. Library

IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

STEPHEN KUAL PETTIT, Appellant, v. REPUBLIC OF PALAU, Appellee.	CRIMINAL APPEAL NO. 14-002 Criminal Case No. 14-130 **OPINION**

Decided: February 2, 2016

Counsel for Appellant: Oldiais Ngiraikelau
Counsel for Appellee: J. Evan Robbins, Assistant Attorney General

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

On October 23, 2014, a jury convicted Defendant Stephen Pettit of possessing more than one gram of methamphetamine and acquitted him of a trafficking charge arising out of the same events. While deliberating on the verdict, the jurors asked the trial judge to allow them to review the trial testimony of two government witnesses. The trial judge denied that request, and Pettit, by counsel, immediately sought reconsideration, which the trial court also denied. Shortly thereafter, the jury rendered its mixed verdict,

and on November 24, 2014, the trial court sentenced Pettit to seven years' incarceration. Pettit now appeals the trial court's denial of the jury's request to review the two witnesses' trial testimony during their deliberations. Because we determine that the trial court's denial of the jury's request to review the trial testimony was firmly within its lawful discretion, and it properly exercised that discretion for the reasons outlined in greater detail below, we affirm the decision of the Trial Division, and decline to overturn the jury's verdict.

BACKGROUND

Pettit was originally charged with three controlled substance counts related to the importation by mail of methamphetamine. In the same Information, the government charged Telel Jelsy Blesam with the same three offenses. By a separate Information based on separate events, the government also charged Kalingo Kangich with trafficking and possessing methamphetamine. *See* Crim. Case No. 14-143 (filed Aug. 29, 2014). Blesam pleaded guilty to a lesser included charge of one of the three counts against her, and Kangich pleaded guilty to one of the two counts against him. In exchange for these pleas, in which each received a sentence substantially lower than the maximum sentence allowable for the charges against them, and which included a condition that each testify against Pettit in his trial, the government dismissed the remaining counts against Blesam and Kangich.

The jury in Pettit's trial was selected on October 13, 2014, and trial began shortly thereafter. At the beginning of the trial, before arguments or evidence, the trial judge

advised the jurors in one of the preliminary instructions that they must pay close attention to testimony because they would not have access to it during deliberations, other than from their own recollection. Court's Preliminary Jury Instruction No. 11 (October 10, 2014); *see also*, ROP Internal Jury Trial Guidelines for Judges No. XII (pattern jury instruction entitled "No transcript available to jury") (citing 9th Cir. Crim. Jury Instr. 8.03A (1192) at 11).

Blesam testified on October 16, 2014, the fourth day of trial, for just under two hours. She testified that she agreed to pick up a package containing methamphetamine from the post office for Pettit because she owed him a favor, and that Pettit drove Blesam to the post office on the day in question. Blesam further testified that, while picking up the package containing methamphetamine, she wore a WCTC store uniform that she obtained from a friend in an attempt to avoid drawing attention. She testified that she picked up the package and went to a Division of Customs inspection point in the post office, where officers found methamphetamine in the package, after which she was interviewed first by Customs and then by narcotics officers. She testified that, at first, she lied to law enforcement about her involvement, but later that day she began to tell them the truth. Finally, Blesam testified that, following her interviews with law enforcement, Pettit bought plane tickets to California for himself and for Blesam, but that the police apprehended them before they could leave Palau.

Kangich testified on October 20, the sixth day of trial, for about 1 hour and 15 minutes. After defense voir dire and objection on the matter of relevance, the trial judge

permitted the government to examine Kangich before the jury. Kangich testified that he had known Pettit for six years, initially as a colleague at a dive shop, later socially, and eventually in the methamphetamine business. He further testified that Pettit told him that Pettit was expecting a package in the mail containing 130 grams of methamphetamine, and Pettit said he would give it to Kangich to "take care of it." Sometime later, Pettit showed Kangich a post office slip and told Kangich to go get the package, but Kangich refused. Kangich testified that, a couple of hours later, Pettit came to Kangich again and told him that a woman had been busted at the post office while attempting to pick up the package. Kangich went on to testify that, later that same evening, Pettit came with Blesam to where Kangich was staying, and then Pettit and Blesam went back to "their house." Kangich testified that he went to Pettit's house in Airai the next morning, and that was the last time Kangich saw Pettit before coming to court to testify in Pettit's trial.

During the week-long trial the parties called over 15 witnesses, and counsel gave closing arguments on October 22, 2014. Despite having been admonished at the outset of trial that they must pay close attention to all testimony because they would not have access to it during deliberations, "the jury sent a note requesting 'to see the testimony of Telel [Jelsy Blesam] and Kalingo [Kangich],'" on the very first day of deliberations. *See* Order Denying Request to Reconsider Ruling on Jury Request to Hear Trial Testimony at 1 (October 23, 2014). Upon receiving the jury note, the trial judge informed the parties of it, but denied the jury's request, over Pettit's objection. The trial judge instructed the jury to rely on their own recollection, as they had previously been instructed. The next day,

Pettit filed a written objection to the decision and moved for reconsideration. The trial judge issued a written opinion the same day denying reconsideration. Later that day, the jury returned its mixed verdict, finding Pettit guilty of possession of over a gram of methamphetamine, and not guilty of trafficking. A month later, the trial court sentenced Pettit to seven years' incarceration.

Pettit timely filed his notice of appeal, listing four grounds for appeal. One of the four grounds listed was the trial court's denial of the jury's request to review trial testimony. After an extension, Pettit timely filed his opening brief, which listed and argued only that one issue for review. The government responded, no reply brief was filed, and the appeal is now ripe. We therefore take up only the issue of the trial judge's denial of the jury's request to review the testimony of the government's two cooperating witnesses.

STANDARD OF REVIEW

A trial judge's decisions are grouped into three main categories, each of which requires a unique standard of review on appeal: questions of law, questions of fact, and matters of discretion. *See Remengesau v. Republic of Palau*, 18 ROP 113, 118 (2011); *Ngoriakl v. Gulibert*, 16 ROP 105, 106-07 (2008); *see also Pierce v. Underwood*, 487 U.S. 552, 557-58 (1988). "'Matters of discretion' include a broad range of decisions because a trial court is invested with great discretion in managing and controlling litigation before it." *See* ROP R. Jury Tr. § VIII ("[I]t is within the discretion of the trial judge to conduct his or her trial as he or she sees fit."); ROP R. Crim. P. 57 ("If no

procedure is specifically prescribed by rule or applicable statute, the court may proceed in any lawful manner not inconsistent with any rule or applicable statute."); ROP R. Crim. P. 57 comm. (2004) ("[L]anguage has been added to the rule to provide the courts with broad discretion to proceed in any lawful manner in the absence of controlling law.").

Responding to a jury's questions during deliberation is a classic example of a discretionary act entrusted to the trial judge. Jury questions must be addressed expeditiously, and the trial judge is in the best position to address them, given her familiarity with the trial, evidence, and witnesses.[1] *See, e.g.*, *United States v. McDonald*, 935 F.2d 1212, 1222 (11th Cir. 1991) ("A trial court's response to a jury's question is entrusted to its own sound discretion and a conviction will not be reversed in the absence of an abuse of discretion.") (citing *United States v. Loyd*, 743 F.2d 1555, 1567 (11th Cir.1984); *United States v. Lopez*, 728 F.2d 1359, 1363 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984); *United States v. Quesada-Rosadal*, 685 F.2d 1281, 1283 (11th Cir. 1982)); *see also* 1 Fed. Jury Prac. and Instructions 6th *Jury Trial* § 9:3 (2006); 75B Am. Jur. 2d *Trial* §§ 1447, 1450, 1451, 1452 (2007).

We therefore review for abuse of discretion the trial court's response to questions from the jury during deliberation, including a request to review trial testimony. *See Remengesau*, 18 ROP at 118 ("[D]iscretionary decisions are evaluated under the abuse of

[1] Palau has only recently begun holding jury trials, so the Court looks to the law of other jurisdictions for guidance, as non-binding, persuasive authority. *Kazuo v. ROP*, 1 ROP Intrm. 154, 172 n.43 (1984). We look to common law as expressed in the restatements where available, and as generally understood and applied in the United States where no restatement is available. 1 PNC § 303; *see also, e.g.*, *Shmull v. Hanpa Indus. Dev. Corp.*, Civ. App. Nos. 12-048 & 12-049 (Apr. 28, 2014).

discretion standard, where a trial court's decision will not be overturned unless the decision was arbitrary, capricious or manifestly unreasonable, or because it stemmed from an improper motive.") (citing *Ngoriakl v. Gulibert*, 16 ROP 105, 107 (2008)); *see also, e.g.*, *United States v. Eghobor*, No. 14-11354, 2015 WL 8046928, at *4 (5th Cir. Dec. 3, 2015) ("It is a 'firm rule' that the district court 'has broad discretion in responding to the jury's request for the transcript of a particular witness's testimony and will only be reversed upon a finding of an abuse of discretion.'" (quoting *United States v. Schmitt*, 748 F.2d 249, 256 (5th Cir.1984))); *United States v. Pacchioli*, 718 F.3d 1294, 1303 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 804 (2013) ("We also review the district court's denial of a jury request to read back testimony for abuse of discretion.") (citing *United States v. Delgado*, 56 F.3d 1357, 1363 (11th Cir. 1995)); *United States v. Medina Casteneda*, 511 F.3d 1246, 1249 (9th Cir. 2008) (applying abuse of discretion standard "in light of the district court's great latitude to address requests for readbacks"); *United States v. Bennett*, 75 F.3d 40, 46 (1st Cir. 1996) ("The trial judge's decision whether or not to grant a request to read back testimony requested by a jury is reviewed for abuse of discretion . . . .").

The abuse of discretion standard is applied with deference to the trial court's familiarity with the proceedings and the evidence in the case. *See Pierce v. Underwood*, 487 U.S. 552, 560-62 (1988); 19 Moore's Fed. Prac. § 206.05 (1998); *see also* 5 Am. Jur. 2d *Appellate Review* § 623 (2007). More specifically, "'[a]n abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered,

when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment.'" *Ngeremlengui State Pub. Lands Auth. v. Telungalk Ra Melilt*, 18 ROP 80, 83 (2011) (quoting *WCTC v. Kloulechad*, 15 ROP 127, 129 (2008) (quoting *Eller v. ROP*, 10 ROP 122, 128-29 (2003))). Or, to put it plainly, we will find an abuse of a trial judge's discretion only when the judge's decision was "'clearly wrong.'" *Rechebei v. Ngiralmau*, 17 ROP 140, 144 (2010) (quoting *Tmichjol v. Ngirchomlei*, 7 ROP 66, 68 (1998)).

ANALYSIS

This appeal raises a distinct issue concerning a trial judge's discretion in managing a jury trial in Palau,[2] and, as cited in detail in the Standard of Review section above, we review for abuse of discretion the trial judge's decision not to provide the jury with trial testimony for review during deliberations. Indeed, how a trial judge should respond to jury questions is an issue of first impression in Palau; therefore the Court looks to the law of other jurisdictions for guidance, as non-binding, persuasive authority. *Kazuo v. ROP*, 1

[2] Because jury trials are of recent vintage in the Republic, a brief background on Palau's jury system is appropriately footnoted here. That is, Palau's constitution did not originally grant the right to a jury trial, and for most of our history, our legal system has not included them. *See ROP v. Chisato*, 2 ROP Intrm. 227, 230-31 (1991). But in 2008, voters passed the Ninth Amendment to the Constitution, which creates a right to a jury trial for criminal defendants charged with a crime that carries a maximum penalty of twelve years or more of imprisonment. In 2009, Palau's legislature passed RPPL 8-12 (Senate Bill No. 8-31, SD6, HD1), codified at 4 PNC § 601 *et seq.*, which gave legal structure to the Ninth Amendment right to jury trial. Shortly thereafter, early in 2010, then-President Johnson Toribiong signed the bill into law. The same year, this Court drafted and promulgated Jury Trial Rules, basing them on the jury trial rules used in United States federal courts. The first jury trial was held in 2012. Since 2010 there have been five jury trials, including Pettit's. *See ROP v. Suzuky*, No. 14-096 (filed June 12, 2014); *ROP v. Yano*, No. 13-077 (filed July 24, 2013); *ROP v. Annes*, No. 13-074 (filed July 22, 2013); *ROP v. Misech*, No. 12-065 (filed June 29, 2012).

ROP Intrm. 154, 172 n.43 (1984).[3] In doing so, the Court notes that there is no universal test for whether a trial court should allow jurors to review trial testimony. Courts uniformly agree, however, that decisions on this subject are appropriately relegated to the sound discretion of the trial judge. *See* Standard of Review section, *supra*; *see also* 75B Am. Jur. 2d *Trial* §§ 1447, 1450, 1451, 1452 (2007). And indeed, the parties in this case acknowledge that the decision was within the trial court's discretion. There is no one-size-fits-all answer here. "Each case must be decided on its facts, and it is the appellant's burden to show that the trial judge acted unreasonably." *United States v. Bennett*, 75 F.3d 40, 46 (1st Cir. 1996) (affirming where trial court responded to jury request for testimony by telling jury to use recollections, but that testimony would be provided if the jury still found it necessary, then granted later jury request for only direct testimony of two victims over defense objection requesting to have cross-examinations read as well).

I. How a trial court should analyze a jury request to review testimony

Though conceding that the decision is firmly rooted in the trial judge's discretion, Pettit argues that the exercise of the trial court's discretion nonetheless "'should be guided by consideration of the jurors' need to review the evidence before reaching a verdict, assessed against the difficulty in locating the specific testimony requested, the

---

[3] We look to common law as expressed in the restatements where available, and as generally understood and applied in the United States where no restatement is available. 1 PNC § 303; *see also, e.g.*, *Shmull v. Hanpa Indus. Dev. Corp.*, Civ. App. Nos. 12-048 & 12-049 (Apr. 28, 2014). There is no restatement applicable here, so we apply common law. United States common law is particularly pertinent to our jury trial analysis because the Jury Trial Rules that this Court promulgated in 2010 were drafted based on the jury trial rules used in United States federal courts.

possibility of undue emphasis on any portion of the testimony, and the possibility of undue delay in the trial.'" Opening Br. at 12 (quoting *United States v. Escotto*, 121 F.3d 81, 84 (2d Cir. 1997)). We agree, and find that the *Escotto* case appropriately sums up a trial judge's relevant considerations in broad strokes, although *Escotto* addresses the issue in terms too broad to be very useful in itself as a test or a standard. That is, when deciding whether to grant a jury's request to review trial testimony, the trial court must weigh the importance of providing the information to ensuring fairness and accuracy in the rendering of the verdict on the one hand, against the difficulty, delay, and risk of the requested information bearing undue weight on the other. There are, of course, myriad considerations encompassed within these general categories, including the length and complexity of the trial and the requested testimony, the breadth of the request, the nature of the testimony requested, the quantity and quality of other evidence, the importance of the requested evidence relative to the other evidence in the case, and the available medium and timeframe for providing the requested testimony, to name a few.

These myriad considerations make review of a judge's discretionary decision to refuse a jury's request to hear recorded trial testimony highly fact-specific. To that end, the only way to analyze it is by comparison to the specific factual scenarios raised in other cases, which requires review of approaches in other jurisdictions, since this is a case of first impression in Palau. In making such comparisons, it is important to note that we are discussing only jury requests to review trial testimony, not jury requests to see documentary or physical evidence admitted during the trial, or requests to re-hear

attorney's arguments or review the court's jury instructions, and the analysis would not be the same for each of these categories of possible jury requests.

Jury requests to hear trial testimony may be granted, but they may also be denied—there is no hard and fast rule, and this is a matter of discretion.[4] *See, e.g.*, *United States v. Eghobor*, No. 14-11354, 2015 WL 8046928, at *5 (5th Cir. Dec. 3, 2015) (affirming trial court's decision to provide requested transcript of one witness's testimony, discussing other circuits' decisions addressing danger of jury giving undue weight to certain testimony when trial testimony is provided); *United States v. Kolodesh*, 787 F.3d 224, 238-39 (3d Cir. 2015) (applying plain error standard because issue was not raised until appeal, affirming trial court where it responded to request for partial transcripts of three witnesses' trial testimony by saying the jury could rely on its recollections, or the court could provide full but not partial transcripts for two and no transcript but a read-back for the third, but ultimately provided no testimony when verdict

[4] The standard is abuse of discretion in United States federal courts, although some states have *statutorily* indicated a preference for providing requested testimony: In Indiana, statute *used to* require that courts read to the jury any properly admitted testimony or evidence upon the jury's request; that law was repealed in 1998. *Johnson v. State*, 518 N.E.2d 1073, 1078 (1988) (citing to Ind. Code § 34-1-21-6 (Burns 1986), repealed by P.L.1-1998, § 221 which changed law to require jurors be provided with the required information if they disagree about any part of the testimony during deliberation, similar to Texas statute, *infra*). Texas statute requires that *only* if jurors disagree about a particular point, the court must read to them *only* the part of the testimony addressing that dispute, "and no other" testimony. *Fuller v. State*, 716 S.W.2d 721, 724 (Tex. App. 1986) (citing Tex. Code Art. 36.28) (affirming trial court's refusal to read testimony to jury when jury note stated no disagreement as to the contents of the testimony requested). Under New York law, courts have discretion, but statute requires a "meaningful response" to a jury's request for testimony read-back, and it seems a flat denial might then be reversible error, although federal courts have held that while discouraging read-backs might be inadvisable, it is not reversible error. *Cottrel v. New York*, 259 F. Supp. 2d 300, 305 (S.D.N.Y. 2003). In Connecticut, pursuant to court rules, a trial judge must review a jury's request for reasonableness, and if the request is reasonable, then allow review of the testimony. *State v. Fletcher*, 525 A.2d 535, 539 (Conn. App. 1987), aff'd, 540 A.2d 370 (Conn. 1988). Palau has no such law or rule.

was returned before testimony was prepared); *United States v. Pacchioli*, 718 F.3d 1294, 1305-06 (11th Cir. 2013) (holding trial courts have broad discretion in responding to jury's request to rehear testimony, affirming trial court's decision that providing testimony in response to jury's question in case at bar would have been too onerous or time consuming; holding that, in any event, defendant did not show prejudice from court's decision because, *despite some inconsistencies in the testimony*, the witnesses said defendant "was an active participant in the conspiracy" who had brought the witnesses into it, so "*[t]he evidence had at least as much potential to damage [Defendant] as it did to help him*" (*emphasis* added)); *United States v. Hatcher*, 513 Fed. Appx. 581, 583 (6th Cir. 2013) (finding no abuse of discretion where trial court responded to request for transcript of cooperator's testimony by playing recording of testimony where no transcript was available, and stopping the playing after direct when jury requested to skip hearing the cross); *United States v. White*, 582 F.3d 787, 805 (7th Cir. 2009) ("White next complains that the district court erroneously refused the jury's request for a transcript of the trial testimony of Officer Hughes, a decision we review for abuse of discretion. [] There was no abuse of discretion here. . . . [T]he judge declined the jury's request and instructed jurors to rely on their collective memory of the evidence. This approach to jury questions of this sort is well within the trial court's discretion." (citation omitted.)); *United States v. Rodriguez*, 457 F.3d 109, 120 (1st Cir. 2006) ("[T]here was some danger, as the court noted, that allowing only [one witness's] testimony to be read might risk highlighting his testimony inappropriately. We believe the district court did not abuse its

discretion in denying the request. As the court noted in its comments to the jury, the [two-day] trial was brief, and the jurors' collective memory should have been sufficient for their deliberations."); *United States v. Davis*, 93 Fed. App'x. 924, 926 (7th Cir. 2004) (affirming trial court's decision not to provide transcript of police officer's testimony, explaining "[t]he district court's decision is not an abuse of discretion when it is based on legitimate reasons such as the trial's brevity, the ability of jurors to take notes, the relative clarity of the witness's testimony, and the overall simplicity of the issues before the finders of fact"); *Marra v. Larkins*, 46 F. App'x 83, 87-88 (3d Cir. 2002) (affirming trial court's refusal to provide full transcript of witness's trial testimony or to provide full transcript of that witness's grand jury testimony that conflicted with trial testimony, instead only reading four lines of grand jury testimony that court determined most closely addressed jury's interest in testimony about whether witness saw victim's body before and/or after shooting); *United States v. Escotto*, 121 F.3d 81, 83-85 (2d Cir. 1997) (collecting cases, affirming trial court's decision to provide transcripts in lieu of the requested read-backs, holding trial court may not have "wholesale prohibition" on read-backs, stating that cautionary instruction accompanying transcripts is advisable); *United States v. Bennett*, 75 F.3d 40, 46 (1st Cir. 1996) (affirming where trial court responded to jury request for testimony by telling jury to use recollections, but that testimony would be provided if the jury still found it necessary, then granted later jury request for only direct testimony of two victims over defense objection requesting to have cross-examinations read as well); *United States v. Krout*, 66 F.3d 1420 (5th Cir. 1995) ("Generally, rereading

or replaying testimony is disfavored." (citing *United States v. Nolan*, 700 F.2d 479, 486 (9th Cir.), *cert. denied*, 462 U.S. 1123 (1983); *United States v. Keys*, 899 F.2d 983, 988 (10th Cir.), *cert. denied*, 498 U.S. 858 (1990).)); *United States v. Hernandez*, 27 F.3d 1403, 1408-09 (9th Cir. 1994) (where trial court initially urged jurors to rely on collective memories rather than rehearing testimony, but jury then requested again to rehear testimony, trial court abused discretion by providing full transcript of witness's testimony without taking proper precautions, including telling jury not to give undue emphasis to any portions of the trial, and telling jury that rehearing of testimony was not a substitute for memory or credibility assessment); *United States v. Ratcliffe*, 550 F.2d 431, 434 (9th Cir.1976) (per curiam) (no abuse of discretion where trial court instructed jury before trial that it would refuse read-backs in order to induce jurors to pay attention); *United States v. Jackson*, 257 F.2d 41, 43-44 (3d Cir. 1958) (finding that discretion was abused where jury asked for a particular piece of information that was obviously highly relevant—whether a particular person was working for the government at the time of the purported entrapment—they were entitled to get it, and the court's failure to provide it before a verdict was reached was reversible error); *see also* 2A Charles Alan Wright & Peter J. Henning, *Federal Practice and Procedure* § 504 (4th Ed. 2009); 1 Kevin F. O'Malley, *et al*, Federal Jury Practice and Instructions §§ 9:1, 9:3 (6th Ed. 2006).

While it's nearly impossible to generalize helpfully in an area that is so fact-dependent, for the benefit of trial courts and attorneys the Court will draw out a few principles. Broadly speaking, a court should consider the jury's need for the information

in ensuring fairness and accuracy in the rendering of the verdict on the one hand, against the risk of the requested information bearing undue weight, as well as the difficulty and delay of providing it, on the other. Examples of considerations falling within these broad categories include the length and complexity of the trial and the requested testimony, the breadth of the request, the nature of the testimony requested, the quantity and quality of other evidence, the importance of the requested evidence relative to the other evidence in the case, and the available medium and timeframe for providing the requested testimony, to name just a few. Where the jury has asked a specific factual question that appears relevant to a charge, that is one indication that providing the information is likely to be important to the outcome, and it should be provided. The same is true when the jury requests multiple times to review testimony—the court may ask the jury to carefully consider exactly what it wants to review, but the court should itself carefully consider why the jury is so focused on its request. When testimony is requested, the court should consider whether the request should be granted in full or in part, or refused in full or in part, and whether additional information should be provided to balance what it is giving to the jury during deliberations. For example, it will often be most appropriate to offer the jury a witness's cross-examination as well, even if the jury only expressly requests the direct. Whatever the trial court's decision, it should clearly explain those reasons in the trial record, either on the record verbally, or via written order, specifically referring to the relevant considerations listed in this Opinion, so that the parties understand the basis of the decision and can make an informed decision about whether to seek reconsideration or

appeal. Finally, cautionary instructions will almost always be advisable, and they should include that the re-provided testimony should not supplant the jurors' memories of the in-court testimony and any credibility determinations they made then; and that the jurors should consider all of the evidence and not focus on a few pieces while ignoring the rest.

II. A brief restatement of Pettit's arguments regarding the trial court's abuse of discretion

"Each case must be decided on its facts, and it is the appellant's burden to show that the trial judge acted unreasonably." *United States v. Bennett*, 75 F.3d 40, 46 (1st Cir. 1996). Although it doesn't raise the bar in reality because it can be folded into the question of whether the trial court acted reasonably, some courts specifically add that "[w]here a defendant cannot show that the district court's decision prejudiced him, we will not find an abuse of discretion." *United States v. Pacchioli*, 718 F.3d 1294, 1306 (11th Cir. 2013). The onus is on Pettit to argue specifically how the trial court's decision was an abuse of discretion, based on the facts of this case, and how the refusal to replay the requested testimony prejudiced his case. Using the very broad framework from *Escotto*, Pettit offers a number of legal bases for his argument that the trial court abused its discretion in refusing to allow the jury to review the witnesses' trial testimony. First, Pettit argues that the court failed to consider the jurors' need to review the testimony, although he doesn't explain what he thinks that need was, or offer any suggestion for the framework of that consideration. Second and third, Pettit states that "the [trial judge's] concern about delay was negligible and, as to undue emphasis, the concern was misplaced." *See* Opening Br. at 14. Fourth, Pettit implies that the trial court simply

overestimated the risk of damage to the defendant given the surprising sequence of events in which, (a) the jury requested only the testimony of the two key *prosecution* cooperating witnesses, and yet (b) only the *defense* objected to the judge's decision to deny the request.

Pettit does not explain the significance of the requested testimony, or in what way he believes it could have been exculpatory. *See, e.g.*, *United States v. Jackson*, 257 F.2d 41, 43-44 (3d Cir. 1958) (finding that discretion was abused where jury asked for a particular piece of information that was obviously highly relevant—whether a particular person was working for the government at the time of the purported entrapment—they were entitled to get it, and the court's failure to provide it before a verdict was reached was reversible error). In fact, Pettit states that "[t]heir testimony clearly favored the prosecution, and not the Defendant." (Opening Br. at 11.) He provides a good summary of the testimony in his Statement of Facts, but does not tie those facts to either legal argument or a defense theory of the case. In short, he contends the trial judge did not have adequate reasons for refusing the jury's requests, but doesn't explain why he thinks it was important that the jury's request be granted in *this case*, beyond pointing out that the jury made the request, suggesting that the jury thought it would somehow be helpful. He took a stab at explaining the exculpatory potential of the evidence in his closing argument at trial, but did not mention that in his appeal.

Importantly, Pettit does *not* argue that the trial judge considered improper factors. Instead, he simply disagrees with the weight the trial judge afforded to the proper factors.

Though commendable in its fidelity to the appropriate legal standard of abuse of discretion, and to the facts of this case, the argument Pettit adopts requires that he overcome a demonstrably high hurdle. That is, even if this Court were convinced that a reasonable jurist might have decided differently based on its weighing of the factors, in order to reverse on appeal we would nonetheless have to find that the trial judge was clearly wrong in weighing the factors—and that is not the case here.

Pettit also argues that the trial judge's concerns about undue emphasis on the requested testimony could have been addressed by providing the witnesses' entire testimony and giving appropriate accompanying instructions. *See United States v. Richard*, 504 F.3d 1109, 1115-16 (9th Cir. 2007). Pettit is correct that such precautions would have been prudent and important had the trial court decided to allow the jury to rehear the testimony, but the availability and necessity of such precautions had the request been granted is beside the point here, because the request was not granted. The existence of such precautions does not mean that the trial court must always grant the jury's request and implement the precautions, although it may alleviate some danger of granting jury requests for testimony.

III. The trial court did not abuse its discretion in its weighing of the relevant factors or its decision to deny jury review of trial testimony

In its Order Denying Request to Reconsider Ruling on Jury Request to Hear Trial Testimony, the trial court indicated that it was denying the jury's request based on the danger of the jury placing undue weight on particular testimony, and to avoid delaying deliberations. The court's decision indicated that it was made "[i]n light of the facts and

circumstances of this case." *See* Order Denying Request to Reconsider Ruling on Jury Request to Hear Trial Testimony at 3. Undue emphasis and delay are proper factors to consider under the relevant legal framework, and we find that the trial judge did not afford either of these factors undue weight or weigh them together improperly. We note, however, that a more fulsome explanation of the trial court's decision than was offered in this case is advisable in order to allow thorough review on appeal. Such an explanation should take into account the various relevant factors listed in this Opinion.

First, we find Pettit's argument that the trial judge improperly failed to consider the jury's need to review the testimony to be fallacious and circular. That is, the jury's need to review the testimony is self-evident, given the very fact that the jury requested to see it—and so this factor always weighs in favor of granting the jury's request. Put another way, if the jury didn't feel some need to review the testimony then there wouldn't be a request, and there would be no need for the trial judge to consider the request, exercise her discretion, and make a decision. By engaging in the weighing process and recognizing that she had discretion to decide the request, we find that the trial judge implicitly considered the jurors' need to review the testimony. And we further agree with the trial judge that the need was not compelling here—the testimony the jurors requested here was not particularly complicated, and the trial was only a week long, so it was reasonable to expect the jurors to adequately remember all of the testimony. The trial judge's finding that the jury's need was not compelling is also supported in hindsight. That is, rather than being unable to reach a verdict without the requested testimony, the

jury reached its decision very quickly. That said, a better approach in future cases would be to ask the jury to narrow its request, or to ask for clarification on particular subjects, or at least to ask the jury to use its recollection, but to tell the jury that the judge will reconsider if the jury attempts to recall the testimony but continues to believe that re-hearing it would be helpful.

Second, we find the trial judge's weighing of the possibility that providing the testimony might lead to the jury affording that testimony undue weight to be reasonable, and certainly not "clearly wrong." The concern about undue emphasis is the primary one for appellate courts: "It is a 'firm rule' that the district court 'has broad discretion in responding to the jury's request for the transcript of a particular witness's testimony and will only be reversed upon a finding of an abuse of discretion.' [] Though the court's discretion is broad, it cannot ignore the risk of the jury placing undue emphasis on the provided testimony." *United States v. Eghobor*, No. 14-11354, 2015 WL 8046928, at *4-5 (5th Cir. Dec. 3, 2015) (citations omitted) (affirming trial court's decision to provide requested transcript of one witness's testimony over defense objection, discussing other circuits' decisions addressing danger of jury giving undue weight to certain testimony when trial testimony is provided). Here, despite defense counsel's strategic decision to seek to provide the jury with a second look at the prosecution's most vital testimony, the trial judge properly exercised discretion given the concern that providing the jury with only the testimony of Pettit's partners in crime, the two key prosecution witnesses, could result in that testimony carrying undue weight with the jury. There were more than ten

other witnesses, and providing the testimony of only two of them could have created a bolstering effect for that specific testimony: the jury would hear *only* that testimony twice, and the second time would be during deliberations while they were already talking about the case and forming opinions regarding guilt. This situation is somewhat unusual—a more typical case would be a trial court replaying testimony over defense objection. Still, the trial court has discretion to act as it sees fit to protect the integrity of a verdict even where the court disagrees with defense counsel as to how that will best be accomplished.

As the Court has noted, Pettit's briefing does not explain his theory of how the requested testimony could have been exculpatory, i.e., how he was prejudiced by the trial judge's decision, instead arguing the case in terms of broad generalities. Because this is a criminal case, and in the interest of assessing it as carefully and thoroughly as possible, the Court has listened to the requested testimony and the defense's closing argument. The latter attempts to point out certain inconsistencies in the former, and to cast Pettit as a hapless bystander in the wrong place at the wrong time with the wrong friends, caught up in criminal activity by the real criminals, cooperators Blesam and Kangich. Without any detailed argument from Pettit on the subject, we have found nothing to suggest that a rehearing of the testimony was obviously vital to the jury's deliberations, and we disagree with Defendant's suggestion during closing argument, instead holding that that the testimony did not "contain[] more than the customary measure of minor variations or inconsistencies." *United States v. Bennett*, 75 F.3d 40, 46 (1st Cir. 1996). Frankly, in this

Court's view of the cooperator's testimony, Pettit got off pretty lightly with only the possession conviction, and it appears likely that without rehearing the testimony, the jury gave Pettit the benefit of any doubt on the trafficking charge, such that Pettit likely benefitted from the trial judge's refusal of the jury's request. In other words, Pettit has failed to show that the trial court's decision prejudiced his case. *See, e.g.*, *United States v. Pacchioli*, 718 F.3d 1294, 1305-06 (11th Cir. 2013) (holding trial courts have broad discretion in responding to jury's request to rehear testimony, affirming trial court's decision that providing testimony in response to jury's question in case at bar would have been too onerous or time consuming; holding that, in any event, defendant did not show prejudice from court's decision because, *despite some inconsistencies in the testimony*, the witnesses said defendant "was an active participant in the conspiracy" who had brought the witnesses into it, so "*[t]he evidence had at least as much potential to damage [Defendant] as it did to help him*" (*emphasis* added)). And again, even if the members of this Court would have ruled differently, the trial court's decision here did not rise to the level of an abuse of discretion. *See United States v. Davis*, 93 Fed. Appx. 924, 926 (7th Cir. 2004) (affirming trial court's decision not to provide transcript of police officer's testimony, explaining "[t]he district court's decision is not an abuse of discretion when it is based on legitimate reasons such as the trial's brevity, the ability of jurors to take notes, the relative clarity of the witness's testimony, and the overall simplicity of the issues before the finders of fact").

Moreover, the jury was admonished to assess the credibility of these self-interested cooperating witnesses, as Final Jury Instruction No. 7 warned them to do, and they were further admonished that they "may recall not only [a witness's] testimony, but their demeanor on the stand and mannerism in testifying . . . ." *See* Final Jury Instruction No. 6. But the jury's request "to *see*" all of the two witnesses' testimony could have reasonably suggested to the trial judge that the jury wanted to conduct a wholesale reevaluation of the two witnesses. (*Emphasis* added.) Indeed, this kind of request raises the question of whether the jury wanted a transcript, or (mistakenly) thought there was video of the testimony. Though this question is unanswered in the record, the fact remains that there were only two possibilities available to the trial judge for granting the request: providing a transcript or replaying audio of the testimony. Neither of these options would have offered the jurors the opportunity to assess the witnesses' demeanor and credibility in the same way as actually viewing the witnesses live and in-person, as they had already been able to do during the trial. Thus, the trial court was reasonable in exercising its discretion to weigh this factor against providing the jury with the testimony.

Third, delay was also a valid concern, although it certainly would not have been very convincing if it were the only reason the trial court gave here. Pettit points out that the testimony of Blesam and Kangich lasted less than 3.5 hours combined. But Pettit fails to account for various attendant activities, including the time to prepare the recordings or transcripts, address what portion of the testimony to provide to the jury, and discuss appropriate cautionary instructions. Providing the testimony may also have led to

additional, unforeseeable delays in deliberation. In short, while reasonable minds may disagree about the risk of significant delay, the trial judge's concern was a valid part of the balancing of the factors, the trial court did not indicate any unduly great concern about delay, and this Court cannot say that the trial court afforded the factor of delay undue weight or was clearly wrong in its exercise of discretion on this point.

Fourth, and finally, the Court plainly instructed the jurors before trial began that they would not have trial testimony available to them during deliberation except in their memories and notes. In the absence of evidence to the contrary—and there has not been so much as an allegation here—we presume that the jurors listened to and followed the judge's instructions. Here, we presume that they paid attention to all of the testimony, and had its benefit in coming to a verdict.

CONCLUSION

For the foregoing reasons, we hold that, in denying the jury's request to review certain trial testimony, the trial judge considered all of the appropriate factors, considered no inappropriate factors, and came to a reasonable decision based on that analysis. The trial court's decision was not an abuse of discretion, nor was it clearly wrong. To be clear, we do not hold in this opinion that a jury may never review trial testimony, nor do we make any other absolute holding with respect to a judge's responses to jurors' questions or requests made during deliberations. Instead, we hold that these are matters best left to the sound discretion of the trial court, and the trial court's decisions on these matters are properly reviewed by this Court for abuse of that discretion. This Opinion

discusses various factors relevant to a judge's decision of whether to allow a jury to review testimony, and a trial judge should discuss these factors on the record for the benefit of the parties and the appellate panel.

The decision of the Trial Division is **AFFIRMED**.

SO ORDERED, this 2nd day of February, 2016.

Lourdes F. Materne

LOURDES F. MATERNE
Associate Justice

RI ASHBY PATE
Associate Justice

NGIRAKLSONG, Chief Justice, Concurring:

The issue before us is whether the trial court abused its discretion when it denied a jury's request to rehear testimonies of two witnesses.

The facts are not in dispute. Shortly after the jury retired and began deliberating, they requested to rehear the testimonies of two witnesses. The jury did not give reasons why they felt they needed to rehear the testimonies. The trial court, without asking why the jury wanted to rehear these testimonies, denied the request to rehear.

The trial court denied the jury's request for rehearing of the testimonies on two grounds: First, it would delay the trial and second, for fear that giving only certain testimonies would create a danger in that the jurors might give that portion undue weight.

These are common reasons trial courts rely on for denying or granting juries' request to rehear testimonies.

I take issues with the trial court's robotic assessment of these two factual issues. As to delay, the delays usually amount to significant delays. In *United States v. Rice*, 550 F.2d 1364, 1375 (5th Cir. 1977), the jury's request was for over 2,000 pages of transcript. In *United States v. Morrow*, 537 F.2d 120, 148 (5th Cir. 1976), a portion of transcript requested by the jury exceeded "300 pages . . . and would have taken the jury . . . a day or more to read." Also "[t]he possibility of undue emphasis by the jury on a small part of the testimony given in the six week trial of this case amply justified the district court's denial of the jury request." *Id.* And these are more complicated cases than our case.

The trial of this simple case lasted a week. The estimated delay had the jury gotten its wish to rehear, according to defense counsel, is three hours. Permitting the jury to rehear in this case would not have delayed the trial in any significant way. *United States v. Schmitt*, 748 F.2d 249, 256 (5th Cir. 1984). A delay as a reason to deny rehearing rings hollow.

As to the second issue, the jury's possible misplacement of emphasis on certain parts of the testimonies if allowed to rehear, there was no attempt on the trial court's part to assess that possibility. Courts inquire why juries want to rehear certain testimonies so they may assess the possibility of this fear of undue influence if a rehearing is allowed. The trial court did not ask the jury why they wanted to rehear the testimonies. "Although

we recognize that the decision to permit or deny readbacks of testimony when requested by a jury during deliberations is within the broad discretion of the trial court, we have also instructed that a trial court's response to any particular request should be guided by consideration of the jurors' need to review the evidence before reaching a verdict, assessed against the difficulty in locating the specific testimony requested, the possibility of undue emphasis on any portion of the testimony requested, the possibility of undue emphasis on any portion of the testimony, and the possibility of undue delay in the trial. We have also stated a clear preference for readbacks whenever they are requested by a deliberating jury. Indeed, we have explicitly held that it is not within the trial court's discretion to announce a wholesale prohibition on readbacks, and we have expressed disapproval of the practice of discouraging the jury from requesting them." *United States v. Escotto*, 121 F.3d 81, 84 (2nd Cir. 1997) (internal citations omitted). The trial court's fear of undue influence if the jury was allowed to hear the requested testimonies may have been in the "fear itself."

The trial court's discretion to grant or deny jury's request to rehear testimonies is reviewed for abuse. This discretion, however, is not "unlimited." *United States v. Bennett*, 75 F.3d 40, 46 (1st Cir. 1996). "While there are inherent dangers in reading testimony back to the jury in that undue emphasis may be accorded such testimony, and the limited testimony that is reviewed may be taken out of context, absent circumstances requiring denial of a jury request to rehear testimony, justice is more likely to be promoted than

obstructed if the jury is allowed to rehear specific testimony given at the trial." 75B *Am. Jur*. 2d *Trial* § 1447 (2007).

I believe the trial court abused its discretion when it denied the jury's request for rehearing without any effort to assess what delay and what possible undue influence would result if the jury was allowed its request to rehear.

I would vote to reverse, but for the appellant's failure to show that the trial court's denial of the jury's request to rehear prejudiced him. Courts have "broad discretion in responding to a jury request that certain evidence be reread. Where a defendant cannot show that the district court's decision prejudiced him, we will not find an abuse of discretion." *United States v. Pacchioli*, 718 F. 3d 1294, 1306 (11th Cir. 2013) (citations and quotation marks omitted).

I concur.

ARTHUR NGIRAKLSONG
Chief Justice