No. 17-132

In The
Supreme Court of the United States

JAMES LINDSEY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION

MARK R. HERRING
Attorney General
of Virginia

TREVOR S. COX
Acting Solicitor General

MATTHEW R. MCGUIRE
Acting Deputy
Solicitor General
Counsel of Record

OFFICE OF THE
ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7773
mmcguire@oag.state.va.us

October 18, 2017

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

REVISED QUESTION PRESENTED

While the Due Process Clause requires the prosecution to prove every element of a crime beyond a reasonable doubt, certain presumptions and inferences have been found to be permissible or have been generally accepted. Examples include permissive inferences—where the inferential fact need be only rationally related to the basic fact—and statute-based irrebuttable presumptions of intent, such as State laws on statutory rape or possession of drugs with intent to distribute.

The question presented is:

> Whether Instruction No. 16, which is an accurate statement of the Virginia statute defining the offense, violated the Due Process Clause by informing the jury that willful concealment of goods on store property "is evidence" of the relevant intent.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

1. James Lindsey was found guilty after a jury trial of petit larceny, third or subsequent offense, because he willfully concealed a pair of hats with the intent of stealing them from an outdoor-goods store in Arlington, Virginia in 2014. Pet. App. 1a-2a. He was sentenced to seven days in jail. *Id.* 1a.

Lindsey's petition for a writ of certiorari characterizes his case in the light most favorable to him, gratuitously pointing out his race as if to impugn the motives of the store employees and officers who caught him shoplifting. *See* Pet. 6-7. But such speculation—which was rejected by the jury—is irrelevant to this Court's review. His challenge is limited to a single jury instruction—Instruction No. 16—related to intent to defraud:

> 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, unless there is believable evidence to the contrary. Pet. App. 2a, 31a.

Lindsey does not contest the jury's finding that he willfully concealed merchandise on store property. *See* Pet. i; Pet. App. 32a (setting forth the elements of the offense). So the sole question presented in this case is: were Lindsey's due process rights violated when he willfully concealed merchandise on his person and the jury was told that his willful concealment was evidence of intent?

2. Lindsey appealed his conviction to the Virginia Court of Appeals, arguing that Instruction No. 16 was an unconstitutional burden-shifting instruction and that there was insufficient evidence to convict him. Pet. App. 22a-23a. Although the Court of Appeals denied his appeal without oral argument, *see id.* 22a, the Virginia Supreme Court granted Lindsey's petition for appeal with respect to whether Instruction No. 16 violated his due process rights, *id.* 1a.

Ultimately, the Virginia Supreme Court concluded that Instruction No. 16 was not an impermissible burden-shifting instruction; rather, the instruction "merely created a permissible inference that the jury was free to reject." Pet. App. 8a. As the court explained, "willful concealment is prima facie evidence of intent to convert or defraud" under Virginia Code § 18.2-103, so Instruction No. 16 was an accurate statement of the law. *Id.* Moreover, "[t]he instruction did not state that willful concealment alone satisfies the Commonwealth's burden of proof as to the element of intent." *Id.* "The remaining language of the instruction, 'unless there is believable evidence to the contrary,' reinforced that the Commonwealth had the burden of proving each element beyond a reasonable doubt." *Id.*

Lindsey timely filed a petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

There are several reasons why the Court should deny Lindsey's petition for a writ of certiorari, but the primary one is that there is no split of authority warranting this Court's review. Lindsey goes to great lengths to manufacture a circuit split, but his attempt fails. Moreover, there are vehicle problems associated with this case—including that any error was harmless—so this Court will be unable to award meaningful relief.

It also is worth noting the excessive breadth of Lindsey's challenge. Instruction No. 16 is an accurate statement of Virginia law, which provides that it is prima facie evidence of intent to defraud or convert if a person willfully conceals merchandise. Va. Code Ann. § 18.2-103 (2014). Thus, a decision by this Court that Instruction No. 16 is unconstitutional will effectively nullify all similar State laws with prima-facie-evidence standards. Although Lindsey acknowledges how broadly his argument sweeps, *see* Pet. 29-30 ("there are state criminal statutes in every State and the District of Columbia providing that predicate acts shall be 'prima facie evidence' of intent or another element of a crime"), he spends little time explaining why the Court should take such an unprecedented step. *See Virginia v. Black*, 538 U.S. 343, 395-98 (2003) (Thomas, J., dissenting) (explaining that the Court has not held unconstitutional as a matter of federal due process even irrebuttable statutory presumptions of intent, e.g., statutory rape and "possession of drugs with intent to distribute" offenses).

Finally, even if there were a circuit split and no vehicle problems with the case, the Virginia Supreme Court is right on the merits. Instruction No. 16 stated a permissive inference, not an unconstitutional mandatory presumption. And the inference at issue here was so plainly rational as to pass muster under controlling decisions of this Court. That fact further weighs against granting review.

I. There is not a split of authority involving the question presented warranting this Court's review.

State and federal courts are not intractably divided about whether jury instructions like Instruction No. 16 violate the Due Process Clause. Indeed, Lindsey's petition fails to identify a single jury instruction that is similar to Instruction No. 16; as shown below, the jury instructions at issue in every case cited by Lindsey are distinguishable from Instruction No. 16 on their face. Because there is no genuine circuit split, Lindsey is asking this Court to grant certiorari to provide generalized guidance about mandatory presumptions and permissive inferences. Relying on 30-year-old decisions of federal courts of appeals, Lindsey argues that such guidance is urgently needed. But that is simply not the case. Instruction No. 16, and the Virginia Supreme Court's analysis of that instruction, stand apart from every case cited by Lindsey and, as a result, there is no basis for granting review.

A. The cases that Lindsey argues form a split of authority are distinguishable on their face.

Lindsey cites numerous cases in his petition, claiming that they demonstrate a deep circuit split about jury instructions like Instruction No. 16. But all of the cases he cites are plainly distinguishable. In fact, the holdings in the three cases Lindsey principally relies on—*People v. Pomykala*, 784 N.E.2d 784 (Ill. 2003); *State v. LaForge*, 347 N.W.2d 247 (Minn. 1984); and *State v. Deal*, 911 P.2d 996 (Wash. 1996) (en banc)—do not conflict in any respect with the Virginia Supreme Court's holding in this case.

To begin, *Pomykala* cannot form part of a circuit split because, unlike Instruction No. 16, the instruction in that case explicitly was cast in the language of a command to the jury. 784 N.E.2d at 787 ("*shall be presumed* to be evidence of a reckless act unless disproved by evidence to the contrary") (emphasis added). In light of that express presumption, the Illinois Supreme Court's holding that the jury instruction "create[d] an unconstitutional mandatory presumption" makes perfect sense. *Id.* at 791. By contrast, Instruction No. 16 stated simply that willful concealment "is evidence" of intent to defraud, not that the jury *shall presume* intent from a basic fact. Pet. App. 31a. The instruction at issue in *Pomykala*, and in at least seven other cases cited by Lindsey,[1] therefore is fundamentally different

[1] *See Moody v. State*, 202 So. 3d 1235, 1237 (Miss. 2016) ("is presumed to be"); *Commonwealth v. Claudio*, 541 N.E.2d 993, 994

than Instruction No. 16. In short, *Pomykala* and other cases with similar instructions do not conflict with the Virginia Supreme Court's decision in this case.

Next, the Minnesota Supreme Court's decision in *LaForge* is not in conflict with the decision in this case for several reasons. First, the defendant in *LaForge* was found guilty of interfering with the use of public property after he participated in an anti-war demonstration in a university ballroom. 347 N.W.2d at 249-50. The Minnesota statute he was convicted under made it a misdemeanor to intentionally interfere with "the free access to or egress from or to use or remain in or upon public property or in like manner interfere with the transaction of public business therein." *Id.* at 250 (citation omitted). To be sure, the Minnesota Supreme Court discussed the difference between permissive and mandatory presumptions. *See id.* at 250-56. But the basis for the court's ruling was that the State had not shown "a rational connection . . . between the basic facts provided and the ultimate fact presumed." *Id.* at 256. "An intent to interfere with the transaction of public business or with the ingress to and egress from a public building does not logically flow from the

---

(Mass. 1989) ("you must accept that presumption"); *Commonwealth v. Johnson*, 542 N.E.2d 248, 248 (Mass. 1989) ("you must accept"); *State v. Leverett*, 799 P.2d 119, 120 (Mont. 1990) ("it shall be presumed"); *State v. Chambers*, 709 P.2d 321, 324 (Utah 1985) ("shall be deemed"); *Barnes v. People*, 735 P.2d 869, 871 (Colo. 1987) ("it shall be presumed"); *People v. Wright*, 289 N.W.2d 1, 5 (Mich. 1980) ("[t]he law presumes that"). *But see* Pet. App. 31a ("is evidence").

decision to demonstrate in the ballroom as opposed to the hallways." *Id.*

Unlike *LaForge*, there is no doubt in this case that there is a rational, indeed obvious, connection between willfully concealing merchandise in a store and the intent to defraud. If someone willfully conceals (as distinct from unwittingly possesses) store merchandise, the conclusion that such concealment is accompanied by an intent to defraud is virtually inescapable. Lindsey never argues that such an inference is irrational, so the inference at issue in *LaForge* and the one at issue here are entirely different.

Second, Instruction No. 16 plainly differs from the instruction at issue in *LaForge*. The *LaForge* instruction expressly stated that certain basic facts "established a prima facie case of intent," whereas Instruction No. 16 used the more limited phrase "is evidence." *Compare* 347 N.W.2d at 250-51, *with* Pet. App. 31a. That distinction is critical because the meaning of the phrase "prima facie evidence" differs from State to State.[2] And the use of that legal phrase in the *LaForge* jury instruction arguably was case-dispositive; the court stated that "'[p]rima facie' is a legal term of art that no juror can be expected to understand as meaning anything but a shift in the burden of proof unless the trial judge carefully defines the term. No such definition was given . . . so we too will treat it as a mandatory presumption." 347 N.W.2d at 253. In light of

---

[2] *See, e.g.*, *Black*, 538 U.S. at 369-71 (Scalia, J., dissenting) (discussing prima-facie-evidence standard generally).

how the Minnesota Supreme Court viewed "the phrase prima facie evidence," it is impossible to conclude that a decision about the instruction at issue in *LaForge* conflicts with a decision about Instruction No. 16. Consequently, *LaForge*, and the four other cases with similar instructions,[3] cannot serve as part of any alleged circuit split.

Finally, Lindsey's reliance on Deal suffers from a number of flaws, including that the court applied the wrong legal standard and that the decision may no longer be good law in Washington. In *Deal*, the Washington Supreme Court expressly applied the older, superseded legal standard for evaluating jury instruction challenges: "whether a reasonable juror might interpret the presumption as mandatory." *Deal*, 911 P.2d at 1000; *see also Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991). Lindsey concedes in his petition that that is the wrong standard, Pet. 6 n.1, so his reliance on *Deal* is misplaced from the outset. It is unclear what result the Washington Supreme Court would have reached in the case had it properly considered "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990).

---

[3] *See Claudio*, 541 N.E.2d at 994; *Johnson*, 542 N.E.2d at 248; *State v. Johnson*, 666 P.2d 706, 708 (Kan. 1983); *Chambers*, 709 P.2d at 324; *Collins v. State*, 567 N.E.2d 798, 801 (Ind. 1991).

Moreover, *Deal*, decided in 1996, has been called into question by a subsequent decision of the Washington Supreme Court. In *State v. Drum*, 225 P.3d 237 (Wash. 2010) (en banc), the court confronted a statute that imposed substantively the same presumption that was at issue in *Deal*: intent may be inferred from certain predicate acts "unless such [acts] shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent." *Drum*, 225 P.3d at 243; *Deal*, 911 P.2d at 998 (similar). But unlike *Deal*, the court in *Drum* found that the statute did not impose an unconstitutional mandatory presumption; instead, "the statutory inference operated permissively."[4] Thus, there is an unresolved conflict in Washington's case law, and it is unclear whether that court would find that Instruction No. 16 was permissive or mandatory.

Lindsey recognizes but fails to distinguish *Drum*. He urges that *Drum* turned on the fact that it was a bench trial, not a jury trial. Pet. 16 n.3. But that distinction is irrelevant if *Deal* held that *every* "'unless' clause" constituted an unconstitutional mandatory presumption. Pet. 16. In fact, Lindsey's argument is inconsistent with another Washington Supreme Court case he cites, *State v. Cantu*, 132 P.3d 725 (Wash. 2006),

---

[4] Without mentioning the problem, *Drum* noted that *Deal* applied the wrong legal standard. *See Drum*, 225 P.3d at 244 ("This improperly shifted the burden of proof to the defendant because a reasonable juror *could* be forced to conclude. . . ." (emphasis added)).

which applied *Deal* to "a non-jury juvenile adjudication."[5] Pet. 16. Moreover, Lindsey is wrong to conclude that *Deal* "turned on the reasonable likelihood that a *juror* would be affected by an instruction." Pet. 16 n.3. As noted above, *Deal* explicitly applied the wrong legal standard, asking whether a reasonable juror *could* interpret the presumption as mandatory instead of deciding whether there was a reasonable likelihood that the jury *has applied* the presumption in a mandatory way. After *Drum*, and in light of the fact that *Deal* committed legal error in analyzing the earlier instruction, no decision of the Washington Supreme Court conflicts with the decision at issue here.

In sum, not one of the cases cited by Lindsey conflicts with the holding of the Virginia Supreme Court. Nor do any of those cases involve a jury instruction at all similar to Instruction No. 16. There simply is not a split of authority warranting this Court's review with respect to whether jury instructions like Instruction No. 16 state a mandatory presumption or a permissive inference.[6]

---

[5] *Cantu* also does not contribute to a circuit split because, like *Deal*, the court applied the wrong legal standard to determine whether a presumption was unconstitutional. *See Cantu*, 132 P.3d at 729.

[6] Lindsey cites numerous cases that pre-date this Court's decision in *Francis v. Franklin*, 471 U.S. 307 (1985). *See* Pet. 19 n.5. Because those decisions could all be revisited in light of *Francis*, they are of little value in determining whether there is an entrenched split of authority.

B. Lindsey is wrong that inconsistent reasoning by State courts is sufficient to create a circuit split.

Lindsey also asks this Court to grant certiorari because the Virginia Supreme Court's "reasoning independently conflicts with the reasoning of multiple state high courts." Pet. 20. But this Court reviews lower courts' conflicting *holdings*, not their *reasoning*. *See* Rule 10(b).

Even if this Court were amenable to claims that State courts' reasoning differed in similar cases, Lindsey is wrong that there is any such conflict here. He argues that the Illinois Supreme Court in *Pomykala* and the Montana Supreme Court in *State v. Leverett* have employed a different analytical approach than the Virginia Supreme Court. Pet. 20-21. Not so. As discussed above, *Pomykala* and *Leverett* both addressed jury instructions that were expressly cast in the language of a command. So it is not surprising, as Lindsey points out, that "[m]ost jurisdictions considering similar jury charges have found that they create mandatory presumptions." Pet. 21 (citation omitted).

In the end, Lindsey's argument collapses because Instruction No. 16 is entirely different from the instructions at issue in *Pomykala* and *Leverett*. *See* Pet. App. 31a. While he might have had a point if the Illinois Supreme Court and Montana Supreme Court had disagreed about whether the instructions at issue in those cases established mandatory presumptions or permissive inferences, he is incorrect that the Virginia

Supreme Court's "reasoning differs starkly from the rule followed" in those jurisdictions. Pet. 21. Put differently, there is no way to tell from this record whether the Virginia Supreme Court would have found that the jury instructions at issue in *Pomykala* and *Leverett* were consistent with the federal Due Process Clause. It is similarly impossible to know based on *Pomykala* and *Leverett* whether the Illinois Supreme Court and Montana Supreme Court would have concluded that Instruction No. 16 imposed an unconstitutional mandatory presumption. The jury instructions at issue in these cases were entirely different.

C. Instruction No. 16 bears no relation to the so-called *Mann* instruction.

Lastly, Lindsey asserts that the Virginia Supreme Court's decision conflicts with federal courts of appeals' decisions addressing the so-called *Mann* instruction, almost all of which arose before this Court's decisions in *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Francis*. *See* Pet. 21 (acknowledging that this issue arose "[l]ong before *Sandstrom*"). What Lindsey does not expressly say, however, is that the *Mann* instruction falls squarely within the holdings of *Sandstrom* and *Francis*, whereas Instruction No. 16 does not.

To begin, the *Mann* instruction stated:

> It 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 and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.[7]

That instruction plainly is an impermissible burden-shifting instruction under *Sandstrom* and *Francis*. *Sandstrom* found unconstitutional a jury instruction that stated that "[the] law presumes that a person intends the ordinary consequences of his voluntary acts." 442 U.S. at 513. And *Francis*, expanding on *Sandstrom*, invalidated a jury instruction that stated that: "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. 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." *Francis*, 471 U.S. at 311. Indeed, Lindsey does not contend that federal courts continue to use this instruction; his limited argument is that a decision in this case "*could* provide the federal courts with useful clarification" about mandatory presumptions in general. Pet. 23 (emphasis added). That is not enough to show a split of authority.

Put simply, the *Mann* instruction is entirely different from Instruction No. 16, *see* Pet. App. 31a, and neither *Mann* nor any of the related cases held as per se

---

[7] *Mann v. United States*, 319 F.2d 404, 407 (5th Cir. 1963).

unconstitutional jury instructions that use the word "unless." *See, e.g.*, *United States v. Barash*, 365 F.2d 395, 402-03 (2d Cir. 1966) (Friendly, J.) (noting the various cases to have addressed the *Mann* instruction, and finding that it was impermissible based on the entire scope of the instruction, not simply because of the "unless" clause). In fact, most of the cases Lindsey cites related to the *Mann* instruction are harmless-error cases. *See* Pet. 23 n.7. But even if some federal courts did suggest that the use of the word "unless" in a jury instruction automatically created an unconstitutional mandatory presumption, there still would not be a certworthy conflict. The Virginia Supreme Court reached no decision in this case about the abstract meaning of the word "unless" in the jury instruction context. The Virginia Supreme Court's decision was limited to holding that Instruction No. 16 stated a permissive inference. *See* Pet. App. 8a.

II. This case is a poor vehicle for addressing the question presented.

Lindsey also asks this Court to grant certiorari because this case presents "an important and frequently recurring issue." Pet. 24. But in making that claim, Lindsey glosses over the differences between his case and cases like *Francis* and *Sandstrom*, and the significant vehicle problems associated with this case. First, unlike *Francis* and *Sandstrom*, which involved common-law-based homicide offenses, *see Francis*, 471 U.S. at 311, *Sandstrom*, 442 U.S. at 512, Lindsey was convicted of a statutory crime with an intent requirement

defined by statute. *See* Va. Code Ann. § 18.2-103. And as the Virginia Supreme Court stated, Instruction No. 16 "was a proper statement of the law." Pet. App. 8a. That fact makes this case far different from *Francis* and *Sandstrom*.

Second, any error in giving Instruction No. 16 was harmless. Lindsey has abandoned his challenge to the jury's finding that there was sufficient evidence to find that he willfully concealed the goods on store property, and he, unsurprisingly, has offered no plausible innocent explanation for that action.

A. Because Instruction No. 16 is an accurate statement of Virginia law, a decision in Lindsey's favor would effectively nullify on federal Due Process grounds all similar State laws.

Code § 18.2-103 establishes that willful concealment of goods on store premises is prima facie evidence of intent for the statutory offense: "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." And as two members of the Court recognized in *Virginia v. Black*, "[t]he Virginia Supreme Court has . . . embraced [the] canonical understanding" of the phrase prima facie evidence: "It is evidence that suffices, on its own, to establish a particular fact." 538 U.S. at 369-70 (Scalia, J., dissenting).

And the jury instruction given in *Black*, just like Instruction No. 16 in this case, "did not suggest . . . that a jury may, in light of the prime-facie-evidence provision, ignore any rebuttal evidence presented and, solely on the basis of a showing that the defendant [committed a predicate act], find that he intended to intimidate." *Id.* at 370.[8] Applying that analysis, this case should be analyzed as involving a permissive inference and under that inquiry, Instruction No. 16 is plainly constitutional. *See infra* Part III. But even if Code § 18.2-103 established a rebuttable presumption of intent, as Lindsey argues, such a presumption would not violate the Due Process Clause.

As Justice Thomas pointed out in his dissent in *Black* (and which also was not disputed by any other member of this Court), "the Court has not shown much concern" even for "statutes containing a mandatory irrebuttable presumption as to intent." 538 U.S. at 397 (Thomas, J., dissenting) (citing statutes from Indiana, Tennessee, Oregon, Missouri, and Georgia on statutory

---

[8] Neither the plurality nor the concurrence in *Black* disagreed with Justice Scalia's overall characterization of Virginia law on prima facie evidence. The concurrence did not discuss the issue at all, *see* 538 U.S. at 368 (Stevens, J., concurring), and the plurality noted that the Virginia Supreme Court had not "authoritatively interpreted the meaning of the prima facie evidence provision" and "refuse[d] to speculate on whether *any* interpretation of the prima facie evidence provision would satisfy the First Amendment," *id.* at 367. Given the First Amendment issues posed by the case, a majority of the Court found the jury instruction unconstitutional on that ground. *See id.* Notably, the Court did not suggest the jury instruction was unconstitutional under the Due Process Clause.

rape); *see also* Va. Code Ann. § 18.2-63 (2014). As he noted, "there is no scienter requirement for statutory rape," nor is there for "[s]tatutes prohibiting possession of drugs with intent to distribute." *Black*, 538 U.S. at 398 (citing statutes from Delaware, Massachusetts, and South Carolina). Given this Court's general acceptance of those statutory presumptions of intent, there is no reason why the prima-facie-evidence provision of Code § 18.2-103 would be constitutionally suspect or why accurately stating Virginia law in a jury instruction would violate the Due Process Clause when the statutory provision itself does not. Unlike the statute at issue in *Black*, there are no First Amendment concerns implicated by Code § 18.2-103 or this case generally. *See Black*, 538 U.S. at 367 (plurality op.); *see also id.* at 398 (Thomas, J., dissenting) ("The plurality, however, is troubled by the presumption because this is a First Amendment case.").

More to the point, regardless of whether the Court agrees with the Commonwealth's position, Lindsey has not fully apprised this Court of what it likely will be deciding if it grants certiorari and concludes that Instruction No. 16 is an unconstitutional burden-shifting instruction. If this Court were to disagree with the Commonwealth and hold that Instruction No. 16 impermissibly shifted the burden to Lindsey, this Court's decision invalidating the jury instruction will sweep much farther than that limited holding. That is because the instruction was entirely consistent with the Virginia statute defining Lindsey's offense. *See* Pet.

App. 8a. By finding Instruction No. 16 unconstitutional, the Court will have essentially nullified numerous State statutes that establish both rebuttable and irrebuttable presumptions of intent. Unless this Court is prepared to take that step, certiorari should be denied.

B. Even if Instruction No. 16 shifted the burden to Lindsey, such error was harmless in this case.

Additionally, any error by the trial court in granting Instruction No. 16 was harmless beyond a reasonable doubt. *See Rose v. Clark*, 478 U.S. 570, 576-79 (1986). "The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Id.* at 577 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)). "Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed." *Id.* at 579. Defendants are entitled "to a fair trial, not a perfect one." *Id.* (citation omitted).

Here, there is no evidence in the record to suggest that the jury would have found Lindsey not guilty if it had been given his proposed instruction, *see* Pet. App. 30a, instead of Instruction No. 16. Indeed, the other jury instructions entirely comported with the principle that the Commonwealth had to prove each element of the offense beyond a reasonable doubt. *See* Pet. App. 9a-11a. As the Virginia Supreme Court noted, the jury was instructed "that the Commonwealth had the burden of proving each element beyond a reasonable doubt, that the defendant, was presumed innocent until proven guilty, that the presumption of innocence remained with him throughout trial, and that he had no burden to produce any evidence." *Id.* 9a. Moreover, Lindsey abandoned his challenge to the jury's finding that he had willfully concealed goods while still on the store premises. And the fact that Lindsey fled from the store and the police officers provides even more evidence of his intent. *See* Pet. App. 23a. Put simply, it is difficult to imagine how a jury would not have found that Lindsey possessed the requisite criminal intent when he willfully concealed the goods. *See Barrett v. Commonwealth*, 597 S.E.2d 104, 111 (Va. 2004) ("[T]he word [willful] . . . when used in a criminal statute . . . generally means an act done with a bad purpose. . . . The word is also employed to characterize a thing done without ground for believing it is lawful.").

Lindsey's arguments on the harmless-error issue are limited to (1) whether a general jury instruction

can cure an infirmity in a specific jury instruction, (2) that no one argued intent to the jury, and (3) that this Court should ignore the vehicle problem. *See* Pet. 26-28. First, with respect to whether a general instruction saves a flawed specific instruction, that is not the relevant question under harmless-error analysis, *see Rose*, 478 U.S. 576-77. Second, the fact that intent was not a significant issue in the case weighs in favor of the Commonwealth. Lindsey has abandoned his challenge to the central issue (whether he concealed the goods), *compare* Pet. 1-30 (challenging only intent), *with* Pet. App. 25a-27a (challenging willful concealment), and he has offered no innocent reason for why he concealed merchandise on store property. Given Lindsey's inability to even posit *post hoc* a plausible non-criminal motive, it is no surprise that the Commonwealth did not argue the obvious point to the jury; if Lindsey willfully concealed the goods, then his intent was plain. He has never given an explanation to the contrary.

This Court should avoid deciding important constitutional questions when the result will have no effect on the case. Because any error associated with Instruction No. 16 was harmless beyond a reasonable doubt, granting certiorari in this case would not afford Lindsey meaningful relief.

III. The Virginia Supreme Court's decision was correct on the merits, so review is not necessary here.

While this case does not warrant this Court's review for the reasons given, it is worth noting that the Virginia Supreme Court reached the right result. The principles governing Lindsey's argument are well-settled, and the Virginia Supreme Court properly applied this Court's precedent.

"The Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Francis*, 471 U.S. at 313 (citation omitted). To that end, States may not rely on "evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." *Id.* (citation omitted). But it is not the case that every inference violates the Due Process Clause; "[i]nferences and presumptions are a staple of our adversary system of factfinding." *Cty. Court of Ulster Cty., New York v. Allen*, 442 U.S. 140, 156 (1979). Indeed, "[i]t is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an 'ultimate' or 'elemental' fact—from the existence of one or more 'evidentiary' or 'basic' facts." *Id.* (citation omitted).

Determining whether a jury instruction is impermissible involves a straightforward inquiry: "The court

must determine whether the challenged portion of the instruction creates a mandatory presumption or merely a permissive inference." *Francis*, 471 U.S. at 314 (citation omitted). "A mandatory presumption instructs the jury that it must infer the presumed fact," whereas "[a] permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion." *Id.* Permissive inferences are generally constitutional because they do not shift the burden of proof to the defendant. *See Allen*, 442 U.S. at 157. Indeed, a permissive inference is unconstitutional "only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *Id.*

The Virginia Supreme Court correctly held that Instruction No. 16 did not violate the defendant's due process rights because it was a permissive inference. First, unlike the instructions held unconstitutional in *Francis* and *Sandstrom*, the contested portion of Instruction No. 16 was not "cast in the language of command." *Francis*, 471 U.S. at 316. In *Sandstrom*, for example, the court instructed the jury that "the law *presumes* that a person intends the ordinary consequences of his voluntary acts." 442 U.S. at 512 (emphasis added). Likewise, in *Francis*, one instruction stated that "[t]he acts of a person of sound mind and discretion *are presumed* to be the product of the person's will, but the presumption may be rebutted." 471 U.S. at 315 (emphasis added). Further, such a person was "*presumed* to intend the natural and probable consequences

of his acts but the presumption may be rebutted." *Id.* (emphasis added).

By contrast, Instruction No. 16 did not require the jury to reach any conclusion; it merely informed the jury that it should treat evidence of willful concealment as evidence of intent to convert or defraud. Pet. App. 31a ("is evidence"). Nothing in Instruction No. 16 instructs that the jury must make a particular presumption or states that willful concealment alone satisfied the prosecution's burden of proof with respect to criminal intent. The instruction simply informed the jury of a rational conclusion that it could draw from certain predicate facts. Instructing the jury that it can rely on a plainly rational inference does not violate the Due Process Clause. *See Allen*, 442 U.S. at 164 (state statute providing that, with certain exceptions, presence of firearm in automobile was presumptive evidence that all occupants had illegally possessed it was a constitutional permissive inference; inference that all four occupants possessed firearms in plain view "is surely more likely than the notion that these weapons were the sole property of the 16-year-old girl" in the car rather than three adult males); *Barnes*, 412 U.S. at 843-44 (fact that "[f]or centuries courts have instructed juries that inference of guilty knowledge may be drawn from fact of unexplained possession of stolen goods," thereby "reflecting accumulated common experience, provides strong indication that the instruction comports with due process").

In short, the jury here was instructed that: the defendant was presumed innocent and this presumption

remained with him throughout the trial; the Commonwealth had to prove each element of the offense beyond a reasonable doubt; the defendant had no burden to produce any evidence; the evidence as a whole had to exclude every reasonable theory of innocence; and the jury had to acquit Lindsey if it found that the Commonwealth failed to prove any of the elements of the offense beyond a reasonable doubt. Va. JA 4-7. Further, the Commonwealth's closing argument never even hinted at any reliance on Instruction No. 16, but instead pointed to the things in the record that demonstrated the credibility of the Commonwealth's witnesses, rather than Lindsey. Va. JA 193-99, 204-07.

Given this record, there is no reasonable likelihood that the jury in this case applied Instruction No. 16 in an unconstitutional manner. *See Boyde*, 494 U.S. at 378-81 (reasonable-likelihood standard adopted on claims that jury applied challenged instruction so as to prevent consideration of constitutionally relevant evidence). After the Commonwealth proved beyond a reasonable doubt that Lindsey had willfully concealed goods while inside the store, there certainly was a sufficient link between the predicate fact and the inferred fact to render the inference constitutional. *See Barnes*, 412 U.S. at 845 (record showed that defendant possessed recently stolen checks payable to individuals he did not know and provided no plausible innocent explanation for such possession; based on "this evidence alone, common sense and experience tell us that

petitioner must have known or been aware of the high probability that the checks were stolen").[9]

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

MARK R. HERRING
Attorney General
of Virginia

TREVOR S. COX
Acting Solicitor General

MATTHEW R. MCGUIRE
Acting Deputy
Solicitor General
Counsel of Record

OFFICE OF THE
ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7773
mmcguire@oag.state.va.us

October 18, 2017

[9] Even if this Court believed that Instruction No. 16 did shift the burden, it did no more than shift the burden of production, not the burden of persuasion. *See Allen*, 442 U.S. at 157 n.16. Although Lindsey's question presented arguably raises the issue, he has not argued that Instruction No. 16 improperly shifted the burden of production. So that issue, which was left open by *Francis*, 471 U.S. at 314 n.3, is not properly presented here.