In the

United States Court of Appeals

For the Seventh Circuit

No. 21-2724

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

THOMAS R. ALT,

Defendant-Appellant.

Appeal from the United States District Court for the
Central District of Illinois.
No. 19-cr-10056 — **James E. Shadid**, *Judge.*

ARGUED NOVEMBER 28, 2022 — DECIDED JANUARY 25, 2023

Before ROVNER, ST. EVE, and KIRSCH, *Circuit Judges*.

ST. EVE, *Circuit Judge*. Thomas Alt made plans to meet with a fifteen-year-old boy whom he met on Grindr (a popular dating app) to smoke marijuana and engage in sexual activity. What Alt did not know was that the boy was actually an undercover FBI Agent. Alt was arrested later that day when he attempted to meet up with the boy. After a three-day jury trial, Alt was convicted of attempted enticement of a minor and sentenced to the mandatory minimum 120 months in

prison, followed by fifteen years of supervised release. He timely filed this appeal challenging the district court's denial of his motion to suppress, claiming the government committed a *Batson* violation, and arguing he was deprived of a fair trial because of the government's statements during closing arguments. Alt also challenges the requirement that he participate in a sex offender treatment program as a condition of his supervised release. We now affirm.

I. Background

On November 1, 2019, Thomas Alt—then twenty-six years old—sent a message to a Grindr account operated by an undercover FBI Agent. The account included the picture of a youthful-looking boy and listed his age as eighteen years old, the minimum required to use the Grindr app. The boy responded to Alt after Alt sent two more messages. During their subsequent conversation, the two discussed meeting up to engage in sexual activity and smoke marijuana. The boy explicitly told Alt that he was only fifteen years old, but Alt continued with his plans to meet. Approximately an hour-and-a-half after the boy first responded, FBI agents arrested Alt outside of what Alt believed to be the boy's home. At the time of his arrest, Alt had a tablet with the Grindr app and messages, an iPhone, and marijuana.

A. Post-Arrest Interview

FBI agents interviewed Alt following his arrest. Prior to any substantive questioning, the following exchange occurred:

> **FBI**: So, before we ask you any questions, you must understand your rights. You have the right to remain silent, anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask questions, uh, you have a right to have a lawyer with you during the questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you have the right to stop answering at any time. So, that last one is the big one.

ALT: Yep.

FBI: So, no matter what you say, if you decide that you want to have a lawyer, then we stop. So just, any time …

ALT: And, real quick, on the, uh, appointed lawyer, do you have a lawyer here?

FBI: No.

ALT: Ok, gotcha, so I would have to schedule something.

FBI: So, that would be appointed at your initial appearance.

ALT: Yeah, ok.

FBI: So, um, then, I got a consent statement here. So, if you could just read that out loud.

ALT: Ok. Uh, I have read this statement of my rights, and I understand what my rights are. At this time, I am willing to answer, uh, questions without a lawyer.

FBI: If that is correct, then uh, if you believe that, then go ahead, and sign where it says signed.

> **ALT**: Allowing that I'm still able to stop when whenever.
>
> **FBI**: Whenever you want.
>
> **ALT**: Perfect, ok, solid.…

After signing the consent statement, Alt admitted that he was the one using the Grindr app to send messages to whom he believed to be a fifteen-year-old boy. But Alt claimed that, while the two were originally planning on engaging in sexual activity, after learning the boy was only fifteen years old, Alt only planned to "hang out," "smoke a little bit," and have a "cool conversation."

B. Pre-trial Motions

Two days after his arrest, the government filed a criminal complaint against Alt, charging him with one count of attempted enticement of a minor under 18 U.S.C. § 2422(b). A grand jury indicted Alt two weeks later.

Alt subsequently moved to suppress the statements he made to the FBI, arguing that he unequivocally invoked his right to counsel when he said, "do you have a lawyer here?" after the agents read him his *Miranda* rights. The district court denied the motion: "In viewing the context of his statements, Alt appeared to be contemplating whether to ask for counsel or asking about the process if he did request counsel in the future …. Even if Alt was attempting to invoke his right to counsel, it was not unambiguous and unequivocal."

With his suppression motion denied, Alt's case proceeded to trial.

C. Jury Selection

During jury selection the government asked if any prospective juror had any negative experiences with law enforcement. Only Juror 68—the only African American prospective juror—raised his hand. Juror 68 recounted how he was forced to plead guilty to a DUI charge that he did not commit. When the district court asked if Juror 68 would nonetheless be able to keep an open mind when listening to the evidence here and make a decision based solely on the facts, Juror 68 responded "absolutely."

Later, the government asked if any prospective juror had experiences with sexual abuse. Three jurors raised their hands, including Juror 68. While being uncertain on the details, Juror 68 stated that he had "a couple of family members" and "close personal friends" "go through a situation of sexual abuse" as minors. When the government asked if Juror 68 would be able to objectively view the evidence despite these experiences, Juror 68 responded, "I would … stick with the facts. … This is a totally different situation, so you have to take it for what it is right now."

Based on Juror 68's responses to these two questions—and that he "provided some hesitancy" when responding—the government asked the district court to excuse Juror 68 for cause. Alt opposed excusing Juror 68 for cause because Juror 68 was the only African American prospective juror and explicitly stated that he could look at the evidence objectively and would not be biased. The district court denied the government's request.

The government then used a peremptory challenge to strike Juror 68, and Alt objected under *Batson v. Kentucky*, 476

U.S. 79 (1986). To support its use of a peremptory challenge, the government incorporated its reasons for requesting to excuse Juror 68 for cause.

> As we talked back and forth, you know, there were times when he shrugged his shoulders, where he was hesitant; he paused. … [T]hat hesitation is what we don't want [from] a juror coming out of the gate listening to the facts. … [H]ere is a man that pleaded for something that he was innocent for. Well, that creates … an unconscious bias …. And then on top of that … he has family members [and friends] that [were] involved in sexual abuse. And so we would rather just have somebody that … [is] able to sit there and listen to the facts of the[] case without that extra baggage or weight weighing them down.

The district court denied Alt's *Batson* challenge, holding that the government provided sufficient race-neutral reasons for the strike. Once the jury was empaneled, the case proceeded to trial.

D. Jury Instructions, Closing Arguments, & The Verdict

At the close of evidence, the district court instructed the jury that "[t]he government has the burden of proving the defendant's guilt beyond a reasonable doubt. This burden of proof stays with the government throughout the case."

Later, during its closing argument, the government added:

> [When] you are considering the evidence and whether it fits these three elements, keep in mind the government's burden; it is beyond a reasonable doubt. It is not beyond all doubt. It is not beyond any shadow of a doubt.

Alt objected to the government "defining" the reasonable doubt standard. The district court overruled the objection and instructed the jury, "I've not instructed you as to any definition of 'beyond a reasonable doubt' or 'reasonable doubt,' so that is for you to ultimately determine what you believe to be reasonable doubt." During his closing argument, Alt reiterated to the jury that "[i]t's for you to decide what beyond a reasonable doubt means."

E. Sentence & Condition of Supervised Release

The jury ultimately convicted Alt of attempted enticement of a minor under 18 U.S.C. § 2422(b). The district court sentenced Alt to the mandatory minimum 120 months in prison, followed by fifteen years of supervised release. As a condition of his supervised release, the court ordered Alt to participate in a sex offender treatment program approved by the U.S. Probation Office.

II. Discussion

Alt appeals the district court's (1) denying his motion to suppress, (2) overruling his *Batson* challenge, (3) overruling his objection to the Government's closing arguments, and (4) ordering that he participate in a sex offender treatment program as a condition of his supervised release.

A. Motion to Suppress

Alt first argues that the district court erred when it denied his motion to suppress his statements to the FBI. We review the district court's legal conclusion regarding whether a defendant unequivocally invoked his Fifth Amendment right to counsel de novo. *United States v. Bebris*, 4 F.4th 551, 560 (7th Cir. 2021).

"[A] suspect is entitled to the assistance of counsel during custodial interrogation …." *Davis v. United States*, 512 U.S. 452, 462 (1994) (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)). And during such an interrogation, "if the suspect invokes the right to counsel at any time, the police must immediately cease questioning him until an attorney is present." *Davis*, 512 U.S. at 462 (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)). But in order to trigger this protection, the invocation of the right to counsel must be unequivocal. *United States v. Hunter*, 708 F.3d 938, 943 (7th Cir. 2013); *United States v. Hampton*, 885 F.3d 1016, 1019 (7th Cir. 2018). In determining when a request for counsel is clear enough, "our court has found statements indicating a certain and present desire to consult with counsel sufficient to invoke a defendant's right to counsel." *Hunter*, 708 F.3d at 943; *see also Hampton*, 885 F.3d at 1020 (invoking the right requires action-oriented words—i.e., statements that "request an action (or permission to act)."). "[A]n ambiguous or equivocal reference to an attorney" is not sufficient to trigger the *Edwards* rule. *Davis*, 512 U.S. at 459. When making this assessment, "we consider the circumstances in which the statement was made as well as the words employed." *United States v. Wysinger*, 683 F.3d 784, 793–94 (7th Cir. 2012).

It is undisputed here that Alt was subjected to a custodial interrogation. Thus, the issue is whether Alt unequivocally invoked his right to counsel during that interrogation. He did not. Alt's alleged invocation—"real quick, on the, uh, appointed lawyer, do you have a lawyer here?"—does not "indicat[e] a certain and present desire to consult with counsel." *See Hunter*, 708 F.3d at 943. Alt's statement is devoid of any action-oriented words—such as "can"—that we have held sufficient to unequivocally invoke the right. *See id.* at 944 ("The defendants' choice of the word 'can,' by definition,

means that they were inquiring into their present ability to be 'able to' obtain a lawyer or to 'have the opportunity or possibility to' obtain a lawyer."). Indeed, "do you have a lawyer here?" suggests that Alt was still undecided about whether he wanted a lawyer.

Looking at this statement in context, Alt was merely inquiring into the *process* if he did request to speak to counsel. As the district court aptly noted, "[i]f counsel was there and it was convenient at the time for Alt, then he considered asking for counsel. But since counsel was not immediately there at the residence where Alt was arrested and Alt was seemingly ready to talk now, he chose to not ask for a lawyer and to speak to the Agents instead." At best, Alt's statement indicated that he *might* want to speak to counsel. This is insufficient to unequivocally invoke the right. *See Davis*, 512 U.S. at 459 ("But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.") (emphasis in original).

As part of this assessment, Alt asks us to consider the Agent's statements *after* Alt allegedly invoked his right to counsel. According to Alt, the Agent's response that counsel would be provided at his initial appearance improperly indicated that counsel could not be consulted prior to the present questioning. This argument misunderstands the *Edwards* bright line rule. "[C]ourts should only consider *prior* context when determining whether a defendant unambiguously invoked his right to counsel." *Hunter*, 708 F.3d at 945 (emphasis added). If Alt unequivocally invoked his right to counsel, then

nothing law enforcement said after that could negate the effect of his invocation, and all subsequent statements must be excluded. Law enforcement's post-invocation statements are irrelevant to whether Alt invoked his right to counsel in the first place.[1]

The district court did not err in denying Alt's motion to suppress.

B. *Batson* Challenge

Alt argues next that the district court erred in denying his *Batson* challenge because the government's race neutral reasons for challenging Juror 68 were not reasonable. We review a district court's "*Batson* findings for clear error." *United States v. Lovies*, 16 F.4th 493, 500 (7th Cir. 2021) (quoting *United States v. Cruse*, 805 F.3d 795, 806 (7th Cir. 2015)). Our review is highly deferential. *Lovies*, 16 F. 4th at 500 (citing *Hunter*, 932 F.3d at 617). "Deference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court to make credibility determinations. Thus, we affirm unless 'we arrive at a definitive and firm conviction that a mistake has been made.'" *Lovies*, 16 F. 4th at 500 (quoting *United States v. Rutledge*, 648 F.3d 555, 558 (7th Cir. 2011) and *Cruse*, 805 F.3d at 806).

Batson prohibits prosecutors from "challeng[ing] potential jurors solely on account of their race or on the assumption that

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[1] Alt's reliance on *Wysinger*, 683 F.3d at 802, does not warrant a different result. In *Wysinger*, we found that law enforcement's "pattern of diversion," post-invocation, was improper "because it relates to and supports Wysinger's claim of misleading *Miranda* warnings." *Id.* at 802. Alt does not allege that the *Miranda* warnings were misleading. Thus, this holding in *Wysinger* is inapplicable here.

black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). Accordingly, to prevail on a *Batson* challenge, Alt "must show the government had a racially discriminatory intent in exercising its peremptory strike" to remove Juror 68. *Lovies*, 16 F.4th at 499.

A *Batson* challenge has three steps:

> First, a challenger must make a prima facie case that the peremptory strike was racially motivated. … The second *Batson* step requires only that the explanation offered in defense of the strike be non-discriminatory. … At the third and final step, the trial court must determine whether the opponent of the strike has carried his burden of proving purposeful discrimination.

Id. at 499–500 (citations omitted).

As the government proffered race-neutral reasons for the strike which the district court ruled on, we review only the third step—"whether the opponent of the strike has carried his burden of proving purposeful discrimination."[2] We hold that Alt has not met this burden.

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[2] Alt's sole argument to support his *Batson* challenge is that Juror 68 was the only African American prospective juror. This is not sufficient to state a prima facie case that the strike was racially motivated. *See Lovies*, 16 F. 4th at 499 ("To meet this burden at the first step, however, the strike's opponent cannot merely point to the stricken juror's race.") (citation omitted). However, "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Id.* at 503 (quoting *Hernandez v. New York*, 500 U.S. 352, 359 (1991)).

The government pointed to two potential biases, as well as the juror's demeanor, to support its use of the peremptory strike. Foremost, Juror 68 was the only juror to indicate that he had had negative interactions with law enforcement, being forced to plead guilty to an offense he did not commit. While Juror 68 stated that he could "absolutely" keep an open mind when looking at the evidence in this case despite this experience, he also noted that, "I don't think that it would be total bias. There [is] going to be some unconscious bias. I think that can happen. I think that's just a natural thing to do." Further animating the government's concern here, all four witness whom the government planned to call at trial (and ultimately did call) were law enforcement personnel. Thus, Juror 68's acknowledgement that his prior negative experience with law enforcement created "some unconscious bias" is a legitimate race-neutral reason to strike the juror. *See United States v. Brown*, 809 F.3d 371, 376 (7th Cir. 2016) ("[B]ias against law enforcement is a legitimate race-neutral justification.") (citing *United States. v. Smallwood*, 188 F.3d 905, 915 (7th Cir. 1999)).

Juror 68's indication that he has both family and friends who have had negative experiences with sexual abuse as minors, the very subject of this case, also created a risk of bias

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Even so, as a reminder, we recently "encourage[d] district courts to follow each of *Batson's* three steps in sequence and to develop a comprehensive record as to each step." *Lovies*, 16 F. 4th at 503. "The Supreme Court has designed the three *Batson* steps as a bulwark to protect against racial discrimination. By methodically working through each step of a *Batson* challenge, and not collapsing them into a single inquiry, a crystal-clear record is developed for the benefit of all, including to facilitate appellate review." *Id.* at 503–04 (citations mitted).

which constitutes a sufficient race-neutral reason to strike the juror.

Finally, the government pointed to Juror 68's demeanor in responding to questions as another reason for the peremptory strike: "As we talked back and forth, you know, there were times when he shrugged his shoulder, where he was hesitant; he paused." Being present during voir dire, the district court was able to independently assess and consider both the prosecutor's and Juror 68's demeanor when ruling on Alt's *Batson* challenge, and "[w]e accord the district judge's credibility determination great deference on appeal." *See Lovies*, 16 F. 4th at 502 ("From his firsthand vantage point, the district judge was in the best position to make the determination that the prosecutors were sincere."); *id.* at 501 ("A trial judge's firsthand observations of a juror's demeanor are important where a peremptory strike's proponent refers to that demeanor."). We do so here, as well.

The district court did not clearly err in denying Alt's *Batson* challenge.

C. Defining the Reasonable Doubt Standard

Alt also alleges that the government's discussion of the standard of proof constitutes reversible error. During closing arguments, the prosecutor told the jury, "[when] considering the evidence and whether it fits these three elements, keep in mind the government's burden; it is beyond a reasonable doubt. It is not beyond all doubt. It is not beyond any shadow of a doubt." Alt objected and the district court overruled his objection. "We review for abuse of discretion a district court's 'decision to overrule an objection to comments in a closing argument.'" *United States v. Chavez*, 12 F.4th 716, 728 (7th Cir.

2021) (quoting *United States v. Lopez*, 870 F.3d 573, 579 (7th Cir. 2017)). This analysis is a two-step process, asking "(1) 'whether the prosecutor's comments were improper standing alone,' and if improper, (2) 'whether the remarks in the context of the whole record denied the defendant[ ] the right to a fair trial.'" *Chavez*, 12 F.4th at 728 (quoting *United States v. Kelerchian*, 937 F.3d 895, 916 (7th Cir. 2019)).

"Many times in the past, we have been explicit about the inappropriateness of defining 'reasonable doubt.'" *United States v. Alex Janows & Co.*, 2 F.3d 716, 722 (7th Cir. 1993). We have been so clear, in fact, that in *Alex Janows*, we found it "remarkable" and improper for the prosecutor to tell the jury that "beyond a reasonable doubt means just that. It does not mean proof to a certainty or proof beyond all doubt." *Id.* at 723.

The government's comments here were substantially the same as those in *Alex Janows*. "[W]e [again] admonish counsel, do not define 'reasonable doubt' to a jury." *Id*. Without more, however, "we will not reverse because the error is harmless." *Id.* The evidence against Alt was overwhelming. Specifically, the government presented the Grindr messages, in which Alt repeatedly asked the boy for his address and discussed, in detail, his plans to engage in sexual activity with the boy. Even after the boy told Alt that he was only fifteen years old, Alt persisted in his plans. After finally providing his address, for example, the boy told Alt, "Just don't tell anyone I blew you lol," and Alt responded, "Agreed, and same goes with u. Just between us." Alt then traveled to what he believed to be the boy's address, in another city, and was arrested outside of that residence. "There is no chance that a jury would have resolved this case differently" absent the prosecutor's

comments. *Id.* Put differently, the prosecutor's remarks in no way deprived Alt of a fair trial. *See Chavez*, 12 F.4th at 728.

Alt's argument that jurors afford statements from government prosecutors substantial weight, rendering this error significant, is unpersuasive. Even if statements from the government are impactful for a jury, statements from the presiding judge carry even more weight. *Compare United States v. Vargas*, 583 F.2d 380, 386 (7th Cir. 1978) ("coming from the mouth of the representative of the United States, the [prosecutor's] statements carry much weight ….") (citation omitted), *with United States v. Harper*, 662 F.3d 958, 961 (7th Cir. 2011) ("instructions from the court carry more weight with jurors than do arguments made by attorneys.") (citing *Boyde v. California*, 494 U.S. 370, 384 (1990)). And here, the district court immediately reminded the jury that, "I've not instructed you as to any definition of 'beyond a reasonable doubt' or 'reasonable doubt,' so that is for you to ultimately determine what you believe to be reasonable doubt." This additional instruction cured any potential risk of prejudice. *See United States v. Cornett*, 232 F.3d 570, 574 (7th Cir. 2000) (holding "whether the trial court's instructions to the jury were adequate to cure any prejudice that might otherwise result from the improper comments" is a relevant factor to assess prejudice due to prosecutor's comments); *see also Harper*, 662 F.3d at 961 ("we presume that the [district] court's proper instruction ensured that the jury applied the correct standard."). Alt also reiterated to the jury that it was up to them to define the standard during his own closing argument.

While denying the objection to the prosecutor's statements was in error, the error was harmless and does not warrant reversal.

D. Conditions of Supervised Release

Finally, Alt argues that the district court abused its discretion by ordering sex offender treatment as a condition of supervised release. We review a district court's decision to impose a special condition of supervised release for abuse of discretion. *United States v. Ross*, 475 F.3d 871, 873 (7th Cir. 2007); *Gall v. United States*, 552 U.S. 38, 46 (2007) ("[A]ppellate review of sentencing decisions is limited to determining whether they are 'reasonable.'").

Alt argues that sex offender treatment programs are only necessary for repeat offenders, which he is not. But nowhere do the Sentencing Guidelines indicate that this condition should only be imposed for repeat offenders, and Alt provides no legal support for this argument. The Guidelines recommend imposing this condition for a defendant like Alt, who was convicted of a sex offense. U.S.S.G. § 5D1.3(d)(7). Further, the district court noted the condition was necessary to help protect the public given that Alt posed a risk to minors and the community. *See* 18 U.S.C. § 3583(d)(1) (noting courts may impose conditions of supervised release "reasonably related" to the § 3553(a) sentencing factors); § 3553(a)(2)(C) ("The court shall impose a sentence sufficient, but not greater than necessary, … to protect the public from further crimes of the defendant."). The district court did not abuse its discretion by imposing this condition.

III. Conclusion

For the foregoing reasons, the rulings of the district court are

AFFIRMED

KIRSCH, *Circuit Judge*, concurring. I join the majority opinion but write separately on the issue of defining the reasonable doubt standard (part II.C.). Our circuit has a rigid rule, which has developed over time, that strictly prohibits district judges and the parties from ever defining reasonable doubt for a jury. We are the only circuit that affords district judges no discretion to define the phrase. In my view, we should join the other circuits that trust district judges with the discretion to define the phrase in the appropriate circumstances. We should, however, counsel district judges against doing so as a matter of course so as not to further confuse the meaning of the phrase, particularly when it has not been put at issue in the case.

"[T]he Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). But we have made very clear that district judges and parties in our circuit are prohibited from doing so. For instance, in *United States v. Glass*, 846 F.2d 386, 387 (7th Cir. 1988), defense counsel attempted to define reasonable doubt during closing argument. The jury sought a more precise definition from the district judge during its deliberations, but the judge refused to give one, and the jury returned a guilty verdict. The defendant appealed, arguing that the trial court erred in refusing to define reasonable doubt for the jury. We affirmed, holding that:

> It is … inappropriate for judges to give an instruction defining "reasonable doubt," and it is equally inappropriate for trial counsel to provide their own definition. See, e.g., *United States v. Dominguez*, 835 F.2d 694, 701 (7th Cir. 1987). Trial counsel may argue that the government

> has the burden of proving the defendant's guilt "beyond a reasonable doubt," but *they may not attempt to define "reasonable doubt."* Thus, the court below should not have allowed Glass's counsel to explain to the jury his understanding of "reasonable doubt." And Glass's counsel, who created this whole problem, should not have defined it.

Id. (emphasis in original); see also, e.g., *United States v. Hatfield*, 591 F.3d 945, 949 (7th Cir. 2010) ("[S]ome courts, including our own, tell district judges not to try to explain to a jury the meaning of beyond a reasonable doubt."); *United States v. Bruce*, 109 F.3d 323, 329 (7th Cir. 1997) ("It is well established in this Circuit, however, that neither trial courts nor counsel should attempt to define 'reasonable doubt' for the jury."); *United States v. Thompson*, 117 F.3d 1033, 1035 (7th Cir. 1997) ("The law is clear in this circuit that it is improper for attorneys to attempt to define the term."); *United States v. Hall*, 854 F.2d 1036, 1039 (7th Cir. 1988) ("[N]o attempt should be made to define reasonable doubt."); *Dominguez*, 835 F.2d at 701 ("In this circuit, instructions by counsel on the meaning of reasonable doubt are improper … .").

Our rule has not always been so stringent. In the not too distant past, we merely cautioned district courts against defining reasonable doubt. See, e.g., *United States v. Kramer*, 711 F.2d 789, 795 (7th Cir. 1983) ("caution[ing]" judges not to define reasonable doubt); *United States v. Martin-Trigona*, 684 F.2d 485, 493 (7th Cir. 1982) ("advis[ing] against defining 'reasonable doubt'"); see also Seventh Circuit Pattern Criminal Jury Instructions § 2.07 (1980) (recommending that no instruction be given defining 'reasonable doubt' but acknowledging

that "the Seventh Circuit has refused to adopt a per se rule against defining reasonable doubt"); Seventh Circuit Manual on Jury Instructions in Federal Criminal Cases § 6.01-3 (1963) (providing a definition of reasonable doubt). But now, we direct all district judges to follow *Glass* and abstain from ever defining the term for a jury, without exception. Seventh Circuit Pattern Criminal Jury Instructions § 1.04, Committee Comment (2022) (relying exclusively upon the *Glass* line of cases to conclude "that it is inappropriate for the trial judge to attempt to define 'reasonable doubt' for the jury").

Our rule stands alone. Although several circuits discourage district judges from defining the phrase, all but ours give district judges at least some discretion to do so.[1] Moreover,

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[1] See, e.g., *United States v. Herman*, 848 F.3d 55, 57 (1st Cir. 2017) (holding that a district court "retains significant discretion in formulating" an instruction defining reasonable doubt, so long as the instruction is accurate); *United States v. Shamsideen*, 511 F.3d 340, 348 (2d Cir. 2008) (holding that the district court did not err when it "clearly and accurately instructed the jury on the reasonable doubt standard in some detail"); *United States v. Hoffecker*, 530 F.3d 137, 174–75 (3d Cir. 2008) (holding that the district court correctly defined reasonable doubt for the jury based on the Third Circuit Pattern Criminal Jury Instructions § 3.06); *United States v. Walton*, 207 F.3d 694, 696, 699 (4th Cir. 2000) (en banc) (discouraging definition of the reasonable doubt standard but allowing a trial judge to define it "if the jury requests a definition"); *United States v. Williams*, 20 F.3d 125, 128, n.1 (5th Cir. 1994) (rejecting our approach and noting that the Fifth Circuit has "encouraged" district courts "to use [the Fifth] Circuit's Pattern Jury Instruction on the definition of reasonable doubt"); *United States v. Ashrafkhan*, 964 F.3d 574, 578 (6th Cir. 2020) ("[I]f a court chooses to define the [reasonable doubt] standard, [then it must] make[ ] clear to the jury that the burden of proof is high."); *United States v. Harris*, 974 F.2d 84, 85–86 (8th Cir. 1992) (instruction defining reasonable doubt is proper when it provides "a correct statement of the law"); *United States v. Nolasco*, 926 F.2d

most circuits have pattern jury instructions defining the phrase.[2] The Eighth Circuit even imposes an affirmative duty on district courts to instruct juries on the meaning of reasonable doubt. See Eighth Circuit Pattern Criminal Jury Instructions § 3.11, Committee Comments (2021) (citing *Friedman v. United States*, 381 F.2d 155 (8th Cir. 1967)).

Still, the Supreme Court and several circuits have cautioned that efforts to define the phrase may "result in further obfuscation of the concept[.]" *United States v. Olmstead*, 832 F.2d 642, 645 (1st Cir. 1987); see also, e.g., *Holland v. United States*, 348 U.S. 121, 140 (1954) (citation omitted) ("Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury … ."). But that is not the same as curtailing altogether the district court's

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869, 872 (9th Cir. 1991) (en banc) (holding that "an appropriate instruction defining reasonable doubt is permissible but not necessarily required"); *United States v. Petty*, 856 F.3d 1306, 1309 (10th Cir. 2017) (district courts retain "considerable latitude in instructing juries on reasonable doubt" so long as instruction accurately conveys concept); *Johnson v. Alabama*, 256 F.3d 1156, 1191 (11th Cir. 2001) ("If a trial court does attempt to define reasonable doubt, it must explain the standard correctly[.]"); *United States v. Mejia*, 597 F.3d 1329, 1340 (D.C. Cir. 2010) (rejecting challenge to jury instruction defining reasonable doubt when defendant "offer[ed] no reason why the Constitution would apply differently simply because he preferred no instruction").

[2] See, e.g., Third Circuit Pattern Criminal Jury Instructions § 3.06 (2021); Fifth Circuit Pattern Criminal Jury Instructions § 1.05 (2019); Sixth Circuit Pattern Criminal Jury Instructions § 1.03 (2022); Eighth Circuit Pattern Criminal Jury Instructions § 3.11 (2021); Ninth Circuit Pattern Criminal Jury Instructions § 6.5 (2022); Tenth Circuit Pattern Criminal Jury Instructions § 1.05 (2021); Eleventh Circuit Pattern Criminal Jury Instructions § BI B3 (2020). I am confident that our circuit's pattern instruction committee can likewise craft an appropriate instruction.

discretion to ever provide a definition, and the Supreme Court has "never held that the concept of reasonable doubt is undefinable[.]" *Victor*, 511 U.S. at 26 (Ginsburg, J., concurring in part and concurring in the judgment).

In my view, while district courts need not define the term for the jury as a matter of course (particularly where the meaning of the phrase has not been put at issue), I am not convinced that there will never be a case in our circuit where the jury will not benefit from an instruction defining this seminal phrase.

This is a case in point. Here is the full exchange on this issue that took place in front of the jury during the government's closing argument:

> PROSECUTOR: … keep in mind the government's burden; it is beyond a reasonable doubt. It is not beyond all doubt. It is not beyond any shadow of a doubt.
>
> DEFENSE COUNSEL: I'm going to object to defining a "reasonable doubt." The jurors can do that for themselves.
>
> COURT: [Prosecutor], your response?
>
> PROSECUTOR: My response is that I'm not defining it so much as explaining that [sic] what it is not.
>
> COURT: I don't think at this point [prosecutor] has gone out of bound here, so I'll allow it go ahead.
>
> PROSECUTOR: The only thing I'll add to that is any doubt you have --

> COURT: Let met interject one thing though.
>
> PROSECUTOR: Yes, sir.
>
> COURT: I've not instructed you as to any definition of "beyond a reasonable doubt" or "reasonable doubt," so that is for you to ultimately determine what you believe to be reasonable doubt. Go ahead, [defense counsel].
>
> DEFENSE COUNSEL: Judge, I still believe that it's improper argument. There's a reason that's not defined.
>
> COURT: I understand, but he's moving on. Go ahead, [prosecutor].

After the prosecutor defined reasonable doubt for the jury, to me it would have been better for the district judge to simply have included an instruction to the jury—after the lawyers' arguments concluded—along these lines:

> [T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. 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.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very 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. 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.

Federal Judicial Center Pattern Criminal Jury Instructions § 21 (1988). This "clear, straightforward, and accurate" definition of reasonable doubt "plainly informs the jurors that the prosecution must prove its case by more than a mere preponderance of the evidence, yet not necessarily to an absolute certainty." *Victor*, 511 U.S. at 26–27 (Ginsburg, J., concurring). This instruction would have been better—for both the jury and the parties—after the government had put the definition at issue. Instead, the district judge followed our precedent and left it completely to the jurors to determine what they believed reasonable doubt meant. At least to me, that route seems much more likely to lead to confusion among jurors than providing them with an accurate definition of reasonable doubt.

All the other circuits give district judges at least some discretion to define reasonable doubt depending on the unique circumstances of the case, and most provide them with language accurately conveying the concept. We should too.