1 September 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*, v. Senior Airman (E-4), TRENTLEE D. MCCLOUR, USAF, *Appellant*.	))))))))	FINAL BRIEF ON BEHALF OF THE UNITED STATES USCA Dkt. No. 16-0455/AF Crim. App. No. 38704

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
	)	
v.	)	USCA Dkt. No. 16-0455/AF
	)	
Senior Airman (E-4), TRENTLEE D. MCCLOUR, USAF, *Appellant*.	)	Crim. App. No. 38704

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUE PRESENTED

WHETHER AFCCA ERRED WHEN IT FAILED TO GRANT RELIEF WHERE THE MILITARY JUDGE INSTRUCTED THE MEMBERS, "IF BASED ON YOUR CONSIDERATION OF THE EVIDENCE, YOU ARE FIRMLY CONVINCED THAT THE ACCUSED IS GUILTY OF ANY OFFENSE CHARGED, YOU MUST FIND HIM GUILTY," WHERE SUCH AN INSTRUCTION IS IN VIOLATION OF UNITED STATES v. MARTIN LINEN SUPPLY CO., 430 U.S. 564, 572-73 (1977) AND THERE IS INCONSISTENT APPLICATION BETWEEN THE SERVICES OF THE INSTRUCTIONS RELATING TO WHEN MEMBERS MUST OR SHOULD CONVICT AN ACCUSED.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally accepted.

STATEMENT OF FACTS

In his preliminary instructions to the court members, the military judge instructed:

> If, based on your consideration of the evidence, you're firmly convinced that the accused is guilty of the offense charged, you must find him guilty. If, on the other hand, you think there is a real possibility the accused is not guilty, you must give him the benefit of the doubt and find him not guilty.

(J.A. at 29.)

As part of his findings instructions, the military judge repeated this charge. The entirety of the reasonable doubt instruction given prior to findings reads as follows:

> A "reasonable doubt" is a conscientious doubt based upon reason and common sense, and arising from the state of the evidence. Some of you may have served as jurors in civil cases, or as members of an administrative board[], 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 accused'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 accused is guilty of any

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

(J.A. at 30, 67-68.)

Trial defense counsel did not object to any of these instructions. Appellant was convicted of the specification of abusive sexual contact, but acquitted of the specification of rape. (J.A. at 59.)

SUMMARY OF THE ARGUMENT

The military judge did not err by instructing the members "[i]f, based on your consideration of the evidence you are firmly convinced that the accused is guilty of any offense charged, you must find him guilty." AFCCA similarly did not err in denying Appellant relief. The challenged instruction was not the equivalent of a directed verdict of guilty by the military judge, and there is no reasonable likelihood that the court members understood it as such. Contrary to Appellant's argument, the military judge was also not prohibited by Article 51(c), UCMJ from giving the instruction. The instruction was a correct statement of the law, since court-martial panels have a duty to follow the law, and there is no right to jury nullification. Numerous federal courts have, in fact, upheld the propriety of instructing jurors that they "have a duty to" or "must" convict an accused if they are convinced beyond a reasonable doubt of his guilt.

Furthermore, the instruction is by no means constitutionally deficient, as Appellant claims, because there is no reasonable likelihood that the members in this case applied it in an unconstitutional manner during Appellant's trial. Although Appellant contends that "additional safeguards" are necessary to ensure every military conviction is supported by proof beyond a reasonable doubt, he has not met his burden of establishing why military conditions require such additional safeguards. Nor has Appellant explained what statute or rule would form the basis for the creation of these additional safeguards.

Even if the instruction at issue somehow constituted error, that error was not plain or obvious. There is no settled law establishing that the challenged instruction constitutes reversible error. Rather, there is an abundance of military and federal case law approving of the use of this same instruction. Finally, Appellant cannot demonstrate he was prejudiced by any error in the instruction. The members clearly understood their ability to acquit Appellant, as they did in fact acquit him of the far more serious specification of the Charge.

ARGUMENT

THE MILITARY JUDGE DID NOT COMMIT ERROR, PLAIN OR OTHERWISE, BY INSTRUCTING THE MEMBERS "IF, BASED ON YOUR CONSIDERATION OF THE EVIDENCE, YOU ARE FIRMLY CONVINCED THAT THE ACCUSED IS GUILTY OF ANY OFFENSE CHARGED, YOU MUST FIND HIM GUILTY."

THUS, AFCCA DID NOT ERR IN DENYING APPELLANT RELIEF.

Standard of Review

Whether a court-martial panel was properly instructed is a question of law reviewed de novo. United States v. Medina, 69 M.J. 462, 465 (C.A.A.F. 2011) (*citing* United States v. Ober, 66 M.J. 393, 405 (C.A.A.F. 2008)). When counsel does not object to an instruction at trial, this Court reviews for plain error. United States v. Tunstall, 72 M.J. 191, 193 (C.A.A.F. 2013). Plain error occurs when (1) there is error, (2) the error is plain and obvious, and (3) the error results in material prejudice to a substantial right. Id.

Law and Analysis

The reasonable doubt instruction given by the military judge in this case is taken from the Federal Judicial Center's Pattern Criminal Jury Instructions, 17-18 (1987) (Instruction 21). United States v. Meeks, 41 M.J. 150, 157 n.2 (C.M.A. 1994). It is the standard reasonable doubt instruction included in the Air Force court-martial script in the Air Force Electronic Benchbook.[1] As recognized by AFCCA in its decision in this case, this instruction "is – and has been for many years – an accepted reasonable doubt instruction used in Air Force courts-martial."

[1] Available online at: https://www.jagcnet.army.mil/sites/trialjudiciary.nsf/homeContent.xsp?open&documentId=49C01E1BE32A5FF885257B48005712E2.

United States v. McClour, ACM 38704 (A.F. Ct. Crim. App. 11 Feb. 2016) (unpub. op.) (J.A. at 10.)

Appellant contends that the part of the instruction which stated "[i]f, based on your consideration of the evidence you are firmly convinced that the accused is guilty of any offense charged, you must find him guilty" amounted to plain error. Appellant asserts plain and obvious error despite the fact that this honorable Court suggested the adoption of this very instruction in Meeks, 41 M.J. at 157 n.2, and despite the fact that no federal court has ever held this specific instruction to be reversible error. United States v. Mejia, 597 F.3d 1329, 1340 (D.C. Cir. 2010). Appellant's assertion of error, let alone plain error, is unpersuasive for the following reasons.

a. The military judge did not direct a verdict against Appellant.

Appellant first contends that the military judge's instruction constituted an impermissible "directed verdict." According to Black's Law Dictionary, a directed verdict is "a judgment entered on the order of a trial judge who takes over the fact-finding role of the jury because the evidence is so compelling that only one decision can reasonably follow or because it fails to establish a prima facie case." Black's Law Dictionary, 555 (7th ed. 1999). The United States agrees that the military judge is prohibited from directing a verdict of guilty in favor of the Government. *See* Carpenters v. United States, 330 U.S. 395, 410 (1947); United

States v. Hardy, 46 M.J. 67, 73 (C.A.A.F. 1997). However, that is clearly not what happened in this case.

(1) Several Courts have held that similar instructions including the phrase "you must find him guilty" did not constitute a directed verdict.

Several courts have specifically rejected the claim that similar or identical instructions containing the language "you must find him guilty" amounted to a direct verdict against the Appellant. In Mejia, 597 F.3d at 1340-41, the Court of Appeals for the D.C. Circuit found that an identical instruction to the one given in Appellant's case did not "invade the jury's province," and that there was no reasonable likelihood that the jury applied the instruction in a manner that violated the Constitution.

In Watts v. United States, 362 A.2d 706, 708-09 (D.C. 1976), the District of Columbia Court of Appeals determined that the trial judge's instruction that if the jurors found that the government had proven the existence of each element of the offense beyond a reasonable doubt, then they "must find the defendant guilty" was not a directed verdict of guilty. The Court considered that the trial judge had also instructed the jurors about the presumption of innocence, the government's duty to prove each element beyond a reasonable doubt, that they had to keep each offense separate during deliberations, that the jury had the sole power to determine the verdict, that the jury was free to exercise its own judgment as to the credibility of witness, and that the jury should disregard any intimated or expressed opinion of

the trial judge. Id. at 709-10. Under these circumstances, the D.C. Court of Appeals found "there could have been no uncertainty in the jurors' minds that unless they were convinced of the appellant's guilt beyond a reasonable doubt, no verdict but that of not guilty could be returned." Id. at 710.

In New Jersey v. Ragland, 519 A.2d 1361 (N.J. 1986), the Supreme Court of New Jersey conducted a detailed analysis of the use of the words "you *must* find him guilty" in jury instructions. The Court concluded that "[t]he use of the word 'must,' of course is not the same as a directed verdict. It is not even its functional equivalent." Id. at 1367-68. The Court further rejected the notion the use of the word "must" improperly coerces jury deliberations. Id. at 1373.

Even the Ninth Circuit case cited by Appellant, United States v. Bejar-Matrecios, 618 F.2d 81, 85 (9th Cir. 1980), acknowledged that an instruction that told the jury it had a duty to convict if it believe beyond a reasonable doubt the defendant was guilty "probably did not *divest the jury* of its power to return a verdict of acquittal and would not have been reversible error." (emphasis added). *See also* United States v. Stegmeier, 701 F.3d 574 (8th Cir. 2012) (instruction "if both these elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty . . . does not usurp the jury's role.") Burton v. Renico, 391 F.3d 764, 781 (6th Cir. 2004) (Prosecutor's voir dire question stating that if the *jurors* determined that the prosecution had proven

beyond a reasonable doubt that Burton had committed murder, then they would be under a duty to convict Burton "did not amount to an instruction to the jury that it must convict Burton irrespective of its own assessment of the evidence presented at trial.")

(2) The "directed verdict" cases cited by Appellant are distinguishable from this case.

In contrast to the cases discussed above, the other cases concerning directed verdicts cited by Appellant are distinguishable from the facts of this case. Appellant alleges that the reasonable doubt instruction given in this case violates United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977). While it is true that the Martin Linen Supply Co. opinion contains the statement, "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction," this line was not essential to the holding of the case. The Supreme Court's opinion ultimately resolved the question of whether the government could appeal the directed verdict of an acquittal. Id. at 575. Nothing about Martin Linen Supply Co. addressed the propriety of reasonable doubt instructions, or compels the conclusion that the reasonable doubt instruction in this case amounted to a directed verdict or was otherwise erroneous.

Therefore, it cannot be said that the military judge's instructions in this case "violated" Martin Linen Supply Co.[2]

United States v. Hayward, 420 F.2d 142 (D.C. Cir. 1969), another case cited by Appellant, is also distinguishable from this case. In Hayward, the trial judge attempted to clarify the alibi defense at issue in the case by instructing, "if . . . you find that the Government has proved beyond a reasonable doubt that the Defendant was present at the time when and at the place where the offense charged was committed, then you must find the Defendant guilty." Hayward, 420 F.2d at 143-44. In other words, the trial judge told the jury, perhaps inadvertently, that if the Government had disproved the alibi defense beyond a reasonable doubt, then they must find the defendant guilty. D.C. Circuit found this instruction to be reversible error because it denied the appellant his Sixth Amendment right to "to have a jury decide *all* relevant issues of fact and to weigh the credibility of the witnesses." Id. at 144 (emphasis added). However, the D.C. Circuit has subsequently clarified that its narrow holding in Hayward was based only on the fact that the alibi instruction "eliminated all considerations relevant to the jury's determination of

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[2] Similarly, Sullivan v. Louisiana, 508 U.S. 275 (1993), addressed whether a constitutionally deficient reasonable doubt instruction could ever be harmless error. The instruction at issue in Sullivan, however, was not similar to the one used in Appellant's case. It was found to be constitutionally deficient because of how it defined reasonable doubt, not because it directed a verdict. Once again, the reference to the prohibition on directed verdicts was not essential to the holding of the case. As such, the actual holding of Sullivan is not applicable to the question whether the instruction in Appellant's case constituted a directed verdict.

guilt, except whether the defendant was present at the scene of the crime at the time it occurred." United States v. Pierre, 974 F.2d 1355, 1357 (D.C. Cir. 1992). In Pierre, the D.C. Circuit held that the instruction "[i]f you find that the government has proven beyond a reasonable doubt every element of the offense with which the defendant is charged, and which I will define for you, it is your duty to find him guilty," was not a directed verdict and not erroneous. Id. The instruction in question in this case is much more similar to the instruction in Pierre, than to the instruction in Hayward. Moreover, unlike in Hayward, the instruction in this case did not eliminate any elements from the members' consideration.

(3) When considering the instructions in Appellant's case as a whole there is no reasonable likelihood that the members interpreted the instructions as directing them to reach a verdict of guilty.

To summarize the implication of the cases cited by both parties, a military judge directs a verdict when he or she usurps the role of the jury to determine all relevant issues of fact, to determine the credibility of the witnesses, or to determine the ultimate issue of guilt. A military judge may also not improperly coerce a verdict of guilty or override or interfere with the members' independent judgment. None of this occurred in Appellant's case. The Supreme Court has stated, "[a] single instruction to a jury may not be judged in artificial isolation, but must be viewed in context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 146-47 (1973). When considering the entirety of the military judge's instructions on

findings in this case, the military judge did not direct a verdict. The instruction to the members that they "must convict" Appellant was contingent upon the members first being firmly convinced of Appellant's guilt based on their own consideration of the evidence. (J.A. at 30, 68.) The members were also told that if, on the other hand, they believed there was a real possibility that Appellant was not guilty they *must* acquit him. (Id.) The instruction at issue made clear that *either* conviction *or* acquittal was an option available to the members depending on their own evaluation of the evidence.

Furthermore, the members were instructed that they must disregard any comment or statement or expression made by the military judge that might seem to indicate any opinion on the judge's part as to whether the accused was guilty or not guilty. (Id.) The military judge reminded the members, "*you alone* have the responsibility to make that determination." (Id.) (emphasis added). He likewise told them, "[t]he final determination as to the weight or the significance of the evidence and the credibility of the witnesses of the witnesses in this case rests *solely upon you*." (Id.) (emphasis added).

The military judge's instructions did not override or interfere with the members' independent judgment. Instead, his instructions repeatedly emphasized that it was the members' sole province to determine the issue of guilt. Based on the record, there is no evidence that the military judge usurped the members' fact-

finding role. As evidenced by the fact the members acquitted Appellant of one of the specifications of the Charge, there is no reasonable likelihood that the members understood the military judge's instructions to be a mandate to convict Appellant irrespective of their own evaluation of the evidence. As such, there is also no reasonable likelihood that the members applied the challenged instruction in a manner that violated Appellant's "absolute right to a trial before a properly constituted court with members."[3] *See* United States v. Greene, 43 C.M.R. 72, 73 (1970) (*citing* Article 16, UCMJ).

b. Article 51(c), UCMJ does not prohibit a military judge from instructing the members that if they are firmly convinced of the accused's guilt, they must find him guilty. Furthermore, court-martial panels have a duty to follow the law.

Appellant next claims that a military judge plainly errs when he instructs the members that if they are firmly convinced of the accused's guilt they *must* find him guilty, because such a duty is not enumerated in Article 51(c), UCMJ. (App. Br. 8-9.) Arguing the doctrine of *expressio unius est exclusio alterius*, Appellant

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[3] A directed verdict is considered a violation of the Sixth Amendment because it deprives a defendant to his right to a trial by jury. Hayward, 420 F.2d at 144. It should be noted that the Sixth Amendment right to a jury trial does not apply to courts-martial. United States v. Easton, 71 M.J. 168, 175 (C.A.A.F. 2012). Thus, while a directed verdict in a court-martial with members would be a violation of Articles 16, UCMJ, it is not a constitutional error as it would be in civilian courts. Although a military accused does not have a right to a "jury" under the Sixth Amendment, the Sixth Amendment still confers upon a military accused the right to be tried by a *fair and impartial* trier of fact. United States v. Curtis, 44 M.J. 106, 133 (C.A.A.F. 1996). Appellant has not contested the fairness or impartiality of his panel in this case.

encourages this Court to interpret Article 51(c) to prohibit the military judge from instructing the members that they are required to do anything other than what is expressly listed in Article 51(c). (Id. at 8.)

Appellant's reliance on the doctrine of *expressio unius est exclusio alterius* is misplaced. Appellant himself acknowledges that this principle of statutory construction, where an omission in a statutory scheme is presumed intentional, applies when "language is omitted in an *otherwise comprehensive* statutory scheme." (App. Br. at 8-10, n.2. *citing* United States v. Murphy, 74 M.J. 302, 309-10 (C.A.A.F. 2015) (Erdmann, J., concurring) (emphasis added)). But the Uniform Code of Military Justice (UCMJ) is, by its own design, not a "comprehensive statutory scheme." Through Article 36(c), UCMJ, Congress gave the President the authority to prescribe additional trial procedures in courts-martial which "apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts" which are not "contrary to or inconsistent" with the UCMJ. The President, in turn, has given the military judge the authority to give instructions on findings which "the military judge determines, sua sponte, should be given." R.C.M. 920(e)(7). Therefore, it cannot be fairly argued that the UCMJ prohibits a military judge from giving instructions that are not expressly enumerated Article 51(c). The military judge in this case did not

"usurp legislative authority" in giving the challenged instruction, as Appellant now claims on appeal. (App. Br. at 9.)

The UCMJ, read in conjunction with the Rules for Courts-Martial, establishes the duty for court members to find an accused guilty if they determine his guilt has been proved beyond a reasonable doubt. It is already well-recognized in federal law that juries have the duty to follow the law as instructed to them by the trial judge. As the Supreme Court articulated in Sparf and Hansen v. United States, 156 U.S. 51, 102 (1895), "[w]e must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence." *See also* United States v. Boardman, 419 F.2d 110, 116 (1st Cir.1969), cert. denied, 397 U.S. 991 (1970) (jurors' "duty is to apply the law as interpreted by the court, and they should be so instructed."); United States v. Carr, 424 F.3d 213, 219-20 (2d Cir. 2005) ("[n]othing in our case law begins to suggest that the court . . . cannot tell the jury affirmatively that it has a duty to follow the law, even though it may in fact have the power not to."); United States v. Drefke, 707 F.2d 978, 982 (8th Cir. 1983) (per curiam) ("[F]ederal courts have uniformly recognized the right and duty of the judge to instruct the jury on the law and the jury's obligation to apply the law to the facts.") In the military justice system, a similar

duty for court-martial members to follow the law arises out of the UCMJ and the Rules for Courts-Martial.

In R.C.M. 502(a)(2), the President provided that "[t]he members of a court-martial *shall* determine whether the accused is proved guilty and, if necessary, adjudge a proper sentence, based on the evidence and *in accordance with the instructions of the military judge.*" (emphasis added). R.C.M. 920(a) further states that "[t]he military judge shall give the members appropriate instructions on findings." These instructions "consist of a statement of the issues in the case and an explanation of *the legal standards* and procedural requirements by which the member will determine findings." R.C.M. 920(a) Discussion. (emphasis added). Moreover, Congress, in Article 42, UCMJ, and the President in R.C.M. 807(b)(1)(A), have prescribed that members of a general or special court-martial "shall take an oath to perform their duties faithfully."[4]

The only plausible interpretation of these Rules is that the court members *must* reach their verdict based on the legal standards articulated in the military judge's instructions. In other words, court-martial members must follow the law. The Rules say nothing about the member's ability to disregard the law or the

[4] R.C.M. 502(a)(2), 920(a) and 807(b)(1)(A) indisputably apply principles of law generally recognized in United States district courts, as required by Article 36(a). *Cf. e.g.* Sparf, Boardman, Carr, Drefke, *supra*. Moreover, these Rules for Courts-Martial are not contrary to or inconsistent with Article 51(c) or any other part of the UCMJ.

military judge's instructions.[5] Indeed, as this Court recognized in Hardy, "[n]either Congress nor the President . . . has authorized a court-martial panel to pick and choose among the laws and rules that are applicable to military life in order to determine which ones should be obeyed by members of the armed forces." Hardy, 46 M.J. at 74.

The punitive article at issue in this case, Article 120(d), UCMJ, abusive sexual contact, reads "any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act *is guilty* of abusive sexual contact and shall be punished as a court-martial may direct." (emphasis added). The plain language of the statute does not leave any room for debate. Congress did not use the words "may be found guilty" or "should be found guilty." Quite simply, the statute, when read in conjunction with R.C.M. 918(c)'s requirement that findings be proved beyond a reasonable doubt, means that if all the elements of Article 120(d) are in fact proved beyond a reasonable doubt, the accused *is guilty* of the offense. In this context, the members' duty pursuant to Rules 502,

[5] Notably, unwillingness to yield to the military judge's instructions is grounds for a challenge to and excusal of a court member based on actual bias. United States v. Nash, 71 M.J. 83, 88 (C.A.A.F. 2012). This Court has stated, "[b]oth the Government and the accused are entitled to members who will keep an open mind and decide the case based on evidence presented in court and the law as announced by the military judge." United States v. Reynolds, 23 M.J. 292, 294 (C.M.A. 1987).

807 and 920 to "follow the law" means they similarly have the duty to find the accused guilty if all elements of an offense are indeed proved beyond a reasonable doubt.

In light of the above, it was not error or in any way contradictory to Article 51(c), UCMJ, for the military judge to instruct the members that "if, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of any offense charged, you must find him guilty." Rather it was a correct articulation of military law.

c. A military accused does not have a right to jury nullification.

Appellant next erroneously claims that he has the "legal right to a panel that is authorized to disregard the law." (App. Br. at 15.) This Court has already dismissed that idea in Hardy, holding "a court-martial panel does not have the right to nullify the lawful instructions of a military judge." Hardy, 46 M.J. at 74. While it is correct that juries have the "power" to nullify, this power does *not* arise from an accused's "legal right to a panel that is authorized to disregard the law." Id. at 70. Instead, it results as a collateral consequence from policies such as "the requirement for a general verdict, the prohibition against a directed guilty verdict, the protection against double jeopardy, and the rules that protect the deliberative process of a court-martial panel." Id. at 75. "The courts cannot search the minds of the jurors to find the basis upon which they judge," and therefore must abide by

the jury's decision to acquit, no matter what the underlying reason might have been. Id. at 71 (quoting United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969)).

The Supreme Court of New Jersey has helpfully explained that "[t]he harm of the directed verdict . . . is that it deprive[s] the jury of the power to determine guilt; there is no suggestion or hint [in prior case law] that once having determined guilt, the jury's power thereafter to nullify its own determination is entitled to similar protection.´ Ragland, 519 A.2d at 1368. In other words, although a criminal defendant has the absolute right to have a jury determine his guilt, this right to trial by jury does not extend any further. It does not afford the defendant the right to then have the jury nullify its own determination that the defendant is guilty. Similarly, in the military justice system, the accused's right to be tried by a court-martial panel, as opposed to by military judge alone, does not include a right to have that panel nullify its own findings of guilt. *See also* United States v. James, 203 F.3d 836 (10th Cir. 7 February 2000) (unpublished table decision) ("A defendant's right to an impartial jury does not include a right to a jury composed of persons who will disregard the district court's instructions.")

In Hardy, this Court joined the majority of federal circuits in rejecting "the view that jury nullification should be recognized or encouraged." Id. at 70-72. *See* Boardman, 419 F.2d at 116 (1st Cir. 1969); Carr, 424 F.3d at 219-20 (2d Cir. 2005)

("the power of juries to 'nullify' is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent . . . courts have consistently recognized that jurors have no right to nullify."); Moylan, 417 F.2d at 1006 (4th Cir. 1969); United States v. Krzyske, 836 F.2d 1013, 1012 (6th Cir. 1988) ("To have given an instruction on nullification would have undermined the impartial determination of justice based on law"); United States v. Anderson, 716 F.2d 446, 449-50 (7th Cir. 1983); United States v. Wiley, 503 F.2d 106, 107 (8th Cir. 1974); United States v. Simpson, 460 F.2d 515, 518-19 (9th Cir. 1972); United States v. Trujillo, 714 F.2d 102, 105-06 (11th Cir. 1983) ("neither the court nor counsel should encourage jurors to violate their oath."); United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983) ("A jury has no more 'right' to find a 'guilty' defendant 'not guilty' than it has to find a 'not guilty' defendant 'guilty.") This Court further recognized that "[n]o federal court of appeals has rendered a contrary decision." Hardy, 46 M.J. at 71.

Appellant cites no other authority that would afford him the "right" to have his court-martial panel engage in nullification. In order for this Court to interpret a statute or presidential rule to confer a right greater than provided by a higher source, such as the Constitution, that statute or rule must be "unambiguous" in its intent to confer that right. *See* United States v. Czeschin, 56 M.J. 346, 348 (C.A.A.F. 2002); United States v. Davis, 47 M.J. 484, 486 (C.A.A.F. 1998). There

certainly is no statute or rule in the Manual for Courts-Martial, including Article 51(c), that unambiguously confers upon a military accused the right for his panel to engage in jury nullification. Under these circumstances, it was not error if the military judge's instructions implied that the members could not disregard the law, or could not engage in jury nullification.

d. Other federal courts have approved reasonable doubt instructions that inform the jury that they "have a duty to convict" or "must convict" if they are convinced beyond a reasonable doubt of the defendant's guilt.

More than just dismissing the notion of an accused's "right" to jury nullification, several federal circuits have explicitly held that it is permissible for a trial court to instruct the jury that it "has a duty" to find an accused guilty if convinced of the an accused's guilt beyond a reasonable doubt.[6] United States v. Appolon, 695 F.3d 44, 65 (1st Cir. 2012), Carr, 424 F.3d at 219-20; United States v. Johnson, 462 F.2d 423, 429 (3d Cir. 1972), *cert. denied,* 410 U.S. 937 (1973); Pierre, 974 F.2d at 1357.

Still more federal courts have ratified the notion that a trial judge may instruct the jury that if they are convinced beyond a reasonable doubt of the defendant's guilt, then they "must find" the defendant guilty. Stegmeier, 701 F.3d at 583; Mejia, 597 F.3d at 1340. Indeed, the reasonable doubt instruction approved

[6] As the D.C. Circuit recognized in Mejia, there is little effective difference between the language "must find him guilty" and "have a duty to find him guilty," and the Court considers "neither iteration more objectionable that the other." Mejia, 597 F.3d at 1340.

in Mejia was identical to the instruction given in Appellant's case. No circuit had found this particular reasonable doubt instruction, taken from the Federal Judicial Center's Pattern Criminal Jury Instruction 21, to be reversible error. Id. The Eighth and Tenth Circuit Courts of Criminal Appeals both use model jury instructions on reasonable doubt that contain the language "you must find [the defendant] guilty." (J.A. at 75, 81.) Tellingly, Appellant has not been able to cite any cases where the particular instruction used in his case, or one substantially similar to it, was held to be error requiring reversal.

Appellant claims that in Billeci v. United States, 184 F.2d 394 (D.C. Cir. 1950), the D.C. Circuit "held, *inter alia,* that use of the language 'must find the defendant guilty' was improper." (App. Br. at 17.) However, Appellant misreads that case. In Billeci, the trial judge instructed the jury "if you believe from the testimony that the defendants have committed the crime of which they are charged, then you must find a verdict of guilty." Id. at 399. In its subsequent Pierre decision, the D.C. Circuit itself explained that the instructional error in Billeci resulted because the district court "omitted from its instruction the phrase 'beyond a reasonable doubt.'" Pierre, 974 F.2d at 1357. The Court clarified, "we do not think it significant that the district court used the word 'must' instead of 'should.'" Id. As stated above, the D.C. Circuit has now specifically upheld the propriety the same reasonable doubt instruction used in this case. Mejia, 597 F.3d at 1340.

e. The military judge's instructions on reasonable doubt were not constitutionally deficient.

Appellant further alleges that the military judge instructed the members in a conflicting manner by stating on one hand that they "must convict" Appellant, but on the other hand that they should decide the question of guilt "according to the law I have given you, the evidence admitted in court, and your own conscience." (App. Br. at 9-10.) According to Appellant, the conflicting nature of the instructions rendered them constitutionally deficient. (Id.)

These instructions are not necessarily contradictory. In Sparf, the Supreme Court asserted, "upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, *upon their conscience*, believe them to be." Sparf, 156 U.S. at 102 (emphasis added). Thus, the Supreme Court considered jurors' use of their conscience to be part of their fact-finding duty. Instructing the members to decide matters according to their own conscience does not automatically imply that the members can or should engage in jury nullification. It could equally imply that the members must use their consciences to determine the facts of the case.

Even if the instructions were contradictory, they did not affect any constitutional right of Appellant. The Supreme Court has asserted that in reviewing the constitutionality of jury instructions "the proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner,

but whether there is a reasonable likelihood that the jury *did* so apply it." Victor v. Nebraska, 511 U.S. 1, 6 (1994) (citing Estelle v. McGuire, 502 U.S. 62, 72, n.4 (1991)) (emphasis in original). Appellant has no constitutional right to jury nullification, and therefore could not have been harmed by instructions that implied that the members could not engage in jury nullification. He equally could not have been harmed by a reference to the members' conscience that might arguably have suggested to the members that they could engage in jury nullification. If the members had understood the instructions to allow them to disregard the law, the mistake would have inured to the benefit of Appellant, rather than to the United States. Any such confusion could not have created a reasonable likelihood that the members applied the instructions in an unconstitutional manner.

Appellant also fails to explain how the instruction in question created the reasonable likelihood that the members in this case convicted Appellant using a standard less than beyond a reasonable doubt, in violation of the Fifth Amendment. The entirety of the instruction told the members, "proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt." Then, the members were instructed that if they were "firmly convicted that the accused is guilty" – meaning there was proof beyond a reasonable doubt as to his guilt - they must find him guilty. The military judge instructed the members that the prosecution had the burden to prove each and every element of each offense

beyond a reasonable doubt. (J.A. at 66.) In accordance with Article 51(c), UCMJ, the military judge advised the members that Appellant was presumed to be innocent until his guilt was established beyond a reasonable doubt, that if there was reasonable doubt, such doubt must be resolved in favor of Appellant, and that the burden to establish innocence never shifted to Appellant. (J.A. at 67.)

Trial counsel did not argue that the members should apply a lower standard of proof than proof beyond a reasonable doubt and did not highlight the military judge's instruction that included the phrase "must convict." Under these circumstances, there was no reasonable likelihood that the members misconstrued these instructions and actually convicted Appellant on a lesser standard than proof than beyond a reasonable doubt. That the court members appropriately understood the military judge's instructions is once again supported by the fact that they acquitted Appellant of the more serious specification with which he was charged. The reasonable doubt instruction was not constitutionally deficient.[7]

f. A military accused does not need any "additional safeguards" to ensure his conviction is supported by proof beyond a reasonable doubt.

Finally, Appellant claims that the military justice system requires "additional safeguards" to ensure that every conviction is supported by proof beyond a

[7] Appellant also suggests the reasonable doubt instruction was constitutionally deficient because "there was no guarantee that it was a panel and not the military judge rendering a verdict in Appellant's case." (App. Br. at 10.) Even if this were the case, it would not amount to a *constitutional* error, since Appellant had no constitutional right to a jury trial.

reasonable doubt." (App. Br. at 18.) As described in depth above, based on the plain language of the existing reasonable doubt instructions themselves, there is no reasonable likelihood that court-martial panel members will apply those instructions in a manner that lowers an accused's burden of proof or will interpret the instructions as a directed verdict. As such, Appellant's call for "additional safeguards" is essentially a solution in search of a problem.

"The burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976). Appellant has not met this burden. Appellant's suggestion that court members will hear the words "must convict" as an order simply because they are in the military is unconvincing and unrealistic. The instruction is clearly expressed as a conditional statement; the members must convict *only if* they are firmly convinced of the accused's guilt. If the members are not firmly convinced, they must acquit. "The average military court member is highly educated and has years of experience either leading or dealing with people." United States v. Simoy, 46 M.J. 592, 606 (A.F. Ct. Crim. App. 1996) *rev'd in part on other grounds.* Military court-martial members are also selected based on being "best qualified" for court-martial duty. Article 25(d)(2), UCMJ. As such, there is no likelihood that military court members

would somehow be more confused about this instruction than civilian jurors, thereby requiring "additional safeguards."

Appellant has described nothing else about military life that would require a right to jury nullification or that would create the need to suggest to court-martial members that they have the power to disregard the law in reaching their verdict. In fact, as this Court has already recognized in Hardy, military conditions strongly dictate *against* suggesting to court-members that are free to disregard the law and military judge's instructions. Hardy, 46 M.J. at 74. Court members should not have "an authoritative basis to determine that service members need not obey unpopular, but lawful orders from either their civilian or military superiors." Id. To imply to court members that they are free to disregard the law "would be antithetical both to the fundamental principle of civilian control of the armed forces in a democratic society and to the discipline that is essential to the successful conduct of military operations." Id.

This Court has likewise acknowledged that "the purpose of the Uniform Code of Military Justice . . . is the improvement of military discipline by the melioration of the administration of justice in the armed services." United States v. Johnson, 11 C.M.R. 174, 177, 178 (C.M.A. 1953). It is untenable to argue that military justice or military discipline would be improved by implying to court members that they may disregard the law and engage in jury nullification. "The

right to equal justice under the law inures to the public as well as to individual parties to specific litigation, and that right is debased when juries at their caprice ignore the dictates of established precedent and procedure." Hardy, 46 M.J. at 71-72 (quoting United States v. Gorham, 523 F.2d 1088, 1098 (D.C. Cir. 1975)). Similarly, the right to equal justice inures to military members who depend on the military justice system as a means of upholding good order and discipline.

While it is accurate that Article 31(b), UCMJ provides greater protections to servicemembers than the Constitution, those expanded rights were given to military members by Congress, not by a military court. It is unclear what existing, unambiguous statute or rule Appellant would have this Court interpret to create "additional safeguards" applicable to reasonable doubt instructions. In requesting "additional safeguards," Appellant appears to be asking for a heightened standard of "military due process." However, this Court has specifically rejected the idea that there is a "military due process" right that entitles servicemembers to "due process protections above and beyond the panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the *MCM*." United States v. Vazquez, 72 M.J. 13, 19 (C.A.A.F. 2013).

Ultimately, in advocating for the adoption of the language "should convict" versus "must convict," Appellant is making a policy argument. There is no law that requires such a change. The Supreme Court of New Jersey has aptly stated

that the only effect of using words “should convict” rather than “must convict” “is to make it more likely that juries will nullify the law, more likely, in other words, that no matter how overwhelming the proof of guilt, no matter how convinced the jury is beyond any reasonable doubt of defendant’s guilt, despite the law, it will acquit.” Ragland, 519 A.2d at 1367. The conditions of military life simply do not demand that court members be advised of this power. As such, there is no compelling reason for this Court to recommend the usage of the language “should convict” over “must convict.”[8] In any event, while this Court could decide to reverse course from Meeks and express a preference that military courts-martial use the “should convict” language, such a change would not render the “must convict” language error, much less plain error.

g. The military judge’s reasonable doubt instruction was not plain error.

For all the reasons discussed above, the military judge’s reasonable doubt instruction was not error. Even this Court finds error, such error certainly was not plain or obvious under existing law. “Plain error review requires this Court to look at ‘current law.’” United States v. Marsh, 70 M.J. 101, 108 (C.A.A.F. 2011)

[8] That there may be differences in how the various Armed Services define reasonable doubt is ultimately irrelevant to the resolution of this issue. “So long as the court instructs the jury on the necessity that the defendant’s guilt be proved beyond a reasonable doubt . . . 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. Likewise, “the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so.” Id.

(Ryan, J., with whom Stucky, J. joined, concurring in part and dissenting in part). *See also* United States v. Weintraub, 273 F.3d 139, 152 (2d Cir 2001) (no plain error where no "binding precedent" at the time of trial or appeal established error); United States v. DeChristopher, 695 F.3d 1082, 1091 (10th Cir. 2012) ("An error is plain if it is clear or obvious under current, well-settled law.")

While it is settled law that a trial judge may not direct a verdict in a criminal case, there is no settled military or civilian law establishing that the reasonable doubt instruction in this case, the Federal Judicial Center's Pattern Criminal Jury Instruction 21, was the equivalent of a directed verdict. There is likewise no settled military or civilian law establishing that this instruction is otherwise reversible error. In fact, all existing law on this particular instruction says the opposite.

In Meeks, 41 M.J. at 157 n.2, this Court suggested that the Armed Services "reexamine their reasonable doubt instruction," and specifically identified the exact instruction given in this case as "one possibility." Although this recommendation was essentially dicta contained in a footnote, the recommendation is still persuasive. It is difficult to understand how using an instruction could be "obvious" error, when the military's superior Court has suggested the use of the very same instruction. Furthermore, both AFCCA and the Navy-Marine Corps Court of Criminal Appeals (NMCCA) have upheld the propriety of this instruction.

United States v. Sanchez, 50 M.J. 506, 509 (A.F. Ct. Crim. App. 1999); United States v. Jones, 46 M.J. 815 (N-M. Ct. Crim. App. 1997). *See also,* Marsh, 70 M.J. at 108 (Ryan, J., with whom Stucky, J. joined, concurring in part and dissenting in part) (finding it persuasive in a plain error analysis that the relevant CCA had determined the argument at issue to be permissible).

In her concurrence in Victor, Justice Ginsburg described the Federal Judicial Center's Pattern Criminal Jury Instruction 21 as being "clear, straightforward, and accurate." Victor, 511 U.S. at 26. (Ginsburg, J., concurring in part and concurring in judgment). She further stated, "[t]his model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensively." Id. at 27.

Moreover, many federal circuits have either endorsed the use of the Federal Judicial Center's Pattern Criminal Jury Instruction 21, or at the very least found its use not to be reversible error. United States v. Gibson, 726 F.2d 869, 873-74 (1st Cir. 1984), cert. denied, 466 U.S. 960 (1984); United States v. McBride, 786 F.2d 45, 52 (2d Cir. 1986) *rev. on other grounds;* United States v. Mahabir, 1997 U.S. App. LEXIS 13058, 13-14 (4th Cir. 1997) (unpublished table opinion);[9] United

[9] In United States v. Porter, 821 F.2d 968, 973 (4th Cir. 1987), the Fourth Circuit, expressing its general disdain for any attempt to define reasonable doubt, found the instruction to be error, in that it introduced "unnecessary concepts of being 'firmly convinced' of guilt and a "real possibility of innocence." However, the Court granted no relief, because it found that the error "did not affect the substantial

States v. Hunt, 794 F.2d 1095, 1100-1101 (5th Cir. 1986); Harris v. Bowersox, 184 F.3d 744, 751-52 (8th Cir. 1999) cert. denied, 528 U.S. 1097 (2000); United States v. Artero, 121 F.3d 1256, 1258 (9th Cir. 1997) cert. denied, 522 U.S. 1133 (1998); United States v. Conway, 73 F.3d 975, 980 (10th Cir. 1995); Mejia, 597 F.3d at 1340 (D.C. Cir. 2010).

The fact that Meeks and these other federal circuit opinions might not have specifically addressed the "must convict" verses "should convict" debate[10] does not make them any less relevant to a discussion of plain error. Presumably a federal court or a Supreme Court Justice would not endorse an instruction if any part of it was error, let alone constitutional error.

Given the support for the Federal Judicial Center's Pattern Criminal Jury Instruction 21 by this Court, AFCCA, NMCCA, Justice Ginsburg, and at least eight federal circuits and the existence of no federal case law finding it to be reversible error, the military judge's decision to give the instruction was not plain error.

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rights of the accused" because the "instructions taken as a whole properly described the prosecution's burden and the protection the law affords the accused." Id. In Mahabir, the Fourth Circuit has apparently changed course and has now been persuaded by Justice Ginsburg's concurrence and other Fifth and Tenth Circuit opinions that the instruction is proper. 1997 U.S. App. LEXIS 13058 at 13.

[10] Most of these decision address the propriety of the Federal Judicial Center's Pattern Criminal Jury Instruction 21 in the context of whether the words "firmly convinced" or "real possibility" adequately convey the concept of reasonable doubt.

h. Appellant was not prejudiced by any error in the reasonable doubt instruction.

Appellant contends that automatic reversal without testing for prejudice is required in this case based on Sullivan, 508 U.S. at 280, because the instructional error in this case consisted of an improper description of the burden of proof. However, even if the reasonable doubt instruction did contain an improper description of the burden of proof, Sullivan would not apply to Appellant's court-martial.

In Sullivan, the Supreme Court found structural error specifically because the defective reasonable doubt instruction resulted in a violation of the Sixth Amendment right to a jury verdict of guilty beyond a reasonable doubt. Id. at 278. But, as stated earlier, the Sixth Amendment right to a jury trial does not apply to courts-martial. Easton, 71 M.J. at 175. Since there was no Sixth Amendment violation in this case, Sullivan does not require reversal without first testing for prejudice.

Even if challenged instruction otherwise rose to the level of constitutional error, this Court can test any such error in the instruction for prejudice. Neder v. United States, 527 U.S. 1, 8 (1999) ("[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis") (internal citations omitted). *See also* Porter, 821 F.2d at 973 (evaluating

perceived error in the reasonable doubt instruction and finding no prejudice to the accused's substantial rights.)

Appellant has not demonstrated material prejudice to a substantial right in his case. Reading the findings instructions as a whole, as the Supreme Court has required courts to do, the members were correctly instructed on the presumption of innocence, that Government alone had the burden of proof, that each and every element of every offense had to be proven beyond a reasonable doubt, that any doubt had to be resolved in favor of Appellant, and that it was the members' sole province to determine the issue of guilt. These proper instructions compensated for any possible error in the isolated statement, "if, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of any offense charged, you must find him guilty." In findings argument, trial counsel did not argue for a lower burden of proof or emphasize the military judge's reasonable doubt instruction.

Assuming that any error in the instruction constituted constitutional error, -- and Appellant has not made a convincing argument that any of his *constitutional* rights were violated -- such error in this case would also have been harmless beyond a reasonable doubt. In light of the entirety of the findings instructions, the challenged instruction had no effect upon the guilty verdict. *See* United States v. Wolford, 62 M.J. 418, 420 (C.A.A.F. 2006) ("The inquiry for determining whether

constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence.") (internal quotations omitted). The members clearly understood that they had the ability to acquit the Appellant if they were not convinced beyond a reasonable doubt of his guilt, as they did for one of the specifications of the Charge.

In sum, the military judge did not commit error or plain error in instructing the members, "if, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of any offense charged, you must find him guilty." Even if the instruction was somehow error, Appellant suffered no material prejudice to a substantial right. The Air Force Court of Criminal Appeals did not err in refusing to grant Appellant relief.

<u>CONCLUSION</u>

WHEREFORE the Government respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 1 September 2016.

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COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because:

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/s/____
MARY ELLEN PAYNE, Major, USAF
Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 1 September 2016

APPENDIX

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TORRENCE KEITH JAMES, Defendant-Appellant.

No. 98-1479

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

2000 U.S. App. LEXIS 1738*; *2000 Colo. J. C.A.R. 727

February 7, 2000, Filed

NOTICE: [*1] RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *2000 U.S. App. LEXIS 5569*. Certiorari Denied October 2, 2000, Reported at: *2000 U.S. LEXIS 6474*.

PRIOR HISTORY: (D. Colo.). (D.C. No. 98-CR-168-M).

DISPOSITION: AFFIRMED.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff- Appellee: Henry L. Solano, U.S. Attorney, David M. Gaouette, Asst. U.S. Attorney, Denver, CO. John M. Hutchins, United States Attorneys Office, Denver,CO.

For TORRENCE KEITH JAMES, Defendant - Appellant: Kerry S. Hada, Paul Grant, Englewood, CO.

JUDGES: Before BALDOCK, BRISCOE, Circuit Judges, and CROW, District Judge. **

** The Honorable Sam A. Crow, Senior United States District Judge for the District of Kansas, sitting by designation.

OPINION BY: SAM A. CROW

OPINION

ORDER AND JUDGMENT *

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citations of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of *10th Cir. R. 36.3*.

[*2] Torrence Keith James appeals his convictions on four counts of distributing crack cocaine in violation of *21 U.S.C. § 841*, [1] arguing that the district court impermissibly struck on its own motion one prospective juror during voir dire and then improperly instructed the jury regarding their obligation to follow the law as imparted by the court. James contends that these errors deprived him of his right to a fair trial. The defendant also appeals the four sixty-five month concurrent sentences imposed by the district court on each count of conviction. The defendant contends that the district court erred when it denied his request for a "downward departure" for acceptance of responsibility pursuant to *United States Sentencing Guidelines § 3E1.1* and that the district court denied his request for allocution prior to the imposition of sentence. This court exercises jurisdiction pursuant to *28 U.S.C. § 1291* and affirms.

1 At trial, the government introduced evidence of controlled buys from the defendant. The telephone conversations arranging the controlled buys from James were tape recorded. Law enforcement officers took photographs of James as he sold crack cocaine to a cooperating witness. The cooperating witness who actually purchased the crack cocaine from James testified at trial. In this appeal, the defendant does not challenge the sufficiency of the evidence.

[*3] I. Challenges to the District Court Sua Sponte Striking a Prospective Juror and the District Court's Instructions to the Jury

During voir dire, the district court sua sponte excused prospective juror William A. Altonin, a professor emeritus from Denver University. On appeal, the defendant argues that the district court committed reversible error when it sua sponte struck prospective juror Altonin from the venire. Concomitant with his challenge to striking Altonin, the defendant argues that the district court incorrectly informed the jurors that it is their duty to follow the law as it instructed. The defendant contends that this admonition was a structural error mandating reversal. The defendant argues that the jury always has the power to acquit and that the district court's instructions trampled on the independence of the jury, making it impossible for the jury to render a fair decision in this case.

The government responds, arguing that the district court's decision to strike Altonin as a prospective juror was entirely appropriate under the circumstances and that the district court's instructions regarding the jury's duty to follow the law as given to it by the court [*4] were absolutely correct.

Factual Summary

After discussing the nature of the case and many of the fundamental principles of criminal law--the presumption of innocence, the jury's duty to consider only the evidence admitted and the government's burden of proof--with the entire jury panel, the district court directed its questions to a prospective juror named John S. Cowan, an attorney and solo practitioner. In response to the district court's inquiry, Cowan explained the nature of his civil and criminal practice. The district court then posited the following question: Could we agree on this, although you're an experienced trial lawyer, when it comes time for me to give the instructions in the case and I instruct the jury, you're ready to accept my view of the law as given in the instructions, even though, if it should, may conflict with your view?" Cowan responded "Yes." (Rec. vol. 3, 35). The following is an excerpt of the voir dire of prospective juror Altonin that immediately followed:

THE COURT: Okay. Are any others of you lawyers? Mr. Altonin?

MR. ALTONIN: Yes. I taught criminal law at D.U. about 25 times. I'm not a lawyer--

THE COURT: But you've taught law?

MR. [*5] ALTONIN: Yes.

THE COURT: And are you teaching now?

MR. ALTONIN: No, I'm a professor emeritus for D.U.

THE COURT: And when was it that you taught criminal law?

MR. ALTONIN: From 1966 until I think 1987.

THE COURT: So when you say 25 times, you mean 25 periods, academic periods?

MR. ALTONIN: Sometimes I taught more than once a year.

THE COURT: Yeah. And includes a procedure course?

MR. ALTONIN: No, I did not teach procedure.

THE COURT: Would you be--were you teaching common law, criminal law?

MR. ALTONIN: We relied heavily on codes.

THE COURT: And particularly Colorado?

MR. ALTONIN: No.

THE COURT: Federal?

MR. ALTONIN: Largely, the model penal code.

THE COURT: Okay, Well, I'll have to ask you the same question I asked our practicing attorney, whether you're willing to accept the law from me as I give it in instructions?

MR. ALTONIN: I don't know.

THE COURT: And why do you say that?

MR. ALTONIN: Something may come up that I'd feel very strongly about.

THE COURT: Like what?

MR. ALTONIN: I can't imagine now.

THE COURT: Well, you know it's your duty--

MR. ALTONIN: My inclination is to follow the judge's instructions.

THE COURT: Which of course is what the duty of [*6] a juror is.

MR. ALTONIN: Yes. I've got one qualm there.

THE COURT: Which is?

MR. ALTONIN: That a jury always has the power to acquit.

THE COURT: Well, that's right.

MR. ALTONIN: Not withstanding the evidence.

THE COURT: Well, the jury, in your view, can take the law unto itself?

MR. ALTONIN: Yes, for the purpose of acquittal in a criminal case.

THE COURT: I'm going to excuse you. You're excused.

(Rec. vol. 3, 35-37).

Neither the defendant nor the Government lodged any objection of any kind regarding the dismissal of prospective juror Altonin. The district court then provided the following explanation for removing Mr. Altonin as a prospective juror:

> Now, we were on the subject of experience with the law. I just excused the professor because he expressed a view that the jury can disregard the law. I'm surprised to hear that's being taught, if it is being taught. But at any rate, that's not the law. As I have explained patiently and carefully, the jury has to accept the law as it is, and it's up to the jury to decide on the evidence, you know, whether the evidence meets this high standard of proof, and can certainly decide on an acquittal, as he said, if the evidence [*7] doesn't persuade or convince you beyond a reasonable doubt. But the jury can't make up the law, and that's the little exchange that we had there, and I'm sure you followed along with that, but I wanted to make it plain why it was that I excused this teacher.

(Rec. vol. 3, 38). No objection to this explanation for striking Altonin and these instructions regarding the jury's obligation to follow the law was advanced by either party.

Standard of Review

"It is well settled that the district court has broad discretion in determining how to handle allegations of juror bias." *United States v. Bornfield, 145 F.3d 1123, 1132 (10th Cir. 1998), cert. denied, 145 L. Ed. 2d 935, 120 S. Ct. 986, 2000 U.S. LEXIS 882, 2000 WL 48814 (2000).* "'The trial judge is vested with a wide discretion for determining the competency of jurors and his judgment will not be interfered with except in the case of an abuse of discretion.'" *United States v. Contreras, 108 F.3d 1255, 1265* (10th Cir.) (quoting *United States v. Porth, 426 F.2d 519, 523* (10th Cir.) (internal quotation marks omitted), *cert. denied, 400 U.S. 824, 91 S. Ct. 47, 27 L. Ed. 2d 53 (1970)), cert. denied,* [*8] *522 U.S. 839.*

See United States v. Torres, 128 F.3d 38, 42 (1st Cir. 1997) (trial judge has the authority and responsibility, either sua sponte or upon counsel's motion, to dismiss prospective jurors for cause), *cert. denied, 523 U.S. 1065 (1998).*

Because James did not object to the district court's sua sponte removal of prospective juror Altonin or to the district court's instructions to the jury, we review for plain error. *See United States v. Hughes, 191 F.3d 1317, 1322 (10th Cir. 1999).* To establish plain error, James "'must show: (1) an error, (2) that it is plain, which means clear or obvious under current law, and (3) that affects substantial rights.'" *Id.* (quoting *United States v. Fabiano, 169 F.3d 1299, 1302 (10th Cir. 1999)).*

Juror Qualifications

A criminal defendant is guaranteed a trial "by an impartial jury." U.S. Const. amend. VI. "One touchstone of a fair trial is an impartial trier of fact--'a jury capable and willing to decide the case solely on the evidence before it.'" *McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554, 78 L. Ed. 2d 663, 104 S. Ct. 845 (1984)* [*9] (quoting *Smith v. Phillips, 455 U.S. 209, 217, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982)).* A juror should be excused for cause if a particular belief will "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985). See United States v. Simmons, 961 F.2d 183, 184 (11th Cir. 1992)* ("The constitutional standard for juror impartiality is whether the juror 'can lay aside his opinion and render a verdict based on the evidence presented in court.'") (quoting *Patton v. Yount, 467 U.S. 1025, 1037 n. 12, 81 L. Ed. 2d 847, 104 S. Ct. 2885 (1984)), cert. denied, 507 U.S. 989 (1993).*

A defendant's right to an impartial jury does not include a right to a jury composed of persons who will disregard the district court's instructions. "There is no right to jury nullification." *Crease v. McKune, 189 F.3d 1188, 1194 (10th Cir. 1999)* (citing *United States v. Thomas, 116 F.3d 606, 615 (2d Cir. 1997)* (stating that "the power of juries to 'nullify' [*10] or exercise a power of lenity is just that--a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent") and *United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1992)* (defendants not entitled to jury nullification instructions)).

To the extent the defendant's appeal seeks to require courts to facilitate jury nullification, the law is clear: a criminal defendant is not entitled to have the jury instructed that it can, despite finding the defendant guilty beyond a reasonable doubt, disregard the law. *See United States v. Grismore, 546 F.2d 844, 849 (10th Cir. 1976).* The jury's role is to apply the law to the facts of the case.

United States v. Rith, 164 F.3d 1323, 1337 (10th Cir. 1999), cert. denied, 145 L. Ed. 2d 66, 120 S. Ct. 78 (1999). Cf. United States v. Mason, 85 F.3d 471, 473 (10th Cir. 1996) ("While we recognize that a jury in a criminal case has the practical power to render a verdict at odds with the evidence or the law, a jury does not have the lawful power to reject stipulated facts. Such a power, if exercised, [*11] would conflict with the jurors' sworn duty to apply the law to the facts, regardless of outcome.").

Analysis

In light of his responses to questions during voir dire, the district court did not abuse its discretion or commit plain error in sua sponte dismissing prospective juror Altonin. A person who is either unwilling or unable to follow the court's instructions is not qualified to be a juror. Nor did the district court commit any error when it informed the jurors that it is their obligation to follow the law as it instructs. In short, the defendant was not deprived of his right to a fair trial.

II. Challenges to Sentencing

The defendant contends that the district court erroneously denied his request for a two level "downward departure" for acceptance of responsibility under *U.S.S.G. § 3E1.1.* The defendant contends that he only went to trial to preserve his *Singleton* [2] argument, that he has expressed remorse for his crimes and has in fact accepted responsibility. The defendant notes that he provided information to the government and met the requirements of the "safety valve" provision, *18 U.S.C. § 3553(f)* yet did not receive a [*12] two level reduction for acceptance of responsibility, implying that there is no rational explanation for this result. The defendant also contends that the denial of his request for the two level "departure" is effectively a punishment for exercising his *Sixth Amendment* right to trial by jury. Finally, the defendant contends that the district court denied his request for allocution on the issue of acceptance of responsibility and that such an error requires remand for

resentencing.

2 *See United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998)* (prosecuting attorney violated *18 U.S.C. § 201(c)(2)* when he offered leniency to a co-defendant in exchange for truthful testimony), *vacated pending rehearing en banc, 144 F.3d at 1361 (10th Cir. 1998), on rehearing en banc, United States v. Singleton, 165 F.3d 1297, 1298 (10th Cir. 1999)* ("We now hold *18 U.S.C. § 201(c)(2)* does not apply to the United States or an Assistant United States Attorney functioning within the official scope of the office."), *cert. denied, 527 U.S. 1024, 119 S. Ct. 2371, 144 L. Ed. 2d 775 (1999).*

[*13] The government responds to each of the defendant's allegations, arguing that the defendant was not entitled to a reduction in his sentence for acceptance of responsibility, that the denial of acceptance of responsibility is not a punishment, that the defendant's qualification for the safety valve provision did not automatically entitle him to the two level reduction for acceptance of responsibility, and that the defendant was in fact afforded the opportunity to speak to the court prior to the imposition of sentence.

Two Level Downward Adjustment

Although the defendant's brief framed this issue in terms of the district court's denial of his request for a "downward departure" for acceptance of responsibility, using the nomenclature of the sentencing guidelines, the defendant was in reality seeking a two level downward adjustment in his base offense level for his acceptance of responsibility, not a downward departure from the sentencing guidelines. Although a district court may downwardly depart from the applicable guideline range if the defendant demonstrates remorse to an exceptional degree, *see United States v. Fagan, 162 F.3d 1280, 1284-85 (10th Cir. 1998)* [*14] ("Remorse is a factor taken into account by the Sentencing Guidelines under acceptance of responsibility. If a factor is already taken into account by the Sentencing Guidelines, it is a permissible factor for departure if it is present to some exceptional degree. (Citations omitted). Because remorse is not a prohibited factor, but a factor already considered in the Sentencing Guidelines, a sentencing court may depart downward if it finds that remorse is present to an exceptional degree."), the defendant in this case simply argues that the district court should have granted him a two point reduction in his base offense level for acceptance of responsibility under *§ 3E1.1. See United States v. Gauvin, 173 F.3d 798, 805 (10th Cir. 1999)* ("If 'the defendant clearly demonstrates acceptance of responsibility for his offense,' *the district court grants a two offense-level downward adjustment.*") (quoting *U.S.S.G. § 3E1.1(a)*) (emphasis added), *cert. denied, 145 L. Ed. 2d 210, 120 S. Ct. 250 (1999).* Consequently, and as the defendant's counsel conceded during oral argument, the issue on appeal is not whether the district court committed reversible error [*15] in denying the defendant's request for a "downward departure, but instead whether the district court erroneously denied the defendant's request for a downward adjustment of two levels for acceptance of responsibility under *U.S.S.G. § 3E1.1(a).*

Standard of Review

"Determination of acceptance of responsibility is a question of fact reviewed under a clearly erroneous standard." *Gauvin, 173 F.3d at 805* (citing *United States v. Mitchell, 113 F.3d 1528, 1533 (10th Cir. 1997), cert denied, 522 U.S. 1063, 139 L. Ed. 2d 665, 118 S. Ct. 726,* (1998)). "The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review." *U.S.S.G. § 3E1.1, Application Note 5.*

Acceptance of Responsibility

"The defendant bears the burden of establishing entitlement to a reduction under *§ 3E1.1.*" *United States v. Bindley, 157 F.3d 1235, 1240 (10th Cir. 1998)* (citing *United States v. Nelson, 54 F.3d 1540, 1544 (10th Cir. 1995)), cert. denied, 119 S. Ct. 1086 (1999).* [*16] "To receive a reduction, the defendant must show 'recognition and affirmative acceptance of personal responsibility for his criminal conduct.' *United States v. McAlpine, 32 F.3d 484, 489* (10th Cir.) (quoting *U.S.S.G. § 3E1.1(a)*), *cert. denied, 513 U.S. 1031, 130 L. Ed. 2d 520, 115 S. Ct. 610 (1994).* A "defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." *U.S.S.G. § 3E1.1, Application Note 1(a).*

The Sentencing Commission recognizes that the acceptance of responsibility guideline is "not intended to apply to a defendant that puts the government to its

burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." *U.S.S.G. § 3E1.1, Application Note 2*. The commentary to *§ 3E1.1* continues, stating that "conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction.... [A] determination that a defendant [who exercised his constitutional right to a trial] has accepted responsibility will be based [*17] primarily upon pre-trial statements and conduct." *Id. See Gauvin, 173 F.3d at 805*; *United States v. Moudy, 132 F.3d 618, 621* (10th Cir.), *cert. denied, 523 U.S. 1036, 140 L. Ed. 2d 494, 118 S. Ct. 1334 (1998)*; *United States v. Allen, 129 F.3d 1159, 1166-67 (10th Cir. 1997)*.

"In 'rare situations' a defendant may deserve the reduction for acceptance of responsibility even though he goes to trial." *United States v. Portillo-Valenzuela, 20 F.3d 393, 394* (10th Cir.), *cert. denied, 513 U.S. 886 (1994)*. As an example of an exception to the general rule against receiving a downward adjustment for acceptance of responsibility following conviction by trial, "this may occur...where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute of his conduct)." *U.S.S.G. § 3E1.1, Application Note 2*. As another example, "the entrapment defense is one of those 'rare situations' contemplated by the Sentencing Guidelines in which a defendant may go to trial and still [*18] receive an acceptance of responsibility reduction." *United States v. Garcia, 182 F.3d 1165, 1173 (10th Cir. 1999)* ("We hold only that raising the entrapment defense does not necessarily foreclose the possibility of receiving a reduction for acceptance of responsibility, but that does not mean that the simple assertion of the entrapment defense coupled with acknowledgment of the underlying criminal activity automatically entitles a defendant to a two-point acceptance of responsibility reduction."). Similarly, a defendant who proceeds to trial only to contest the legal element of intent may still, in rare instances receive, a reduction for acceptance of responsibility. *Gauvin, 173 F.3d at 806*. In contrast, "pleading not guilty and requiring the government to prove guilt at trial demonstrates denial of responsibility, regardless of how easily the government can prove guilt." *Portillo-Valenzuela, 20 F.3d at 394-95*. "A defendant is not entitled to an adjustment for acceptance of responsibility merely because he admits to wrongdoing." *United States v. McMahon, 91 F.3d 1394, 1397* (10th Cir.), *cert. denied, 145 L. Ed. 2d 414, 120 S. Ct. 535 (1999)*. [*19]

Singleton

Prior to trial, the defendant filed a motion to stay the trial pending final resolution of the *Singleton* case by the Tenth Circuit. That motion was denied by the district court as it believed that its own prior decision in *United States v. Dunlap, 17 F. Supp. 2d 1183 (D. Colo. 1998)* (agreements by government with cooperating witnesses does not violate the anti-gratuity statute) correctly stated the law. During trial the defendant renewed his *Singleton* motion, arguing that permitting the prosecution to introduce the testimony of witnesses cooperating with the government in exchange for the potential of a reduced sentence or other benefits would constitute a violation of *18 U.S.C. § 201*.

Prior to sentencing, James expressed remorse for his crimes, took responsibility for his acts and informed the district court that he had gone to trial for the purposes of creating and preserving his record on the *Singleton* issue. The district court rejected the defendant's request for a downward adjustment for acceptance of responsibility.

James' contention that he proceeded to trial solely to preserve his *Singleton* [*20] challenge is belied by the fact he denied guilt at trial, put the government to the burden of proving the crimes charged, challenged the evidence offered and presented a defense suggesting that he was involved in illicit gambling, not drug trafficking, and that the recorded conversations received into evidence were not related to drug deals but instead to gambling transactions.

The district court's conclusion that the defendant in this case did not go to trial solely to preserve his *Singleton* challenge and that he is not entitled to a two level adjustment for acceptance of responsibility is not clearly erroneous. The defendant formally denied factual guilt by pleading not guilty, forcing the government to prove his factual guilt at trial. The defendant's pleas and insistence on proceeding to trial "brought into question whether he manifested a true remorse for his criminal conduct." *United States v. Ochoa-Fabian, 935 F.2d 1139, 1143 (10th Cir. 1991), cert. denied, 503 U.S. 961 (1992)*. Contrary to the defendant's argument in his reply brief, nothing precluded him from seeking to enter conditional pleas to preserve his *Singleton* challenge. In [*21] any event, the district court was in a much better position to

evaluate the defendant's purported reasons for going to trial. The district court's denial of the defendant's request for an adjustment for acceptance of responsibility was not clearly erroneous.

Unconstitutional Penalty

The defendant's contention that the denial of his request for a two level reduction for acceptance of responsibility is an unconstitutional penalty for exercising his constitutional right to proceed to trial is an argument that has been repeatedly rejected by the Tenth Circuit:

> [The defendant] also argues that the Constitution prevents the court from penalizing him for his exercise of the right to trial. However, denying the reduction for acceptance of responsibility is not a penalty for exercising any rights. The reduction is simply a reward for those who take full responsibility. Therefore the court may constitutionally deny the reduction if the defendant's exercise of a constitutional right is inconsistent with acceptance of responsibility. *See United States v. Gordon, 4 F.3d 1567, 1573 (10th Cir. 1993)* (holding that denying reduction for acceptance of responsibility [*22] is not an unconstitutional penalty for exercising *Fifth Amendment* rights); *United States v. Jones, 302 U.S. App. D.C. 273, 997 F.2d 1475, 1477 (D.C. Cir. 1993)* (explaining that withholding leniency does not penalize defendant for exercising right to trial), *cert. denied, 510 U.S. 1065, 114 S. Ct. 741, 126 L. Ed. 2d 704 (1994)*; *United States v. Rogers, 921 F.2d 975, 982-83* (10th Cir.) (stating that denying downward adjustment does not penalize exercise of *Fifth Amendment* rights), *cert. denied, 498 U.S. 839, 111 S. Ct. 113, 112 L. Ed. 2d 83 (1990)*; *cf. Corbitt v. New Jersey, 439 U.S. 212, 223, 99 S. Ct. 492, 499, 58 L. Ed. 2d 466 (1978)* (holding that state may constitutionally reduce sentences for those who plead guilty).

Portillo-Valenzuela, 20 F.3d at 395.

The Safety Valve Provision

The "safety valve" provision, *18 U.S.C. § 3553(f)*, provides:

> Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled [*23] Substances Act (*21 U.S.C. 841, 844, 846*) or section 1010 or 1013 of the Controlled Substances Import and Export Act (*21 U.S.C. 960, 963*), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--
>
> (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
>
> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
>
> (3) the offense did not result in death or serious bodily injury to any person;
>
> (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
>
> (5) not later than the time of the sentencing hearing, [*24] the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or

> of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

U.S.S.G. § 5C1.2 adopts verbatim *18 U.S.C. § 3553(f)*.

Section 3553(f) was enacted as a "safety valve" to permit courts to sentence less culpable defendants to sentences under the guidelines, instead of imposing mandatory minimum sentences. As the legislative history of the section states, without such a safety valve, for "the very offenders who most warrant proportionally lower sentences--offenders that by guideline definitions are the least culpable--mandatory minimums generally operate to block the sentence from reflecting mitigating factors." H.R.Rep. No. 103-460, 103d Cong., 2d Sess., 1994 WL 107571 (1994). This would have the unfortunate effect that the "least culpable offenders [*25] may receive the same sentences as their relatively more culpable counterparts." *Id.*

United States v. Acosta-Olivas, 71 F.3d 375, 378 (10th Cir. 1995).

"To override a mandatory minimum sentence, a defendant must prove that he meets all five requirements of the safety valve provision." *United States v. Gonzalez-Montoya, 161 F.3d 643, 651 (10th Cir. 1998), cert. denied, 119 S. Ct. 1284 (1999). See United States v. Verners, 103 F.3d 108, 110 (10th Cir. 1996)* ("Although we have not previously ruled in this circuit on the burden as applied to *U.S.S.G. § 5C1.2*, we now follow the reasoning set out by other circuits and hold that the defendant has the burden of proving, by a preponderance of the evidence, the applicability of this section."). In regard to the fifth requirement of the safety valve provision, the Tenth Circuit has held that *§ 3553(f)(5)* requires a defendant to tell the government all that he knows about the offense of conviction and the relevant conduct, including the identities and participation of others in order to qualify for relief from the statutory mandatory minimum sentence. *Acosta-Olivas, 71 F.3d at 377.* [*26]

"The safety valve provision and acceptance of responsibility under *U.S.S.G. 3E1.1(a)* are not coterminous." *Gonzalez-Montoya, 161 F.3d at 652.* "Conviction by a jury does not foreclose relief under the safety valve provision." *Id.* (citation omitted). Conversely, the commentary to *§ 3E1.1* makes clear that a defendant who "puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse" is not entitled to a two level reduction for acceptance of responsibility. Consequently, the district court's finding that the defendant qualified for the safety valve provision did not automatically entitle him to a downward adjustment for acceptance of responsibility.

Allocution

The defendant contends that the district court treated his request for a two level departure as a purely legal question and denied his request to address the court with regard to that issue during sentencing. The defendant contends that this ruling violated *Fed. R. Crim. P. 32(a)(1)(C)* and his right of allocution. The government responds, arguing that the defendant's counsel was provided [*27] an opportunity to object to the PSIR and that the district court did not impose sentence until ruling on those objections. In any event, the government contends that the court actually provided the defendant with an opportunity to address the court prior to imposing sentence.

"Before imposing sentence the court must 'address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence.'" *United States v. Archer, 70 F.3d 1149, 1151 (10th Cir. 1995)* (quoting *Fed. R. Crim. P. 32(a)(1)(C)*). "The right to allocution is an integral part of the sentencing process which if not fully afforded to the defendant requires a reversal of the sentence imposed." *United States v. Muniz, 1 F.3d 1018, 1025* (10th Cir.) (*citing Green v. United States, 365 U.S. 301, 304, 5 L. Ed. 2d 670, 81 S. Ct. 653 (1961)), cert. denied, 510 U.S. 1002 (1993).*

We have reviewed the transcript of the sentencing hearing and are satisfied that the defendant was specifically afforded an opportunity to address the district court prior to imposition of sentence. In fact, prior [*28] to the pronouncement of sentence the defendant personally addressed the district court and offered these comments regarding his reasons for going to trial and why he should be entitled to a downward adjustment of

two levels for acceptance of responsibility:

> And the only reason I did go to trial was to preserve my issues on *Singleton* and to keep them on record, Your Honor. I never tried to shirk the responsibility. I never tried to run. When the police came to get me, we came peacefully. There was no problem, waived extradition to get back to take care of this, Your Honor.

(Rec. vol. 5, 13).

Conclusion

The district court did not err in sua sponte striking prospective juror Altonin, nor did it err by informing the jurors that they are required to follow the law as it instructs. The district court did not err in refusing to grant the defendant's request for a two-point reduction in his base offense level for acceptance of responsibility, nor did it deny the defendant his right of allocution.

AFFIRMED.

Entered for the Court

Sam A. Crow

District Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BOYSIE MAHABIR, Defendant-Appellant.

No. 95-5311

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1997 U.S. App. LEXIS 13058

April 11, 1997, Argued
June 4, 1997, Decided

NOTICE: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *114 F.3d 1178, 1997 U.S. App. LEXIS 20585.*

PRIOR HISTORY: Appeal from the United States District Court for the District of Maryland, at Baltimore. Benson E. Legg, District Judge. (CR-93-22-L).

DISPOSITION: AFFIRMED.

COUNSEL: ARGUED: Samuel Aaron Abady, ABADY, LUTTATI, KAISER, SAURBORN & MAIR, P.C., New York, New York, for Appellant.

John Francis Purcell, Jr., Assistant United States Attorney, Baltimore, Maryland, for Appellee.

ON BRIEF: Michael B. Lumer, Henry L. Saurborn, ABADY, LUTTATI, KAISER, SAURBORN & MAIR, P.C., New York, New York, for Appellant.

Lynne A. Battaglia, United States Attorney, Baltimore, Maryland, for Appellee.

JUDGES: Before HAMILTON, LUTTIG, and WILLIAMS, Circuit Judges.

OPINION

PER CURIAM:

Boysie Mahabir appeals his convictions for conspiracy to possess cocaine with the intent to distribute and to distribute cocaine, *see 21 U.S.C. §§ 841(a)(1)* and *846*, and possession of cocaine with the intent to distribute, and aiding and abetting the same, *see 21 U.S.C. § 841(a)(1)* and *18 U.S.C. § 2*. Mahabir also challenges his sentence. We affirm.

I

[*2] In late December 1992, in Mahabir's presence, Rayford Knight, the owner of a trucking company located in Brooklyn, New York, instructed Cary Grace, a truck driver employed by Mahabir, to drive a tractor-trailer from Brooklyn, New York to Los Angeles, California to pick up a number of Christmas presents. On his westbound trip, the trailer Grace was pulling was seized by police in Van Horn, Texas because it was stolen. Thereafter, Knight instructed Grace to drive the tractor to Houston to pick up some packages and return them to New York. On January 8, 1993, five boxes, unmarked and wrapped in brown paper with tape, were loaded into the tractor.

At 2:48 a.m. on January 11, as he was returning to

New York, Grace was stopped for running a red light in La Plata, Maryland by Officer Kevin Barrows of the Charles County Police Department. Following the stop, Barrows asked Grace for his driver's license and the tractor's registration. A check of Grace's New York driver's license revealed that it was suspended on October 25, 1992. The tractor's registration revealed that the tractor was registered to Boysie Trucking, Inc., 32 Van Houten Avenue, Jersey City, New Jersey. The address on the registration [*3] was the same address as Mahabir's residence.

Barrows arrested Grace for driving with a suspended out-of-state license and placed Grace in his patrol car. Barrows then decided to search the tractor. Upon entering the tractor, Barrows discovered the five boxes directly behind the driver's seat in the sleeper compartment. [1] During his subsequent search of the boxes, Barrows discovered 199 kilograms of cocaine.

1 The sleeper compartment was separated from the driver's compartment by a curtain, which apparently was open at the time of the search.

Later that morning, the Charles County Police Department notified the Drug Enforcement Administration (DEA) of the cocaine seizure. A short time later, Grace agreed to cooperate with the DEA in its investigation. The essence of the DEA's investigative plan was to have Grace call his conspirators in New York and tell them that he had been admitted to Physician's Memorial Hospital in La Plata with chest pains, with the expectation that his conspirators would travel to Maryland [*4] to retrieve the cocaine. Meanwhile, the tractor was placed in the parking lot of the hospital and put under surveillance.

The phone number provided by Grace for the controlled calls was that of Cherokee Enterprises, the trucking company Knight owned in Brooklyn, New York. Mahabir often used Knight's office to book loads, write up trip logs and general office paperwork. At 3:30 p.m. on January 11, Grace called Knight and told him that he had developed chest pains and stopped at a hospital in La Plata, Maryland. Grace gave Knight the number of the "hospital," which was actually the number of a DEA undercover phone.

At 5:00 p.m., Mahabir called the number of the DEA undercover phone and asked for directions to the hospital and to speak to Grace. Mahabir was given directions to the hospital and informed that Grace did not have a phone in his room, but that a message could be delivered to his room. Mahabir left a message for Grace that it was "very important" that he "call the office." (J.A. 1232).

At 5:30 p.m., Grace called Knight's office. Knight told Grace that Mahabir was on his "way down there to get it." *Id. at 1233.* Knight added: "This way he can get it out of there, you know [*5] what I mean?" *Id.*

Mahabir traveled to La Plata that evening in a pickup truck with Anthony Johnson, an individual who performed odd jobs for Knight and, on occasion, Mahabir. At approximately 12:40 a.m. on January 12, Mahabir and Johnson arrived at the hospital. Mahabir instructed Johnson to circle the tractor and park near the entrance of the hospital, which Johnson did.

A short time later, at Mahabir's direction, Johnson walked to the tractor to see if the boxes were still in the truck. As Johnson approached the tractor, Mahabir maintained a concealed vantage point at the rear of a nearby Dash-In to observe Johnson. Johnson briefly entered the tractor, saw the boxes and went back to Mahabir and informed him that the boxes were still in the truck. Following this conversation, Mahabir directed Johnson to unload the boxes. When Johnson asked for Mahabir's assistance, he refused.

Johnson went to the pickup truck and proceeded to drive it to the parked tractor. Johnson then started removing the boxes from the tractor. As Johnson was removing the boxes from the tractor, he was arrested. Shortly thereafter, Mahabir was arrested as he was walking in a direction away from the Dash-In [*6] and the hospital.

On January 19, 1993, a federal grand jury sitting in the District of Maryland returned a two-count indictment charging Mahabir and Knight with conspiracy to possess cocaine with the intent to distribute and to distribute cocaine, *see 21 U.S.C. §§ 841(a)(1)* and *846*, and possession of cocaine with the intent to distribute, and aiding and abetting the same, *see 21 U.S.C. § 841(a)(1)* and *18 U.S.C. § 2*. Following a jury trial, Mahabir was convicted on both counts. The district court sentenced Mahabir to 188 months' imprisonment. Mahabir noted a timely appeal.

II

Mahabir argues that the district court erred when it concluded that Barrows' search of the five boxes was lawfully conducted incident to Grace's arrest. 2 This argument has no merit.

2 The government apparently concedes that Mahabir had standing to contest the validity of the search by virtue of his ownership interest in the tractor. Also of note, Mahabir does not challenge the validity of Grace's arrest.

In *New York v. Belton,* [*7] *453 U.S. 454, 69 L. Ed. 2d 768, 101 S. Ct. 2860 (1981)*, the Supreme Court created a bright-line rule that incident to a lawful arrest of an occupant of an automobile a police officer may conduct a contemporaneous search of the passenger compartment of the automobile and any containers therein. *Id. at 460-61*. The applicability of this exception to the *Fourth Amendment's* warrant requirement does not turn on the defendant's presence in the passenger compartment or actual ability to grab items therein. *See, e.g., United States v. Moorehead, 57 F.3d 875, 877-78 (9th Cir. 1995)* (*Belton* search conducted while defendant was seated in patrol car).

Applying *Belton* and its progeny to the facts of this case leads to the conclusion that the district court correctly denied Mahabir's motion to suppress. Grace's arrest was lawful, thereby permitting a search of the passenger compartment incident to that arrest. The cocaine was discovered in the passenger compartment during that search; 3 therefore, the cocaine was not the product of an unlawful search and was properly admitted at trial. *See Belton, 453 U.S. at 460-61*.

3 Mahabir does not dispute that the sleeper compartment of the tractor is part of the passenger compartment of the tractor.

[*8] Mahabir contends that, under *Belton*, Barrows was not entitled to open the boxes because they were wrapped in brown paper and taped. However, the Court in *Belton* rejected this argument in favor of a bright-line rule permitting the search of all containers in the passenger compartment. In *Belton*, the Court stated that "the police may . . . examine the contents of any containers found within the passenger compartment." *Id. at 460*; *see also United States v. McCraw, 920 F.2d 224, 228 (4th Cir. 1990)* ("Incident to an automobile occupant's lawful arrest, police may search the passenger compartment of the vehicle and examine the contents of any containers found within the passenger compartment."). Indeed, the boxes at issue here fall within the Court's definition of "container" set forth in *Belton*:

> "Container" here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere
>
> within the passenger compartment, as well as luggage, boxes, bags, clothing and the like.

Belton, 453 U.S. at 460 n.4. Because *Belton* applies to any container found [*9] in the passenger compartment of an automobile, the manner in which the five boxes were wrapped is irrelevant.

III

Mahabir also contends that the district court's instruction on the definition of reasonable doubt following the jury's request for a definition of the term constitutes reversible error. This argument also has no merit.

In instructing the jury on the definition of reasonable doubt, the district court stated:

> Ladies and Gentlemen, you have asked for an instruction on the term reasonable doubt. And I will give you some clarifying language, although the term reasonable doubt, and the phrase beyond a reasonable doubt, really means what it says, and it is, in my view, its own best description.
>
> If you think that the government has proved guilt beyond a reasonable doubt then you should convict. If you think that a reasonable doubt exists, as to the defendant's innocence, then you should find him not guilty. But having said that I will give you some language which may help you understand this principle. But the problem is that if you try to define beyond a reasonable doubt there is always the fear that you may make the concept cloudier

> rather than [*10] clearer, and I think the phrase itself is clear.
>
> The 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.

(J.A. 1207-08).

Mahabir challenges the "firmly convinced" language that appears in the district court's instruction. According to Mahabir, "telling the jurors who want reasonable doubt defined that they [*11] should be 'firmly convinced' of Mahabir's guilt tells them nothing about how to analyze the evidence to insure Mahabir would not be wrongfully convicted." Appellant's Brief at 45.

We have consistently instructed district courts not to define reasonable doubt. *See, e.g., United States v. Reives, 15 F.3d 42, 45 (1994)*; *United States v. Moss, 756 F.2d 329, 333 (4th Cir. 1985)*. We have adopted this approach because "the term reasonable doubt has a 'self-evident meaning comprehensible to the lay juror,' which judicial efforts to define generally do more to obscure than to illuminate." *United States v. Headspeth, 852 F.2d 753, 755 (4th Cir. 1988)* (quoting *Murphy v. Holland, 776 F.2d 470, 475 (4th Cir. 1985), vacated on other grounds, 475 U.S. 1138, 106 S. Ct. 1787, 90 L. Ed. 2d 334 (1986))*. In *Reives*, we acknowledged that a number of our circuit decisions suggested that a definition of reasonable doubt could be given when the jury specifically requested one, but declined the defendant's "invitation to breathe precedential life into this long line of dicta." *15 F.3d at 46* & n.3 (collecting cases). We went on to hold that even when the jury requests a definition of reasonable doubt, the district [*12] court should refrain from giving an instruction. *Id. at 46*. However, the district court's decision to give a reasonable doubt instruction is not necessarily reversible error. In such a case, we must examine whether the instruction "taken as a whole . . . correctly conveys the concept of reasonable doubt to the jury." *Victor v. Nebraska, 511 U.S. 1, 114 S. Ct. 1239, 1243, 127 L. Ed. 2d 583 (1994)* (citation and internal quotes omitted).

In this case, the district court gave an instruction defining reasonable doubt only after the jury requested such an instruction. The definition of reasonable doubt that the district court gave the jury was almost identical to the definition of reasonable doubt endorsed by the Federal Judicial Center. *See* Federal Judicial Center, Pattern Criminal Jury Instructions 17-18 (1987) (instruction 21). Our inquiry, then, is whether this instruction correctly conveys the reasonable doubt standard.

Several circuit courts have endorsed the reasonable doubt instruction of the Federal Judicial Center. *See United States v. Conway, 73 F.3d 975, 980 (10th Cir. 1995)*; *United States v. Williams, 20 F.3d 125, 128-32 (5th Cir. 1994)*. In addition, in her concurring opinion in *Victor*, [*13] Justice Ginsburg specifically cited this instruction with approval as a "clear, straightforward, and accurate" explication of reasonable doubt. *114 S. Ct. at 1253* (Ginsburg, J., concurring in part and concurring in the judgment). After setting out the Federal Judicial Center's proposed jury instruction on reasonable doubt, Justice Ginsburg explained that the Federal Judicial Center's instruction "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." *Id.* Justice Ginsburg further opined that "the 'firmly convinced' standard for conviction, repeated for emphasis, is . . . enhanced by the juxtaposed prescription that the jury must acquit if there is a 'real possibility' that the defendant is innocent." *Id.*

We are persuaded by Justice Ginsburg's concurring opinion in Victor, the Fifth Circuit's decision in *Williams*

and the Tenth Circuit's decision in *Conway*. We agree that the "firmly convinced" phrase juxtaposed with the insistence that the defendant must be acquitted if there is a "real possibility" that he is innocent conveys a cogent statement of the reasonable [*14] doubt standard. Accordingly, we reject Mahabir's challenge to the district court's instruction on reasonable doubt.

IV

At sentencing, Mahabir argued that his crimes represented a single act of aberrant behavior justifying a downward departure from his guideline range. *See* United States Sentencing Commission, *Guidelines Manual*, Ch. 1, Pt. A, 4(d), p.s. Following our decision in *United States v. Glick, 946 F.2d 335, 338 (4th Cir. 1991)*, the district court declined to depart, concluding: "The facts presented are not of sufficient magnitude to warrant a departure under the aberrant behavior test because there was not, as stated in *Glick*, sufficient evidence of a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning." (J.A. 1396).

On appeal, Mahabir urges us to abandon the "spontaneity" requirement adopted in *Glick* in favor of the more expansive view of "aberrant behavior" adopted by the First, Ninth, and Tenth Circuits. *See United States v. Grandmaison, 77 F.3d 555, 561-64 (1st Cir. 1996)* (eschewing focus on spontaneity in favor of totality of circumstances approach); *United States v. Takai, 941 F.2d 738, 741-44* [*15] *(9th Cir. 1991)* (same); *United States v. Pena, 930 F.2d 1486, 1494-96 (10th Cir. 1991)* (same). As a panel of this court, we are in no position to overrule *Glick. See Brubaker v. Richmond, 943 F.2d 1363, 1381-82 (4th Cir. 1991)*. *Glick* settled the issue of what constitutes aberrant behavior, and we cannot disturb it. Accordingly, Mahabir's argument on this score must be rejected.

V

Mahabir raises an additional argument which he contends should be resolved in his favor. He contends that there is insufficient evidence in the record to support his convictions. We have reviewed this assignment of error and find it to be without merit. Accordingly, for the reasons stated herein, the judgment of the district court is affirmed.

AFFIRMED