No.

**IN THE**

# Supreme Court of the United States

JAMES LINDSEY,

*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

## PETITION FOR A WRIT OF CERTIORARI


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July 24, 2017

## QUESTION PRESENTED

The Due Process Clause requires the prosecution to prove every element of the crime beyond a reasonable doubt. Instructing the jury to presume that an element is satisfied is unconstitutional, because it shifts the burden to the defendant.

In this case, the jury was required to find that petitioner intended to deprive the owner of property without paying for it. The court instructed the jury that the defendant's actions were "evidence of [the requisite] intent . . . unless there is believable evidence to the contrary."

The question presented is whether the jury instruction violated due process by shifting to the defendant the burden of producing "believable evidence" to show that he lacked the requisite intent.

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**CASES:** **Page**

**STATUTES:**

**OTHER AUTHORITIES:**

## PETITION FOR A WRIT OF CERTIORARI

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Petitioner James Lindsey respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia.

## OPINIONS BELOW

The Virginia Supreme Court's opinion (Pet. App. 1a) is reported at 795 S.E.2d 311. The Virginia Court of Appeals' decision (Pet. App. 22a) is unreported.

## JURISDICTION

The Virginia Supreme Court entered its judgment on January 19, 2017. Pet. App. 1a. A petition for rehearing was denied on March 24, 2017 (Pet. App. 29a). On June 14, 2017, the Chief Justice extended the time until July 24, 2017. No. 16A1217. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * * ."

Virginia Code § 18.2-103 provides in pertinent part:

> Whoever, without authority, with the intention of converting goods or merchandise to his own or another's use without having paid the full purchase price thereof, or of defrauding the owner of the value of the goods or merchandise, (i) willfully conceals

> or takes possession of the goods or merchandise of any store or other mercantile establishment, * * * when the value of the goods or merchandise involved in the offense is less than $200, shall be guilty of petit larceny and, when the value of the goods or merchandise involved in the offense is $200 or more, shall be guilty of grand larceny. The willful concealment of goods or merchandise of any store or other mercantile establishment, while still on the premises thereof, shall be prima facie evidence of an intent to convert and defraud the owner thereof out of the value of the goods or merchandise.

## INTRODUCTION

This case presents an opportunity for this Court to resolve a deep and persistent conflict among state supreme courts on a fundamental issue that courts commonly deal with: whether a jury can be instructed to presume that the government has proved an element of the crime, absent evidence to the contrary. Consistent with this Court's admonition that the prosecution must prove *every* element beyond a reasonable doubt, most courts have held that instructing the jury to follow such a rebuttable evidentiary presumption is unconstitutional, because it shifts the burden from the prosecution to the defendant. But in this case, a divided Supreme Court of Virginia upheld a conviction even though the jury was told that the defendant's *actions* (actions not sufficient to make out any crime) must be treated as evidence of the defendant's criminal *intent*, "unless there is believable evidence to the contrary." The court's holding conflicts with the supreme courts of

ten other states and joins the minority side of a lopsided conflict. This Court should grant certiorari to resolve this split.

## STATEMENT

1. The Due Process Clause shields criminal defendants from conviction "except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged." *Sandstrom v. Montana*, 442 U.S. 510, 520 (1979) (emphasis in original); *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added). In a case in which the defendant exercises his right to jury trial, the jury must find each of those facts; it cannot simply be instructed that those facts presumptively exist. Giving such a direction to the jury would "'conflict with the overriding presumption of innocence . . . which extends to every element of the crime,' and would 'invade [the] factfinding function' which in a criminal case the law assigns solely to the jury." *Sandstrom*, 442 U.S. at 523 (citations omitted, brackets in original); *accord Francis v. Franklin*, 471 U.S. 307, 316 (1985).

Nor can a State evade that rule by making the presumption a "rebuttable" one. As this Court has recognized, instructing the jury to presume that an element is satisfied *unless the presumption is rebutted* shifts the burden of persuasion from the prosecution to the defendant. A rebuttable presumption "is perhaps less onerous from the defendant's perspective" than a conclusive one, "but it is no less unconstitutional." *Francis*, 471 U.S. at 317.

This Court has repeatedly reversed jury verdicts that rest on such an unconstitutional instruction. In *Sandstrom*, for instance, the defendant was charged

with murder, and the only disputed element was intent. 442 U.S. at 520-21. The jury was instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.* at 512, 513. This Court held that directing the jury to apply such a presumption was unconstitutional, whether or not the presumption could be rebutted. First, given that the jury was told "*[t]he law presumes*," without qualification, the jury could easily have interpreted the instruction as "an irrebuttable direction by the court to find intent once convinced" of predicate facts (the defendant's "voluntary" actions and their "ordinary" consequences). *Id.* at 517 (emphasis in original; brackets in original). This Court explained that it had repeatedly invalidated attempts to tell a jury that intent *must* be presumed from the defendant's actions. *Id.* at 522-23 (citing *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978)).

Second, even if the jury thought the defendant could rebut the presumption, that was no cure. That "effectively shift[s] the burden of persuasion on the element of intent." 442 U.S. at 517. And a defendant may not be required to *disprove* his criminal intent, even if the prosecution proves his criminal acts. *Id.* at 524 (citing *Mullaney v. Wilbur*, 421 U.S. 684 (1975)). Thus, whether Sandstrom's jury was told to apply a rebuttable presumption or a conclusive one, the instruction violated a basic guarantee of due process—proof beyond a reasonable doubt as to every element. *Id.*

Similarly, in *Francis*, this Court held unconstitutional a jury instruction that *expressly* made the presumption rebuttable. The key issue was again intent, and the jury was told that "[a] person of sound mind

and discretion is presumed to intend the natural and probable consequences of his acts *but the presumption may be rebutted*." 471 U.S. at 311 (emphasis added). The Court observed that a jury may be told that it *can* draw a particular inference; "[a] permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved." *Id.* at 314. But the prosecution in *Francis* was relieved of the burden to justify the inference: the jury was simply told, in "language of command," to apply it. *Id.* at 316.

The prosecution in *Francis* emphasized that the mandatory presumption was a rebuttable one. 471 U.S. at 316. But the language "'may be rebutted' could have indicated to a reasonable juror that the defendant bore an affirmative burden of persuasion once the State proved the underlying act." *Id.* at 318. The Court observed that "[a] mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective, but it is no less unconstitutional." *Id.* at 317.

The instruction's deficiency was not cured by a general instruction stressing that the prosecution held the burden of proof beyond a reasonable doubt for every element. 471 U.S. at 319. While the instruction creating the presumption must be assessed in light of the whole charge, a specific deficiency requires a specific cure; general language about burden of proof will not do. A reasonable juror, considering both the general and specific instructions, may have reconciled the two by believing that proof of the predicate act *did* "constitute[] [that] proof of intent beyond a reasonable doubt."

*Francis*, 471 U.S. at 319. The instruction was thus unconstitutional.

All told, a presumption is unconstitutional if there is a reasonable likelihood that a juror would (1) interpret an instruction as a command to find an element of a crime "once convinced of the facts triggering the presumption" or (2) interpret the instruction as a requirement that the defendant rebut the prosecution's triggering facts by presenting his own contrary facts. *Sandstrom*, 442 U.S. at 517, 524.[1]

2. Faced with a highly similar jury instruction in Virginia, James Lindsey fared differently than the defendants in *Sandstrom* and *Francis*. Mr. Lindsey, who is African-American, was a news aide at the *Washington Post*. Virginia Supreme Court Appendix ("Va. Sup. Ct. App.") 135. While at a clothing and hiking store in Arlington, Virginia, Mr. Lindsey got into a dispute with a store clerk who suspected him of shoplifting. Pet. App. 1a-2a; Va. Sup. Ct. App. 33. It was four days before Christmas, and Mr. Lindsey was shopping for his kids. Va. Sup. Ct. App. 136. He was holding two hats, a Macy's bag, and his jacket. *Id*. at 41, 104. Mr. Lindsey was carrying more than enough money to pay for both hats, and he was still in the store, not attempting to leave it. *Id.* at 143-44. A store employee, however, approached him and demanded that he give back

[1] While this Court framed the inquiry in *Francis* as how a "reasonable juror" could have read the instructions, 471 U.S. at 315 (quoting *Sandstrom*, 442 U.S. at 514), this Court has subsequently adopted a "single standard of review" for jury instructions, "the 'reasonable likelihood' standard." *Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991); *see Boyde v. California* 494 U.S. 370, 380-81 (1990).

the hats. Va. Sup. Ct. App. 105, 144. The police were called. *Id.* at 70.

At first, the store employees contended that Mr. Lindsey had removed theft-deterrent sensors from the two hats. *Id.* at 105, 145, 176. But there were never any sensors on the hats. *Id.* at 76, 202. So the employees' story changed: they accused Mr. Lindsey of concealing the hats he was holding by draping his jacket over them. *Id.* at 33, 35, 154. Mr. Lindsey became frustrated, he argued loudly, he threw the two hats at the wall, and he accused store employees of suspecting him because of his race. *Id.* at 33, 57, 118. Mr. Lindsey did not attempt to leave the store; indeed, he said he would wait four hours if necessary while the store reviewed video of the incident (which, it turned out, did not exist). *Id.* at 200. Once the police arrived, the store employees wanted the police to press assault charges based on Mr. Lindsey's throwing of the hats, and to ban Mr. Lindsey from the store. *Id.* at 87, 118. At some point an officer left the scene to get paperwork to ban Mr. Lindsey from the store; Mr. Lindsey attempted to run off and was arrested for "obstruction of justice," a charge that was later dismissed for lack of evidence. *Id.* at 97, 204; Va. Trial Ct. 174 (8-04-2014).

Mr. Lindsey was charged in Arlington Circuit Court with three offenses: assault and battery; obstruction of justice; and petit larceny, third or subsequent offense, in violation of Virginia Code §§ 18.2-103 and -104. Va. Sup. Ct. App. 1; Va. Trial Ct. 5-6 (8-04-14). The jury acquitted Mr. Lindsey of the assault charge, and the court struck the obstruction charge after the close of the prosecution's evidence because the prosecution failed to meet its burden. Va. Trial Ct. 174 (8-04-14);

Va. Trial Ct. 57 (8-05-14). Accordingly, only the larceny charge is at issue in this Court.

Relatively little time was spent at trial on the larceny charge. An employee of the store testified that he saw Mr. Lindsey place his jacket over the hats for about 20 seconds. Va. Sup. Ct. App. 31, 177. The employee's recollection was sufficiently shaky that he testified that Mr. Lindsey had three hats, not two; reminded on cross-examination that he had told a different story to the police, he changed his testimony. *Id.* at 34, 40-41. That was the prosecution's entire case on the larceny charge.

Over Mr. Lindsey's objection, the trial court gave the following instruction: "Willful concealment of goods or merchandise while still on the premises of a store is evidence of an intent to convert and defraud . . . unless there is believable evidence to the contrary." Pet. App. 2a, 31a. Mr. Lindsey specifically objected to that instruction because it unconstitutionally shifted the burden of persuasion under *Sandstrom*, and he proposed that the jury instead be instructed: "You *may* infer that willful concealment of goods or merchandise while still on the premises of a store is evidence of an intent to convert and defraud the owner of the value of the goods or merchandise." Pet. App. 2a (emphasis added), 30a; Va. Sup. Ct. App. 183-190. The trial court, however, rejected Mr. Lindsey's proposed instruction. Pet. App. 2a. The trial court also rejected Mr. Lindsey's motion to strike the larceny charge based on the lack of any evidence that Mr. Lindsey had the requisite intent. Va. Sup. Ct. App. 191-92.

After the court gave the prosecution's proposed jury instruction, the prosecution delivered a closing argu-

ment in which it argued that the only issue on the larceny charge was whether Mr. Lindsey had concealed the hats—never mentioning the intent element:

> There really is only one issue in this case, right? It's whether or not the defendant concealed those hats.
>
> * * * *
>
> The issue at the core of this trial is whether or not the defendant concealed those hats, and when you unpackage that, when you think about that further, it's really an issue of credibility.
>
> Mr. Knot[t] says one thing; the defendant says another. They are conflicting. They are binary. That either happened and there was concealment or it didn't.

*Id.* at 193.

After the defense closing argument, at which defense counsel emphasized that Mr. Lindsey "had money in his pocket, and he had every intention of paying for the hats," *id.* at 203, the prosecution in rebuttal said to the jury:

> Don't lose sight of what is important in this case. The whole defense is kicking up dust about things, trying to keep you from looking at what is important. What is important in this case is concealment. It's a credibility issue. All of this other stuff doesn't matter."

*Id.* at 204-05. Of course, the prosecution could only say that because the jury instruction had relieved it of the

need to prove the intent element of the crime once it proved concealment.

The jury subsequently convicted Lindsey of petit larceny, third or subsequent offense. Pet. App. 1a. The jury fixed and the court imposed a sentence of seven days of incarceration and a $2,000 fine, plus court costs. Va. Sup. Ct. App. 8.

3. The Virginia Court of Appeals affirmed the conviction. Pet. App. 22a-28a. The court held that the instruction was a "permissive inference," not a mandatory presumption. *Id.* at 25a.

The Virginia Supreme Court allowed a discretionary appeal on the question whether the jury instruction "impermissibly shifted the burden of proof to the defense, in violation of the Due Process clause of the Fourteenth Amendment to the United States Constitution." Va. Sup. Ct. App. 16.

4. Over a dissent, the Virginia Supreme Court affirmed. Pet. App. 1a-21a.

The majority held that the jury instruction about the relationship between concealment and intent "was a proper statement of the law." Pet. App. 8a. The majority relied primarily on an earlier precedent of the Virginia Supreme Court, *id.,* although in that case, unlike this one, the jury had expressly been instructed permissively: "you *may* reasonably infer" that a defendant who possesses stolen goods was the thief. *Id.* at 6a (quoting *Dobson v. Commonwealth*, 531 S.E.2d 569, 571 (Va. 2000)). Here, by contrast, the jury was instructed that the prosecution's evidence of concealment "*is* evidence" of intent. Nonetheless, the majority held that the jury instruction was permissive and in-

sufficient to shift the burden of persuasion, apparently because the instruction did not expressly state that evidence of concealment "alone satisfies" the burden of proving intent. *Id.* at 8a. And the majority noted other instructions generally requiring that the prosecution prove each element of the offense, *id.* at 9a-10a, though it did not attempt to distinguish those instructions from the similar instructions held inadequate to cure the unconstitutional burden-shifting in *Francis* and *Sandstrom*.

The majority emphasized that the jury could consider "any other evidence [of intent] that was presented to it"—presumably "contrary" evidence presented by a defendant, as the instruction's final clause recognizes. Pet. App. 8a. The majority held that the final clause—specifying that the presumption applies "unless there is believable evidence to the contrary"—did not shift the burden but in fact "reinforced that the Commonwealth had the burden of proving each element." *Id.*

Justices Goodwyn and Koontz dissented. Pet. App. 11a-21a. In their view, the language "unless there is believable evidence to the contrary" unconstitutionally shifted the burden. *Id.* at 19a-20a. "[R]ather than reinforcing the Commonwealth's burden" as the majority claimed, it "indicate[d] that rebuttal evidence was necessary to overcome the stated presumption regarding intent." *Id.* at 19a. That rebuttal evidence "logically would have been presented by the defendant," and "the jury would have expected such evidence to be offered by the defendant." *Id.* at 20a. And if the defendant did not do so, the jury would believe from the instruction that it *must* find the intent element proved, because the entire instruction was "cast in the language of a command." *Id.* at 13a (citing *Francis*, 471 U.S. at

316). The plain language of the instruction, the dissenters explained, "*requires* the jury to find the elemental fact of intent upon proof of the predicate fact of concealment." *Id.* (emphasis in original). Thus, they concluded, proof of concealment completely substitutes for proof of intent, "unless" the defendant disproves intent through "contrary" "evidence"—an unconstitutional shifting of the burden.

## REASONS FOR GRANTING THE WRIT

In this case, the Virginia Supreme Court disobeyed a "bedrock, axiomatic and elementary [constitutional] principle" that bars courts from using evidentiary presumptions in jury instructions—rebuttable or not—that reasonably might relieve the state of its burden to prove every element beyond a reasonable doubt. *Francis*, 471 U.S. at 313 (citations omitted). The state supreme court's decision conflicts not only with *Sandstrom* and *Francis*, but at least ten other state supreme courts rejecting similarly worded burden-shifting instructions. In every one of those States, Mr. Lindsey's conviction would have been reversed.

Similar language is regularly used in state and federal courts that have not yet rejected it. With no guidance from this Court, the conflict will continue to undermine the jury-trial right in a host of criminal cases, for crimes ranging from larceny to murder. This court should grant certiorari to resolve the conflict on this recurring and important constitutional question.

## I. The decision below conflicts with the precedent of ten other state supreme courts.

In looking at the specific language in Lindsey's jury instruction, Virginia determined that the instruction "merely" indicated that "the jury could consider the concealment . . . as evidence of criminal intent" in addition to "any other evidence that was presented to it." Pet. App. 8a. And the "unless there is believable evidence to the contrary" clause in the instruction simply "reinforced" the state's burden of proof. *Id.* Had this instruction been taken in other courts, the opposite holding would have resulted.

### A. Most state high courts that have considered the issue have held instructions with "unless" clauses unconstitutional.

Ten state high courts that have considered jury instructions with similar "unless" language have found them to shift the burden unconstitutionally. The Virginia Supreme Court's reasoning—that the "unless" clause could not be read as shifting the burden, but actually "reinforced that the Commonwealth had the burden," Pet. App. 8a—cannot be reconciled with the decisions of other state high courts invalidating indistinguishable "unless" language.

The Illinois Supreme Court, for instance, considered a materially identical case but reached the opposite decision. In *People v. Pomykala*, 784 N.E.2d 784 (Ill. 2003), the defendant was charged with reckless homicide, and the government was required to prove recklessness. *Id.* at 786-87. Applying an Illinois statute,

the trial court gave the following burden-shifting instruction:

> If you find from your consideration of all the evidence that the defendant was under the influence of alcohol at the time of the alleged violation, such evidence shall be presumed to be evidence of a reckless act *unless disproved by evidence to the contrary*.

*Id.* at 787 (emphasis added).

The Illinois Supreme Court held that the instruction, and the underlying statute, violated due process. Consistent with *Sandstrom*, the court reviewed the "unless" language from the perspective of a reasonable juror, who does not have the benefit of "the legal expertise of judges and lawyers." *Id.* at 790-91. And "[a] reasonable juror would assume from a reading of the instruction that, once the State established that the defendant was intoxicated, it had proved recklessness, unless the defendant produced sufficient evidence to disprove it." *Id.* at 790. The prosecution argued (like the Virginia Supreme Court here, *see* Pet. App. 8a) that the "unless" language made the instruction read *less* like a mandatory presumption. 784 N.E.2d at 790. The Illinois Supreme Court disagreed, because "th[at] language . . . may be reasonably interpreted as requiring the defendant to rebut the presumption." *Id.*

Indeed, state high courts have held that "unless" language may be enough to render an instruction unconstitutional, *even if* the instruction without that language would create only a "permissive" inference rather than a mandatory one. In *Lindsey* (as in *Sandstrom* and *Francis*), the instruction contained no per-

missive language (though the state supreme court unjustifiably read it as though it had). But in several States, how to characterize the underlying presumption would not matter: the "unless" language would taint the instruction nevertheless.

Thus, for instance, in *State v. Deal*, 911 P.2d 996 (Wash. 1996) (en banc), the Washington Supreme Court held that the addition of an "unless" clause was alone sufficient to invalidate an instruction. The defendant was charged with burglary, and the State was required to prove that he intended to commit a crime in the building he had unlawfully entered. *Id.* at 998. The trial court gave the following instruction, based on a state statute:

> A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein *unless such entering or remaining shall be explained by evidence satisfactory to the jury to have been made without such criminal intent.* This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

*Id.* at 998 (emphasis in original). The Washington Supreme Court held that "the portion of the instruction preceding the word 'unless'"—under which intent "may be inferred" from conduct—was constitutionally permissible and, indeed, had previously been upheld. *See id.* at 699-700 (holding that the first part of the instruction "created a constitutionally valid permissive inference"); *id.* at 702 ("Without the ['unless'] language,

the instruction permits but does not require jurors to infer criminal intent from unlawful presence.").

The "unless" clause changed the analysis. "[T]hat language could have led a reasonable juror to understand that the burden of persuasion had shifted to [the defendant]." *Id.* at 702. "In other words, a reasonable juror could have concluded that once [the defendant's] presence on the premises was shown, a finding that he intended to commit a crime was compelled, absent a satisfactory explanation by [the defendant] as to why he was on the premises." *Id.* at 701. Because that "had the effect of relieving the State of its burden," it was unconstitutional. *Id.* at 702. And "[t]he fact that the instruction is based on a statute d[id] not lessen the violation of the Defendant's due process rights." *Id.* at 703 (citation omitted)[2]; *accord, e.g.*, *State v. Cantu*, 132 P.3d 725 (Wash. 2006) (reaffirming the holding of *Deal* and applying it in a non-jury juvenile adjudication).[3]

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[2] Deal testified in his own defense, and the state supreme court ultimately held the instructional error harmless because he admitted all the elements of burglary. But the state court reached the merits of the constitutional error so that it could "observe again that it is unnecessary to include this sort of language.

[3] The Washington Supreme Court subsequently held that the same statutory language could constitutionally be applied in a bench trial, because the judge carefully considered the relevant evidence, and, based on his on-the-record deliberations, the instruction did not alter "[the judge's] fact-finding process." *State v. Drum*, 225 P.3d 237, 244 (Wash. 2010) (en banc). That does not detract from the holding of *Deal*, which turned on the reasonable likelihood that a *juror* would be affected by an instruction. That is the standard applicable here.

Similarly, in *State v. LaForge*, 347 N.W.2d 247 (Minn. 1984), an "unless" clause was "determinative." *Id.* at 254. The jury was told that it "may" find "intent to violate the law against interference with public property" if it found that the defendant violated a rule that he knew about, "unless you find evidence tending to show such lack of intention." *Id.* at 250-51. Even though the instruction used "the permissive word 'may,'" *id.* at 254, the Minnesota Supreme Court held that the "unless" clause created "a rebuttable presumption of intent," which "may have impermissibly shifted the burden of persuasion to [the defendant]." *Id.* at 255-56. Applying what it took to be "the majority position," *id.* at 255 & n.5, the state court held the instruction unconstitutional and reversed the conviction. *Id.* at 256.

At least seven other states similarly diverge from Virginia. State high courts in Massachusetts, Michigan, Montana, Kansas, Mississippi, Utah, and Indiana have also found "unless" or very similar language unconstitutional.[4] Indeed, at least one such case has held

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[4] *Commonwealth v. Claudio*, 541 N.E. 2d 993, 994-96 (Mass. 1989) (finding an instruction that "[y]ou must accept [the] presumption [that the substance was heroin and its weight was as recorded in the certificates of analysis] *unless there was evidence to the contrary*" would "require[e] the jury to accept the accuracy of the certificates unless persuaded otherwise by the defendant" and, as a result, was unconstitutional because "the jury reasonably could have understood that they were not simply permitted to infer from the certificates the facts reported therein, but rather were required either to accept such information as true or to accept it as true unless the defendant proved otherwise." (emphasis added)); *Commonwealth v. Johnson*, 542 N.E. 2d 248, 249 (Mass. 1989); *People v. Wright*, 289 N.W.2d 1, 8 (Mich. 1980) ("We are convinced that by instructing the jury that 'unless the testimony satisfies you of something else' the trial court created the prospect that the jury

'may have interpreted the judge's instruction as . . . a burden shifting presumption', and the instruction is therefore unconstitutional." (internal citations omitted)); *State v. Leverett*, 799 P.2d 119, 124 (Mont. 1990) ("The instruction required the jury to find intoxication 'unless and until evidence is introduced which would support a finding of its nonexistence' . . . [a] reasonable juror may have believed that the appellant not only had to introduce contrary evidence, but that he had an affirmative duty to convince the jury . . . under *Francis*, such a mandatory rebuttable presumption which shifts the burden of persuasion to the defendant violates due process."); *State v. Johnson*, 666 P.2d 706, 708, 711 (Kan. 1983) (instructions that "drawing, making, issuing, or delivering" a check with insufficient funds was "prima facie evidence" of an "intent to defraud" and that prima facie evidence was "evidence that on its face is true, but may be overcome by evidence to the contrary" were unconstitutional because they "could clearly" have led the jury to believe that the "burden was upon the defendant to overcome the rebuttable presumption of intent to defraud." (emphasis omitted)); *Collins v. State*, 567 N.E.2d 798, 801 (Ind. 1991) (holding the following instruction unconstitutional: "evidence that a letter properly addressed . . . is prima facie proof that the letter was received . . . 'Prima facie evidence' means such evidence as sufficient to establish a given fact and which will remain sufficient *if uncontradicted*" because a reasonable juror would read the instruction as requiring the defendant to "overcome" evidence once given (emphasis added)); *Moody v. State*, 202 So.3d 1235, 1237 (Miss. 2016) (holding the following instruction unconstitutional: "[a] person who is charged with . . . possession of a cell phone in a correctional facility is presumed to be in constructive possession of a cell phone that is found unless that presumption is overcome by competent evidence" because "the burden was shifted improperly to [Defendant] to provide proof that he was not in constructive possession of the cell phone"); *State v. Chambers*, 709 P.2d 321, 324, 326 (Utah 1985) (holding unconstitutional the instruction "Possession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property"); *cf. Barnes v. People*, 735 P.2d 869, 872-74 (Colo. 1987) (reversing a conviction resting on an instruction that "[u]nless the presumption is rebutted by evidence to the contrary," because the instruc-

that the rule against burden-shifting is sufficiently "fundamental," and the failure to follow it is a sufficiently "blatant violation of basic principles," that a failure to object to the jury instruction can be excused. *Collins v. State*, 567 N.E.2d 798, 801 (Ind. 1991).

State high courts are not unanimous on this point. Just this year, the Nevada Supreme Court upheld a jury instruction with an "unless" clause, expressly disagreeing with and declining to follow the Washington Supreme Court's decision in *Deal*. *Carter v. State*, No. 69226, 2017 WL 700501, at *1-*2 (Nev. Feb. 16, 2017). The Nevada Supreme Court rested in part on other evidence of intent in the record, but its decision rejected the notion that adding an "unless" clause could create constitutional problems if added to an instruction discussing a *permissive* inference. *Id.* That additional decision simply exacerbates the conflict that the Virginia Supreme Court created in this case, and heightens the need for this Court's review.[5]

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tion violated a state statute read in light of federal constitutional avoidance considerations).

[5] A handful of other decisions pre-dating *Francis* suggested that an "unless" clause can be permissible. *People v. Getch*, 407 N.E.2d 425, 427-29 (N.Y. 1980) (finding "you may infer that a person intends that which is the natural and necessary and probable consequences of the act done by him. And unless the act was done under circumstances to preclude existence of such intent, you have a right to find from the results produced an intention to effect it" constitutional language because a jury would have to "make a fairly obvious misinterpretation of the court's remark" and there were other instructions that ensured the burden was not shifted); *Calantas v. State*, 608 P.2d 34, 35-36 (Alaska 1980) (finding similar language to *Getch* constitutional because there were sufficient other instructions such that jurors would understand "they were not required to [infer]" intent); *State v. Truppi*,

### B. State high courts have likewise rejected prosecutorial attempts to reclassify a mandatory inference as a permissible one.

The Virginia Supreme Court also attempted to rest its conclusion on the notion that the "instruction merely created a permissible inference that the jury was free to reject." Pet. App. 8a. The court found "[s]ignificant" that the instruction did not expressly "indicate or suggest that the jury was required to draw any conclusion from the facts proved by the Commonwealth." *Id.* That reasoning independently conflicts with the reasoning of multiple state high courts.

The relatively recent decision in *Pomykala* is one example. The state attempted to argue that because the instruction (like the instruction in this case) specified that the predicate fact was "evidence of" intent, the jury was free to reach a different conclusion. 784 N.E.2d at 789. The state supreme court squarely rejected that notion because nothing in the instruction made it a permissive one. *Id.* ("This court has inter-

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438 A.2d 712, 715 (Conn. 1980) (". . . the foregoing instruction explicitly stated that the presumption would vanish when some credible contrary evidence came into the case. Hence reasonable jurors could not have viewed this instruction as conclusive."); *State v. Bolin*, 678 S.W.2d 40, 43 (Tenn. 1984) (the following was constitutional "the use of a deadly weapon by a party who assaults, another with intent to commit murder . . . raises a presumption of malice, unless rebutted by other facts and circumstances to the contrary."). *But see Swanson v. State*, 749 S.W.2d 731, 732 (Tenn. 1988) (noting an instruction "that all homicides were to be presumed malicious absent evidence to rebut the implied presumption . . . were declared unconstitutional . . . by *Sandstrom*.).

preted the word 'shall' to connote a mandatory obligation unless the statute indicates otherwise.").

More generally, in light of the "reasonable probability" standard that applies to constitutional errors in jury instructions, the wide majority of state high courts refuse to presume that an instruction is permissive unless the instruction plainly says so. "[M]ost jurisdictions considering similar jury charges have found that they create mandatory presumptions unless the language of the inference is unambiguously permissive." *State v. Leverett*, 799 P.2d 119, 122 (Mont. 1990) (agreeing with cases from six state high courts, and citing conflicting cases from one state high court and one intermediate court).

Thus, the Virginia Supreme Court created two overlapping conflicts with fellow state high courts. Both as to the presumption language itself and as to the "unless" language that qualifies it, the Virginia Supreme Court's reasoning differs starkly from the rule followed in the majority of other jurisdictions. This Court should step in to resolve the conflict.

### C. Federal courts of appeals have likewise rejected "unless" instructions.

The Virginia Supreme Court's holding in this case likewise conflicts with a line of federal cases forbidding "unless" language in jury instructions because it unlawfully shifts the burden of proof. Long before *Sandstrom*, the same controversy had arisen in federal court in the context of an instruction that became known as the "*Mann* instruction." And several federal courts held such instructions impermissible even before this Court did so. Those decisions remain good law, and

they further broaden the conflict created by the Virginia Supreme Court's decision.

*Mann* was a case in which the Fifth Circuit considered whether the following instruction was unconstitutional:

> [i]t is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances . . . should reasonably have expected.

*Mann v. United States*, 319 F.2d 404, 407 (5th Cir. 1963). The court noted that "if the charge had ended with when the jury was told that a person is presumed to intend the natural consequences of his own acts . . . there would have been no error." *Id.* at 409. But when "'[s]o unless the contrary appears from the evidence' w[as] introduced," the court held, "the burden of proof was thereupon shifted." *Id.* Accordingly, Mann's conviction was reversed and remanded for a new trial. *Id.*[6]

Controversy over instructions like the one in *Mann* pervaded the federal courts for several years, and produced a fractious line of cases under which "unless" language was reversible error in the Fifth, Second, and Eighth Circuits but only harmless error in the Third,

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[6] *See also United States v. Chiantese*, 560 F.2d 1244 (5th Cir. 1977) (en banc) (reaffirming *Mann*).

Tenth, Fourth, Ninth and Sixth Circuits.[7] Even in upholding convictions, federal appellate courts would often forbid district courts from further using the *Mann* instruction, because it could cause juror confusion. *E.g.*, *United States v. Garrett*, 574 F.2d 778, 783 (3d Cir. 1978). Accordingly, a decision by this Court on the question presented could provide the federal courts with useful clarification as well.

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[7] *Compare United States v. Barash*, 365 F.2d 395, 402-03 (2d Cir. 1966) (Friendly, J.); *United States v. Robinson*, 545 F.2d 301, 306 (2d Cir. 1976); *Dietz v. Solem*, 640 F.2d 126 (8th Cir. 1981), *with United States v. Garrett*, 574 F.2d 778, 782-83 (3d Cir. 1978) (finding "unless" language constitutional because the totality of the instructions "vitiated" the "potentially harmful effect of the Mann instruction," yet still ordering the district courts to cease using the Mann instruction because of the "confusing nature of the instruction's language"); *United States v. Woodring,* 464 F.2d 1248, 1251 (10th Cir. 1972) ("Although [Mann instruction] should not have been given . . . still, when considered in context with all of the instructions, there was no plain error."); *United States v. Silva*, 745 F.2d 840, 852 (4th Cir. 1984) (although the court noted "deficiencies" with the "unless" instruction, the remainder of the instructions "ameliorated" any harm, so there was no constitutional violation); *United States v. Wilkins*, 385 F.2d 465, 473-74 (4th Cir. 1967); *Cohen v. United States*, 378 F.2d 751, 755 (9th Cir. 1967); *United States v. Releford*, 352 F.2d 36, 40 (6th Cir. 1965). The Second Circuit produced a rival line of cases distinguishing *Barash* and *Robinson* that the Circuit never settled. *E.g.*, *Washington v. Harris*, 650 F. 2d 447, 453 (2d Cir. 1981); *Brayboy v. Scully*, 695 F.2d 62, 66 (2d Cir. 1982) (Oakes, J., concurring) (discussing intra-circuit schizophrenia on "unless" type instructions under *Sandstrom* and calling on this Court to settle the issue).

## II. The Virginia Supreme Court incorrectly resolved an important and frequently recurring issue.

### A. The Virginia Supreme Court misapplied this Court's precedent.

As this Court has often said, the state's burden of proof beyond a reasonable doubt exists because "it is far worse to convict an innocent man than to let a guilty man go free." *Francis*, 471 U.S. at 313 (citations omitted). Each and every element of the offense must be subject to that rigorous burden. Yet in this case, on the key element of intent, the prosecution was relieved of its burden. The jury was told that concealment *was* evidence of Mr. Lindsey's criminal intent, not just that it *could be*, and that it was up to Mr. Lindsey to prove otherwise. The Virginia Supreme Court misapplied this Court's precedent in upholding that jury instruction.

The first inquiry under this Court's cases is whether the jury instruction creates a mandatory presumption or just a permissive inference. *Francis*, 471 U.S. at 313-14. In *Francis* and later in *Carella v. California*, 491 U.S. 263 (1989), the Court found "is presumed" to be mandatory language; the phrasing affords the jury no choice to follow or to disregard the instruction. *Francis*, 471 U.S. at 316 ("The jurors 'were not told . . . that they *might* infer that conclusion.'" (internal citations omitted)); *Carella*, 491 U.S. at 265. Mr. Lindsey's instruction similarly gave the jury no such choice: "Willful concealment of goods . . . *is* evidence of an intent to convert." Pet. App. 2a (emphasis added). And when Mr. Lindsey offered a more permissively worded instruction—"[y]ou may infer that willful

concealment . . . is evidence of an intent to convert"—the trial court rejected it. *Id.*

Second, when a jury instruction directs the jury to apply a presumption, the question becomes whether it was reasonably likely that a juror would read the instruction to eliminate an element or shift the burden. *Francis*, 471 U.S. at 315.[8] Here, that unconstitutional burden-shifting appears right on the face of the instruction. The final clause of the instruction, "unless there is believable evidence to the contrary," does not ask the jury to examine the prosecution's evidence critically; it asks whether there is *different* evidence that is "contrary" to the prosecution's evidence. That is all but an explicit requirement that the defense provide evidence; it is certainly no less problematic than the language held unconstitutional in *Francis*, which passively told the jury that the presumption "may be rebutted." 471 U.S. at 318. Just as in *Francis*, a juror reading this instruction would not feel free to question whether concealment really was probative of an intent to steal.

But the Virginia Supreme Court held that the "unless there is believable evidence to the contrary" instruction actually "reinforced that the Commonwealth had the burden [of persuasion]." Pet. App. 8a. The court did not explain that conclusion. Presumably it was implying that a jury would have thought "believable contrary evidence" would come from the state's case-in-chief. But as the *Lindsey* dissent noted, "it

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[8] See note 1, *supra* (explaining the change in the relevant standard from how a "reasonable juror" would interpret an instruction to whether it was "reasonably likely" that a juror would have applied an instruction unconstitutionally).

strains common sense" to think the prosecution would have offered evidence rebutting its own case. Pet. App. 20a. Moreover, the jury would not have read the instruction in that way, but in the common-sense way. *Id.*; *see also Boyde v. California*, 494 U.S. 370, 380-81 (1990) ("Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might.").

The state supreme court also contended that the jury charge as a whole served to relieve any constitutional difficulty, but this reasoning, too, is contrary to clear precedent. The court noted that the trial court gave a general "Instruction M" on the crime's elements and another general instruction "that the Commonwealth had the burden of proving each element . . . beyond a reasonable doubt, that the defendant was presumed innocent . . . and that [Lindsey] had no burden to produce any evidence." Pet. App. 9a-10a. This Court has been clear, however, that "general instructions as to the prosecution's burden" do not cure constitutionally defective instructions. *Francis*, 471 U.S. at 319-20. A juror "could have interpreted the two sets of instructions" in an unconstitutional manner by believing "the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied." *Id.* at 319 (quoting *Sandstrom*, 442 U.S. at 518-19 n.7).

Here, the general instructions similarly did not cure the presumption instruction's constitutional infirmity. Under general "Instruction M," the prosecution needed to prove beyond a reasonable doubt that "Mr. Lindsey intended to convert the merchandise to his own . . . use." But that would not have corrected the presumption instruction's error, because a juror would likely have thought "the presumption was a means by which"

to prove intent beyond a reasonable doubt. *Id.* The other general instruction is also no bar. Though the judge instructed that Mr. Lindsey was not required to "produce any evidence," he made clear that he meant that Mr. Lindsey was not required to testify, stating at the beginning of the trial:

> Do you [the jury] understand that the defendant is not required to produce any evidence in this case? In other words, the defendant is not required to testify if he chooses not to. Do you understand that?
>
> (All hands raised.)

Va. Sup. Ct. App. 24. Given that qualification, the jury could very well have interpreted the presumption instruction in an unconstitutional manner. Lindsey need not testify, but he still needed to produce believable contrary evidence to rebut intent. The general instructions, accordingly, did not alleviate the presumption's unconstitutionality.

Nor was the constitutional error harmless. If anything, the plainly prejudicial impact of the instruction makes this case an ideal vehicle to address the constitutional question. The prosecution's larceny case depended on one forgetful witness, and the case on the intent element turned completely on the unconstitutional instruction. In closing, for example, the prosecutor emphasized that concealment was the "only . . . issue" in the case. Va. Sup. Ct. App. 193; *see* p. 9, *supra*. At no point in closing did the prosecutor argue that Mr. Lindsey intended to convert the hats, take the hats, or steal the hats—his only point was that Mr. Lindsey concealed the hats. Further, on cross-examination of Mr. Lindsey and his friend, the prosecutor, again,

dwelled only briefly on the larceny charge and questioned both of them about it only in terms of concealment. Va. Sup. Ct. App. 126, 164. Given that emphasis on concealment, and the sparse record, this Court cannot conclude that a jury would have found intent beyond a reasonable doubt absent the presumption. The error is accordingly not harmless.

In any event, the Court need not take up the concept of harmless error itself, but can follow its "usual practice" of remanding that question. *Maslenjak v. United States*, 137, S.Ct. 1918, 1931 (2017); *see Sandstrom*, 442 U.S. at 526-27 (remanding for harmless error analysis).

### B. Jury instructions like the one here are frequently recurring.

The question presented is a frequently recurring issue. Juries are regularly instructed that they must treat an element as satisfied based on predicate facts, absent evidence to the contrary. In many cases, such as this one, such instructions are *required* by a state statute. This Court should clarify once and for all under what circumstances jury instructions may lighten the prosecution's burden by treating a predicate fact—which may not be a crime in and of itself—as a substitute for proof of intent or a similar element of the crime.

In addition to the courts of last resort already discussed or cited, state appellate courts in Maryland, Alabama, Oklahoma, Kansas, Tennessee, Massachusetts, Idaho, Oregon, Washington, New Mexico, and Georgia have all considered the constitutionality of instructions that presume an element absent evidence to the con-

trary.[9] Many other state and federal courts have also encountered similar instructions, though have not decided the question of their constitutionality.[10]

And these reported appellate decisions, if anything, *under*-state how frequently the question presented recurs. Trial courts are often faced with state criminal statutes that require them to give instructions like the one in this case. For instance, there are state criminal statutes in every State and the District of Columbia providing that predicate acts shall be "prima facie evi-

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[9] *State v. Potter*, No. 1309, 2016 WL 4158885 at *2 (Md. Ct. Spec. App. Aug. 4, 2016); *Cheriogotis v. State*, 555 So.2d 1147, 1149 (Ala. Crim. App. 1989); *State v. DeVries*, 780 P.2d 1118, 1121 (Kan. App. Ct. 1989); *Hunter v. State*, 740 P.2d 1206, 1207-08 (Okla. Crim. App. 1987); *Croscup v. State*, No. 02C01-9502, 1995 WL 739827, at *2 (Tenn. Crim. App. Dec. 15, 1995); *Jones v. State*, 753 So.2d 1174, 1187-89 (Ala. Crim. App. 1999); *Commonwealth v. Umana*, No. 07-P-1392, 2008 WL 1931260, at *1 n.1 (Mass. App. Ct. May 5, 2008); *State v. Hebner*, 697 P.2d 1210, 1212-14 (Idaho Ct. App. 1985); *State v. Arredondo*, No. 32993-3-III, 2016 WL 4203200 at *2 (Wash. Ct. App. Aug. 9, 2016); *Marable v. State*, 267 S.E.2d 837, 838 (Ga. Ct. App. 1980); *State v. Offord*, 512 P.2d 1375, 1377-78 (Or. Ct. App. 1973); *State v. Rainey*, 653 P.2d 584, 585-86 (Or. Ct. App. 1982); *State v. Matamoros*, 547 P.2d 1167, 1169 (N.M. Ct. App. 1976).

[10] *E.g. Swanson v. State*, 749 S.W.2d 731, 732 (Tenn. 1988) (considering post-conviction *pro se* petition standards for a case where the jury was instructed "all homicides were to be presumed malicious absent evidence to rebut the implied presumption."); *Senk v. Zimmerman*, 886 F.2d 611, 612, 614 (3d Cir. 1989) (considering whether an attorney rendered ineffective assistance by failing to pursue appellate relief for an instruction that a presumption "may be rebutted only by other circumstances in the case."); *Jones v. Campbell*, 436 F.3d 1285, 1302 (11th Cir. 2006) (considering whether an attorney's failure to object to a similar instruction as that in *Senk* was ineffective assistance).

dence" of intent or another element of a crime. *E.g.* Colo. Rev. Stat. § 18-4-406; N.J. Stat. Ann. § 2C:20-11; Ky. Rev. Stat. Ann. § 433.234.[11] "Prima facie evidence" is commonly defined as evidence that will "establish a fact . . . unless contradictory evidence is produced." *Black's Law Dictionary* (10th ed. 2014); *Virginia v. Black*, 538 U.S. 343, 369 (2003) (Scalia, J. concurring) ("'prima facie evidence' is . . . [s]uch evidence . . . if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but [it] may be contradicted by other evidence." (internal citations omitted)). And the use of the concept of prima facie evidence in criminal jury instructions risks creating a burden shift in substance.[12] Indeed, the Illinois Supreme Court's decision in *Pomykala* came about because the Illinois legislature revised the statute to replace the law-Latin phrase "prima facie evidence" with a plain-language definition that meant the same thing—and expressly shifted the burden to the defense once the predicate fact was proved. 784 N.E.2d at 788-90.

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[11] *See also* Haw. Rev. Stat. Ann. § 708-830(8); Idaho Code Ann. § 18-4626(a); Ind. Code § 35-43-4-4; Del. Code Ann. Tit. 11, § 900 (West 2009); Fla Stat. Ann. § 832.062 (West 2008).

[12] *See also State v. DeVries*, 780 P.2d 1118, 1121 (Kan. App. Ct. 1989); *State v. Hubbard*, No. W2016-01521, 2017 WL 2472372, at *8 (Tenn. Crim. App. June 7, 2017); *State v. Brown*, 205 So.3d 1032, 1039 (La. Ct. App. 2016); *State v. Jones*, No. C-150331, 2016 WL 1244468, at *1 (Ohio Ct. App. Mar. 30, 2016); *People v. Borowski*, 38 N.E. 3d 190, 193 (Ill. App. Ct. 2015); *Hunter v. State*, 740 P.2d 1206, 1207-08 (Okl. Crim. App. 1987).

* * * * *

The Virginia Supreme Court resolved a frequently recurring legal issue in a way that squarely contradicts not only this Court's precedent, but the precedent of a substantial number of other appellate courts. And by allowing the trial court to tell the jury that it must draw the government's preferred inference of intent unless the defendant puts on his own evidence, the state supreme court downgraded the jury's role and upended the presumption of innocence. This Court should speedily grant review, and reverse.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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July 24, 2017