification, especially when the jury *expressly* asks for such guidance, creates a substantial risk that the defendant will be convicted under a constitutionally deficient standard. Such an outcome results not only in an unlawful conviction for the defendant, but also weakens the structural role of the jury generally.

The petition explains in detail how the Fourth Circuit's decision is both erroneous and contributes to a deep and long-standing division between lower courts

on whether and how to instruct on the "beyond a reasonable doubt" standard. This question alone is significant enough to warrant certiorari, but it is *especially* important for the Court to address now, in light of its relation to the diminishing role of the jury trial itself.

Though intended to be the cornerstone of criminal adjudication, the jury trial today has been all but replaced by plea bargaining as the presumptive manner in which criminal convictions are obtained. And there is ample reason to doubt whether the bulk of such pleas are truly voluntary, and to conclude that many defendants are effectively coerced into giving up their right to a jury trial. While coercive plea bargaining is a complex problem with no simple solution, this Court should grant the petition to ensure that, when deciding whether to go to trial, defendants may at least be confident that their jury will be adequately informed.

ARGUMENT

I. JURIES MUST BE APPROPRIATELY INFORMED ABOUT THE "BEYOND A REASONABLE DOUBT" STANDARD TO PROTECT THE PRESUMPTION OF INNOCENCE.

As this Court has stated time and time again, the "beyond a reasonable doubt" standard is "an ancient and honored aspect of our criminal justice system." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). Although the Constitution itself does not use the phrase, "[t]he requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation." *In re Winship*, 397 U.S. 358, 361 (1970). This particular phraseology was only crystallized in the late eighteenth century,

but the "'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times. . . .'" *Id.* (quoting C. MCCORMICK, EVIDENCE § 321, at 681-82 (1954)). And though it was not until the *Winship* decision in 1970 that this Court formally held the standard to be constitutionally compelled, judicial opinions dating back to the nineteenth century assumed as much. *See id.* at 362.

Requiring the state to prove guilt beyond a reasonable doubt gives practical effect to the presumption of innocence—"that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Id.* at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). Protecting this presumption is obviously of the utmost importance for defendants, given the immense stakes in any criminal prosecution—both in terms of possible loss of life or liberty, as well as the stigma that inherently attends any criminal conviction.

But this principle is also crucial to ensuring that the criminal justice system itself may "command the respect and confidence of the community." *Id.* at 364. John Adams, in his renowned defense of the British soldiers accused of perpetrating the Boston Massacre, expanded upon this social imperative to fiercely safeguard the presumption of innocence:

> We are to look upon it as more beneficial, that many guilty persons should escape unpunished, than one innocent person should suffer. The reason is, because it's of more importance to community, that innocence should be protected, than it is, that guilt should be punished; for guilt and crimes are so frequent in the world, that all of them cannot be punished; and many

> times they happen in such a manner, that it is not of much consequence to the public, whether they are punished or not. But when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, it is immaterial to me, whether I behave well or ill; for virtue itself, is no security. And if such a sentiment as this, should take place in the mind of the subject, there would be an end to all security what so ever.[2]

The presumption of innocence was intended to work hand-in-hand with the right to a jury trial, as it was only an independent citizen jury that the Founders trusted to "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). Indeed, as Alexander Hamilton famously observed, "friends and adversaries of the plan of the [constitutional] convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government." THE FEDERALIST NO. 83 (Alexander Hamilton).

But the jury cannot possibly serve this vital role—and thus, the presumption of innocence itself cannot be protected—when jurors do not properly understand what it means for the state to prove guilt beyond a rea-

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[2] *Adams' Argument for the Defense: 3–4 December 1770,* FOUNDERS ONLINE, National Archives, https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016 (last visited Aug. 15, 2019).

sonable doubt. For as much as this standard is a hallowed component of our constitutional tradition, this Court itself has not hesitated to admit that "it defies easy explication." *Victor*, 511 U.S. at 5. There is thus no guarantee that ordinary members of the public will naturally and correctly grasp all its contours.

The Fourth Circuit's contrary suggestion—that reasonable doubt has "a self-evident meaning comprehensible to the lay juror," *United States v. Walton*, 207 F.3d 694, 699 (4th Cir. 2000) (en banc)—is belied by both common sense and empirical evidence. For judges and lawyers, it is crucial to avoid slipping into the assumption that the general public understands the specialized vocabulary that is so familiar to members of the legal profession as to seem intuitive. As Justice Ginsburg has explained, "[w]hile judges and lawyers are familiar with the reasonable doubt standard, the words 'beyond a reasonable doubt' are not self-defining for jurors." *Victor*, 511 U.S. at 26 (Ginsburg, J., concurring in part and concurring in the judgment).[3]

Numerous studies confirm the truth of this warning, finding that "jurors are often confused about the

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[3] *See also United States v. Witt*, 648 F.2d 608, 612 (9th Cir. 1981) (Anderson, J., concurring) ("The terms 'beyond a reasonable doubt' and the 'presumption of innocence' as such, may be in common usage by the populace of this nation, but there is no demonstrable or reliable evidence, to my knowledge, that a reasonably appropriate definition is in common usage or well understood by prospective citizen jurors. I strongly suspect that no lay juror, without the assistance of a defining instruction, could state the concept in such a fashion as to satisfy the prosecutor, defense counsel, nor the judges of this court. It is quite likely no two jurors would define it in the same way.").

meanings of various legal terms found in jury instructions, including reasonable doubt."[4] For example, one study showed that, as between one set of mock jurors given court-approved definitions of reasonable doubt, and another set given no definition, "there was considerably greater individual uncertainty and group disagreement when reasonable doubt was left undefined, and . . . more hung juries resulted."[5]

This is not to suggest there exists any single perfect way to define "beyond a reasonable doubt," nor even to deny the possibility that, in some cases, the attempt to elaborate on the concept in detail *could* create greater confusion. Nevertheless, "even if definitions of reasonable doubt are necessarily imperfect, the alternative—refusing to define the concept at all—is not obviously preferable." *Victor*, 511 U.S. at 26 (Ginsburg, J., concurring in part and concurring in the judgment).

Most importantly, as the petition explains in detail, whatever the merits of the idea that specific instructions *could* create more confusion than they resolve,

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[4] Note, *Reasonable Doubt: To Define, Or Not To Define*, 90 COLUM. L. REV. 1716, 1723 (1990).

[5] *Id.* (citing Norbert L. Kerr et al., *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. PERSONALITY & SOC. PSYCHOL. 282, 285-86 (1976)).

Another series of studies, based on polling Florida venirepersons, disturbingly found that "twenty-three percent of the instructed jurors believed that when the weight of circumstantial evidence was equally balanced between guilt and innocence the defendant should be convicted," and that "only fifty percent of the jurors understood that the defendant did not have to present any evidence of his innocence." *Id.* (citing David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 480-81 (1976)).

that concern necessarily dissipates when the jury itself requests clarification. *See* Pet. at 19-22. Such a request self-evidently reflects that at least some members of the jury are *already* confused about the "beyond a reasonable doubt" standard. The refusal to offer guidance at that point cannot possibly ensure clarity; it only guarantees that confusion and division among the jurors will persist throughout deliberations.

When a jury that is manifestly confused about the meaning of reasonable doubt renders a conviction, "there cannot be any confidence that the jury applied the burden of proof mandated by the Constitution." Pet. at 20. Failure to properly instruct a confused jury under such circumstances is no mere technical error, but a fundamental threat to the presumption of innocence itself.

II. GRANTING THIS PETITION IS ESPECIALLY IMPORTANT IN LIGHT OF THE VANISHINGLY SMALL ROLE THAT JURY TRIALS PLAY IN OUR CRIMINAL JUSTICE SYSTEM.

The deep division among lower courts on such a crucial doctrinal question as presented here is reason enough to grant the petition. But it is all the more important that the Court resolve this issue now, in light of its connection to an even more fundamental threat to our criminal justice system—the erosion of the jury trial itself.

As discussed above, the jury trial was intended to be the cornerstone of criminal adjudication in this country, and it is discussed more extensively in the Constitution than nearly any other subject. Article III states, in mandatory, structural language, that "[t]he

Trial of all Crimes . . . *shall* be by Jury; and such Trial *shall* be held in the State where the said Crimes shall have been committed." U.S. CONST. art. III, § 2 (emphases added). The Bill of Rights guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed," U.S. CONST. amend. VI; and that no person be "twice put in jeopardy of life or limb," U.S. CONST. amend. V. Notably, the jury trial is the *only* individual right mentioned in both the original body of the Constitution and the Bill of Rights.

Yet despite its intended centrality as the bedrock of our criminal justice system, jury trials are being pushed to the brink of extinction. The proliferation of plea bargaining, which was completely unknown to the Founders, has transformed the country's robust "system of trials" into a "system of pleas." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (observing that plea bargaining "has swept across the penal landscape and driven our vanquished jury into small pockets of resistance").

The Framers understood that "the jury right [may] be lost not only by gross denial, but by erosion." *Jones v. United States*, 526 U.S. 227, 248 (1999). That erosion is nearly complete, as plea bargains now comprise all but a tiny fraction of convictions. *See Lafler*, 566 U.S. at 170 (in 2012, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"); Suja A. Thomas, *What Happened to the American Jury?*, LITIGATION, Spring 2017, at 25 ("[J]uries today decide only 1-4 percent of criminal cases filed in federal and state court.").

Most troubling, there is ample reason to believe that many criminal defendants—regardless of factual guilt—are effectively *coerced* into taking pleas, simply because the risk of going to trial is too great. *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books, Nov. 20, 2014. In a recent report, the NACDL extensively documented this "trial penalty"—that is, the "discrepancy between the sentence the prosecutor is willing to offer in exchange for a guilty plea and the sentence that would be imposed after a trial." NAT'L ASS'N OF CRIM. DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 6 (2018). When prosecutors have the discretion to engage in unbridled charge stacking—especially in light of severe mandatory minimums—they can exert overwhelming pressure on defendants to plead out, no matter the merits of their case. *See id.* 7, 24–38.

One of the few tools defendants have to resist that pressure is the burden of proof prosecutors must meet before they can deprive citizens of their liberty. But that tool amounts to little if a defendant can have no assurance that the jury will understand what this actually requires of the state. When deciding whether to exercise their Sixth Amendment rights, defendants should at least have confidence that their jury will properly understand the presumption of innocence and the "beyond a reasonable doubt" standard.

To be sure, the demise of the jury trial is a deep, structural problem, with no single cause or solution. But the lack of a single fix does not mean that the Court should retreat from incremental solutions. In the Fourth and Seventh Circuits, and in Illinois and Kansas, a citizen can be convicted despite evident and

unaddressed juror confusion on the state's burden of proof. In those jurisdictions, the pressure on defendants to waive their constitutional rights to a jury trial is even greater than elsewhere.

The result is not only that criminal prosecutions are rarely subjected to the adversarial testing of evidence that our Constitution envisions, but also that citizens are deprived of their prerogative to act as an independent check on the state in the administration of criminal justice. We have, in effect, traded the transparency, accountability, and legitimacy that arises from public jury trials for the simplicity and efficiency of a plea-driven process that would have been both unrecognizable and profoundly objectionable to the Founders. Reversing the decision below would be a small but significant step toward restoring the jury trial itself to its proper and intended role.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted,

Clark M. Neily III
Jay R. Schweikert
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1461
jschweikert@cato.org

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