NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

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ROBERT KEITH RAY, *Petitioner,*

v.

COLORADO, *Respondent.*

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On Petition for Writ of Certiorari
to the Colorado Supreme Court

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# PETITION FOR WRIT OF CERTIORARI

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Respectfully submitted,

GAIL KATHRYN JOHNSON
Johnson & Klein, PLLC
1470 Walnut St., Suite 101
Boulder, CO 80302
(303) 444-1885
gjohnson@johnsonklein.com

*Counsel of Record*

## CAPITAL CASE[1]

## QUESTION PRESENTED

In light of this Court's recent Sixth-Amendment jurisprudence emphasizing the constitutional primacy of the role of the jury, should this Court revisit its 5-4 decision in *Boyde*, which adopted the "reasonable likelihood" test for determining whether ambiguous jury instructions violate due process, and instead return to the previous standard, in which appellate courts inquire whether reasonable jurors "could have" interpreted the instructions in a manner that violates the U.S. Constitution?

[1] Sup. Ct. R. 14.1(a) states in part: "If the petitioner . . . is under a death sentence that may be affected by the disposition of the petition, the notation 'capital case' shall precede the questions presented." Mr. Ray is under a sentence of death in another Colorado state case, and the attempted-murder convictions at issue in this Petition were used as an aggravating factor to obtain the death sentence in that case. Because, under *Johnson v. Mississippi*, 486 U.S. 578 (1988), the disposition of this Petition may affect the death sentence in the other case, the "capital case" notation is included.

## LIST OF RELATED CASES

District Court, County of Arapahoe, State of Colorado; Case No. 04CR1805; *People of the State of Colorado v. Robert Keith Ray*; Judgment entered February 8, 2007.

Colorado Court of Appeals; Case No. 2007CA561; *People of the State of Colorado v. Robert Keith Ray*; Modified Opinion entered March 19, 2015; Mandate to the District Court, County of Arapahoe issued June 4, 2019.

Colorado Supreme Court; Case No. 15SC268; *Ray v. People*; Opinion entered April 8, 2019; Petition for Rehearing denied May 20, 2019; Mandate to the Colorado Court of Appeals issued May 23, 2019.

## TABLE OF CONTENTS

## TABLE OF CONTENTS FOR APPENDIX

## TABLE OF AUTHORITIES

Cases

**Statutes**



**Constitutional Provisions**

## PETITION FOR WRIT OF CERTIORARI

Petitioner Robert Keith Ray respectfully petitions this Court for a writ of certiorari to review the opinion of the Colorado Supreme Court.

## OPINIONS BELOW

The opinion of the Colorado Supreme Court in *Ray v. People* is reported at 440 P.3d 412 (Colo. 2019). (Appendix A.) The opinion of the Colorado Court of Appeals in *People v. Ray* has not been published and is referenced at 2015 WL 339316 (Colo. Ct. App. 2015). (Appendix B.)

## JURISDICTION

The judgment of the Colorado Supreme Court was entered on April 8, 2019. The Colorado Supreme Court denied a timely petition for rehearing on May 20, 2019. (Appendix C.) This Court has jurisdiction under 28 U.S.C. § 1257(a).

## RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

## STATEMENT OF THE CASE

Robert Keith Ray was convicted in a Colorado state trial court of two counts of attempted murder, two counts of first-degree assault, and accessory. His convictions

were affirmed by the Colorado Court of Appeals (Appendix B) and then by the Colorado Supreme Court (Appendix A).

Under Colorado law, self-defense/defense of others is an affirmative defense that the prosecution is required to disprove beyond a reasonable doubt before an accused may be found guilty of having used illegal force, such as in the crimes of attempted first-degree murder and first-degree assault for which Mr. Ray was convicted. Colo. Rev. Stat. §§ 18-1-407(2), 18-1-704, 18-1-710.

The facts here were that Mr. Ray admitted having shot one time at one of the victims—who at the time was in the process of beating Mr. Ray's friend after that friend had shot and killed the victim's friend.[2] The trial court correctly ruled that Mr. Ray was entitled to have the jury instructed on self-defense/defense of others.

The jury received several instructions relating to the issue of self-defense/defense of others. First, the elemental instructions for attempted first-degree murder and first-degree assault, Instruction Nos. 16 and 19, respectively, made the *absence* of the affirmative defense in Instruction No. 24 an element of each of those crimes. The jury was earlier instructed in a general manner: "The burden of proof is upon the prosecution to prove to the satisfaction of the jury beyond a reasonable doubt the existence of all of the elements necessary to constitute the crime charged." (Instruction No. 3.) Instruction No. 24 governed the defense of self-defense/defense of others in the context of the use of non-deadly force, defined under Colorado law as force that does not in fact produce death—and thus the standard applicable under

[2] Mr. Ray was charged with this murder under complicity liability, and the jury acquitted him.

Colorado law for the justifiable use of force in the attempted-murder and first-degree assault charges. *See* Colo. Rev. Stat. §§ 18-1-704(1), 18-1-901(3)(d).[3]

Instruction No. 25, the instruction challenged here as impermissibly burden-shifting, was not a Colorado pattern instruction. Indeed, it had never been given in any other criminal case in Colorado. It was crafted by the prosecution during Mr. Ray's trial and issued to the jury over defense objections. Instruction No. 25 read as follows:

> In deciding whether or not the defendant had reasonable grounds for believing that he or another was in imminent danger of being killed or of receiving serious bodily injury or that he or another was in imminent danger from the use of unlawful physical force, *you should determine whether or not* he acted as a reasonable and prudent person would have acted under like circumstances. In determining this you should consider the totality of the circumstances, including the number of people reasonably appearing to be a threat.
>
> *It is not enough that the defendant believed himself or another to be in danger unless* the facts and circumstances shown by the evidence and known by him at the time, or by him then believed to be true, are such that *you can say that as a reasonable person he had grounds for that belief.*
>
> Whether the danger is actual or only apparent, actual danger is not necessary in order to justify the defendant acting in self-defense or defense of others.

(Appendix D at p. 15 (emphases added).) So instructed, the jury convicted Mr. Ray of four crimes involving the alleged unlawful use of force: two counts of attempted first-degree murder and two corresponding counts of first-degree assault.

[3] The jury was separately instructed (No. 23) on the use of deadly force, which related to the murder for which Mr. Ray was acquitted.

Throughout his direct appeal in the Colorado state courts, Mr. Ray preserved the federal constitutional issues raised here.

In his Opening Brief to the Colorado Court of Appeals, Mr. Ray asserted that Instruction No. 25 was burden-shifting and had impaired his right to an affirmative defense in violation of his rights to present a defense, to due process, and to a fair trial under the Sixth and Fourteenth Amendments to the U.S. Constitution. (Opening Brief filed in *People v. Ray*, Colorado Court of Appeals Case No. 07CA561, at p. 22.) The Colorado Court of Appeals rejected this argument, holding instead that "Instruction Number 25 on reasonable belief did not impermissibly shift the burden to prove reasonableness to the defense." (Appendix B at p. 18.)

The Colorado Supreme Court granted certiorari to decide "whether the district court's instructions erroneously shifted the burden of proof relative to the defendant's assertion of self-defense."[4] *Ray*, 440 P.3d at 414.[5] In his Opening Brief to the Colorado Supreme Court, Mr. Ray again asserted that Instruction No. 25 was burden-shifting and had impaired his right to an affirmative defense in violation of his rights to present a defense, to due process, and to a fair trial under the Sixth and Fourteenth Amendments. (Opening Brief filed in *Ray v. People*, Colorado Supreme Court Case No. 15SC268, at pp. 11, 22.) Addressing this claim, the Colorado Supreme Court reasoned in part:

> To the extent the defendant suggests that the instruction's use of the phrase "whether or not" relieved the prosecution of its burden by

[4] During the state-court appellate proceedings, the term "self-defense" was used to encompass both self-defense and defense of others. The same is true at times in this Petition.

[5] The Colorado Supreme Court also granted certiorari on a distinct, state-law issue not raised here.

> implying an obligation of the jury to determine whether any belief actually held by the defendant was or was not reasonable prior to holding the prosecution to its burden to disprove that the defendant's conduct was justified, *there was little chance the jury could have been misled by such a subtle and nuanced interpretation,* especially in light of its other express instructions concerning the prosecution's burden.

*Ray*, 440 P.3d at 416 (emphasis added).[6] The Colorado Supreme Court held that the instruction was not erroneous and affirmed Mr. Ray's convictions. *Id.* at 419.

## REASONS FOR GRANTING A WRIT OF CERTIORARI

### 1. This Court should grant certiorari to revisit the "reasonable likelihood" test and return to the pre-*Boyde* standard that when reasonable jurors "could have" interpreted instructions in an unconstitutional manner, due process is violated—a standard that, unlike *Boyde*, is consistent with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny.

#### A. The *Boyde* test was adopted by the narrowest of margins, and the dissenting justices' warnings have proved prescient and valid.

In *Boyde v. California*, 494 U.S. 370, 380 (1990), a five-justice majority of the Court held that when a jury instruction "is ambiguous and therefore subject to an erroneous interpretation," the standard for whether the instruction violates due process "is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that" violates the Constitution (in that case, by preventing the consideration of constitutionally relevant evidence). The *Boyde* majority made clear that to meet this standard, "a defendant need not establish that the jury was more likely than not" to have interpreted the instruction in an

[6] The Colorado Supreme Court's limited analysis rests in large part on its repeated—but demonstrably incorrect—assertion that the affirmative-defense instruction immediately preceding Instruction No. 25 addressed that the prosecution bore the burden to disprove the affirmative defense of self-defense/defense of others. *Ray*, 440 P.3d at 416. In fact, Instruction No. 24 did not address the burden of proof at all. (Appendix D at p. 14.)

unconstitutional manner. *Id.* But the *Boyde* majority also made clear that a "reasonable likelihood" means something more than a finding that a reasonable juror "could have" applied the instruction unconstitutionally. *Id.* at 378-79. Where a "reasonable likelihood" lies—in the vast gulf between a possibility and more likely than not—has remained a mystery ever since.

The *Boyde* majority, *id.*, canvassed a number of this Court's decisions over the preceding years that had applied varying tests to ambiguous jury instructions:

- *Andres v. United States*, 333 U.S. 740, 752 (1948) ("That *reasonable men might* derive a meaning from the instructions given other than the proper meaning . . . *is probable*.");
- *Sandstrom v. Montana*, 442 U.S. 510, 516-517 (1979): (noting that "[t]he Supreme Court of Montana . . . is not the final authority on the interpretation which a jury *could have* given the instruction" and stating the Court could not "discount the possibility that the jury *may have* interpreted the instruction [incorrectly].");
- *Francis v. Franklin*, 471 U.S. 307, 315-16 (1985): ("The question . . . is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror *could have* understood the charge as meaning.");
- *California v. Brown*, 479 U.S. 538, 541-542 (1987) (same);
- *Mills v. Maryland*, 486 U.S. 367, 375-77 (1988) (discussing whether reasonable jurors "*could have*" drawn an impermissible interpretation

from the trial court's instructions and whether there is a "*substantial possibility* that the jury *may have* rested its verdict on the 'improper' ground.");

- *Penry v. Lynaugh*, 492 U.S. 302, 326 (1989) ("[A] reasonable juror *could well have believed* that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence.").

(Emphases added throughout.) The *Boyde* majority noted that "[a]lthough there may not be great differences among these various phrasings, it is important to settle upon a single formulation for this Court and other courts to employ in deciding this kind of federal question." 494 U.S. at 379. As "the proper inquiry" for evaluating whether an ambiguous instruction violates due process, the Court adopted the test of "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that" is unconstitutional. *Id.* at 380. "This 'reasonable likelihood' standard," the majority wrote, "better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical 'reasonable' juror could or might have interpreted the instruction." *Id.*

The four dissenting justices in *Boyde* recognized that "[i]t is an essential corollary of our reasonable-doubt standard in criminal proceedings that a conviction, capital or otherwise, cannot stand if the jury's verdict could have rested on unconstitutional grounds." *Id.* at 389 (Marshall, J., Brennan, J., Blackmun, J., and Stevens, J., dissenting). Analyzing "[t]he history of the 'reasonable likelihood'

standard" in other legal contexts, the dissenters concluded that "the majority's version of the standard has no precedential support; where the Court has used 'reasonable likelihood' language in the past, it has regarded such language as focusing . . . on whether an error *could* have affected the outcome of a trial." *Id.* at 393-94 (Marshall, J., Brennan, J., Blackmun, J., and Stevens, J., dissenting) (emphasis in original) (citing *Chapman v. California*, 386 U.S. 18 (1967), and *Sandstrom*, 442 U.S. 510). The dissenters predicted that the standard adopted by the majority would not work well in practice:

> To the extent the Court's new standard does require a defendant to make a greater showing than *Sandstrom*, the malleability of the standard encourages ad hoc review of challenged instructions by lower courts. Although the standard, as the majority adopts it, requires a defendant challenging the constitutionality of an instruction to demonstrate more than a reasonable "possibility" that his jury was "impermissibly inhibited by the instruction," a defendant "need not establish that the jury . . . more likely than not" was misled. Beyond this suggestion that error must be more than possible but less than probable, the Court is silent. Thus, appellate courts, familiar with applying the *Sandstrom* standard to ambiguous instructions, are now required to speculate whether an instruction that could have been misunderstood creates a "reasonable likelihood" that it was in fact misunderstood. I cannot discern how principled review of alleged constitutional errors is advanced by this standard. That this Court has regarded the two standards as identical in prior cases will no doubt contribute to confusion in the lower courts.

494 U.S. at 394-95 (Marshall, J., Brennan, J., Blackmun, J., and Stevens, J., dissenting) (internal citations omitted).

Even in the months following the *Boyde* majority's adoption of the "reasonable likelihood" test, other decisions of this Court continued to apply the previous standard. *See Cage v. Louisiana*, 498 U.S. 39 (1990) ("In construing the instruction,

we consider how reasonable jurors *could have* understood the charge as a whole"; "[A] reasonable juror *could have* interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." (emphases added)); *Yates v. Evatt*, 500 U.S. 391, 401 (1991) ("We think a reasonable juror *would have* understood the [instruction] to mean . . ." (emphasis added)). These decisions were then disavowed in *Estelle v. McGuire*, 502 U.S. 62, 72 & n.4 (1991) ("So that we may once again speak with one voice on this issue, we now disapprove the standard of review language in *Cage* and *Yates*, and reaffirm the standard set out in *Boyde*.").

In the intervening decades since the early 1990s, cases from this Court have continued to characterize the *Boyde* test as a higher hurdle than what came before, but have done nothing to illuminate how much of a probability of an unconstitutional interpretation by jurors must exist before an appellate court should find a violation of due process:

- *Johnson v. Texas*, 509 U.S. 350, 367 (1993) ("Although the reasonable likelihood standard does not require that the defendant prove that it was more likely than not that the jury was prevented from giving effect to the evidence, the standard requires more than a mere possibility of such a bar.");
- *Weeks v. Angelone*, 528 U.S. 225, 236 (2000) ("At best, petitioner has demonstrated only that there exists a slight possibility that the jury considered itself precluded from considering mitigating evidence. Such a demonstration is insufficient to prove a constitutional violation under

*Boyde*, which requires the showing of a reasonable likelihood that the jury felt so restrained.");

- *Kansas v. Carr*, 136 S.Ct. 633, 642-43 (2016) ("The alleged confusion stemming from the jury instructions used at the defendants' [capital] sentencings does not clear [the bar of the *Boyde* "reasonable likelihood" test]. A meager 'possibility' of confusion is not enough.").

This Court should grant certiorari to revisit the standard adopted by the five majority justices in *Boyde*.

### B. The *Boyde* test is inconsistent with the constitutional primacy of the jury, as emphasized by this Court's more recent decisions in *Apprendi* and its progeny.

The jury-instruction error presented in Mr. Ray's appeal returns us to first principles of federal constitutional law in the context of the rights of the accused.

The Due Process Clause of the Fourteenth Amendment requires states in criminal prosecutions to prove guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970).

"Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government." *United States v. Haymond*, 139 S.Ct. 2369, 2373 (2019).

By adopting the "reasonable likelihood" test, the *Boyde* majority accepted, as a matter of constitutional doctrine, the risk that in some criminal cases, an accused would be convicted and punished even where there is no valid jury verdict because

the jury actually interpreted and applied the instructions in an unconstitutional manner. This Court has not yet determined whether this outcome should survive constitutional scrutiny following the resurgence of the central and essential role of the jury under *Apprendi* and its progeny. *See, e.g.*, *Hurst v. Florida*, 136 S.Ct. 616 (2016) (Florida capital sentencing scheme allowing judge to override jury recommendation for life sentence held unconstitutional); *Alleyne v. United States*, 570 U.S. 99 (2013); (*Apprendi* rule applies to mandatory minimum sentences); *Southern Union Co. v. United States*, 567 U.S. 343 (2012) (*Apprendi* rule applies to criminal fines); *Cunningham v. California*, 549 U.S. 270 (2007) (California's determinate sentencing law, which authorized enhanced sentencing based on judicial fact-finding, violates *Apprendi*); *United States v. Booker*, 543 U.S. 220 (2005) (mandatory U.S. Sentencing Guidelines held unconstitutional under *Apprendi*).

As the *Southern Union* Court summarized, *Apprendi* guards against "judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow." 567 U.S. at 352. While in practice this rule has been litigated most often with respect to factfinding by trial court judges, the principle applies just as forcefully when appellate judges adopt legal standards that have the effect of allowing convictions and punishments to stand even where there is no valid jury verdict to support them. That is what *Boyde* does. *Cf. Sullivan v. Louisiana*, 508 U.S. 275 (1993) (where deficient reasonable-doubt instruction has vitiated jury's factual findings, a reviewing court "can only engage in

pure speculation—its view of what a reasonable jury would have done," and "[w]hen it does that, the wrong entity judges the defendant guilty").

Once again, the *Boyde* dissenters were prescient. 494 U.S. 370, 397-98 (Marshall, J., Brennan, J., Blackmun, J., and Stevens, J., dissenting) (citing Justice Scalia's concurrence in *Carella v. California*, 491 U.S. 263, 268 (1989): "appellate courts should not 'invad[e] [the] factfinding function which in a criminal case the law assigns solely to the jury.'"). The dissenters continued:

> Thus, where jury instructions are unclear, an appellate court may not choose the preferred construction because "[t]o do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks."

494 U.S. at 397-98 (citing *Bollenbach v. United States*, 326 U.S. 607, 613, (1946)).

Like the New Jersey procedure challenged in *Apprendi*, the *Boyde* majority's "reasonable likelihood" test "is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." *Apprendi*, 530 U.S. at 497.

This Court should grant certiorari and hold that the *Boyde* standard is unconstitutional, and further hold, consistent with decades of pre-*Boyde* precedents, that ambiguous instructions violate due process when jurors could have interpreted them in an unconstitutional manner.

### C. Mr. Ray's case squarely presents the problems with the *Boyde* test; the Colorado Supreme Court affirmed the convictions despite its recognition that jurors could have applied Instruction No. 25 in a manner that shifted the burden away from the prosecution in violation of due process.

In his direct appeal, Mr. Ray claimed that Instruction No. 25 was impermissibly burden-shifting. Although Colorado law clearly requires the

prosecution to bear the burden to *disprove* an affirmative defense such as self-defense or defense of others, Instruction No. 25 conditioned the availability of the defense on whether jurors made certain findings. For example, the instruction told jurors "*[i]n deciding whether or not the defendant had reasonable grounds* for believing . . . that he or another was in imminent danger from the use of unlawful physical force, *you should determine whether or not* he acted as a reasonable and prudent person would have acted under like circumstances." Appendix D at p. 15 (emphases added). And the instruction told jurors "*[i]t is not enough that the defendant believed himself or another to be in danger unless* the facts and circumstances shown by the evidence and known by him at the time, or by him then believed to be true, are such that *you can say* that as a reasonable person he had grounds for that belief." *Id.* (emphases added). Again, this untested instruction was not a deviation from the pattern instruction, but was an ad hoc instruction by the prosecution for Mr. Ray's trial.

When adjudicating Mr. Ray's claim that Instruction No. 25 was burden-shifting and therefore violated the Due Process Clause of the Fourteenth Amendment, the Colorado Supreme Court denied relief on the ground that "there was little chance the jury could have been misled by such a subtle and nuanced interpretation [referring to one such interpretation urged by Mr. Ray], especially in light of [the] other express instructions concerning the prosecution's burden." *Ray*, 440 P.3d at 416. With its use of the phrase "little chance," the Colorado Supreme Court acknowledged a possibility that the jury interpreted and applied Instruction No. 25 as shifting the burden to Mr. Ray to demonstrate certain aspects of self-

defense/defense of others before the jury could consider these affirmative defenses. Under pre-*Boyde* case law, that should be enough to render Mr. Ray's convictions unconstitutional. But under *Boyde*, Mr. Ray and others in federal and state courts around the country are convicted and sentenced despite invalid verdicts that resulted from improper jury instructions and that violate fundamental constitutional rights. This Court should review and remedy this situation.

### D. Conclusion.

As predicted by the *Boyde* dissenters, the Court's 5-4 decision provides little meaningful guidance to lower courts addressing claims of unconstitutional jury instructions. Intervening decades of case law concerning the interrelated federal constitutional rights to due process and jury trial have invalidated the *Boyde* majority's approach. This Court should grant certiorari in Mr. Ray's case and, following full merits briefing and oral argument, reinstate the well-founded test in place before *Boyde*. Applying this former test to Instruction No. 25 here, the Court should hold that a reasonable juror could have interpreted the instruction as having shifted the burden by requiring Mr. Ray to establish certain facts and for jurors to make certain findings of facts supporting the affirmative defense of self-defense/defense of others before it would apply. The Court should then reverse Mr. Ray's convictions for attempted murder and first-degree assault.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

*s/ Gail Kathryn Johnson*
GAIL KATHRYN JOHNSON
Johnson & Klein, PLLC
1470 Walnut St., Suite 101
Boulder, CO 80302
(303) 444-1885
gjohnson@johnsonklein.com

*Counsel of Record*