No. 19-5719

In the Supreme Court of the United States

ROBERT KEITH RAY,
Petitioner,

v.

COLORADO,
Respondent.

On Petition for Writ of Certiorari to the
Colorado Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether giving a jury an instruction not mentioning anything about the availability of the affirmative defense of self-defense requires reversal, if a juror theoretically could have interpreted the instruction as shifting the burden of proof for that affirmative defense to the defendant, even where there is no reasonable likelihood that actually happened, and the jury received several instructions that expressly said the prosecution bore the burden of disproving the affirmative defense.

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STATEMENT

I. Factual background.

Petitioner's attempted murder convictions in this case were used as a sentence aggravator in the penalty phase of his separate capital case, but this case is not itself a capital case. This case involved a shooting at a place called Lowry Park.

On July 4, 2004, Gregory Vann and Javad Marshall-Fields held a musical event and barbeque in the park that was free and open to the public. Early in the evening, Marshall-Fields approached Petitioner about his behavior at the event. Petitioner's wife called Petitioner's friend Sir Mario Owens and asked him to come and support the Petitioner.

Later that night, when Petitioner's wife and sister attempted to drive away from the event, they became embroiled in a confrontation with a crowd of people. Petitioner and Owens got involved. Jeremy Green later confronted Petitioner about his aggressive behavior. Petitioner stated several times that he would kill everybody.

Petitioner then lifted up his shirt as he walked towards the crowd, exposing a handgun in his waistband. Owens then raised his shirt revealing his own gun. As the confrontation ensued, Owens shot Gregory Vann in the chest at close range and again after he fell. Owens attempted to run to Petitioner's car, but Elvin Bell and Marshall-Fields stopped him. Several shots were fired at both Bell and Marshall-Fields. Although both men initially thought Owens had shot at them, another witness saw

that it was Petitioner who calmly came around the car, put his gun under his left arm, and shot at Bell and Marshall-Fields repeatedly.

II. Proceedings in the trial court and Colorado Court of Appeals.

Trial proceedings and jury instructions. Petitioner's defense at trial was that he had no involvement in Owens's shooting of Vann or Owens's attempted shooting of Green. Petitioner also denied shooting Marshall-Fields. He did admit to shooting Bell, but claimed he was acting in defense of Owens.

In the elemental instructions for the attempted murder and assault counts, the trial court instructed the jury that the People had to prove all of the elements beyond a reasonable doubt, and "without the affirmative defense in Jury Instruction No. 24." The trial court also provided the jury with the following additional instructions on self-defense:

Instruction Number 11

> In this case, a separate offense is charged against the defendant in each count of the information. Each count charges a separate and distinct offense, and the evidence and the law applicable to each count should be considered separately, uninfluenced by your decision as to any other count.

Instruction Number 22

> The evidence in this case has raised an affirmative defense.
>
> The prosecution has the burden of proving the guilt of the defendant to your satisfaction beyond a reasonable doubt as to the affirmative defense, as well as to all the elements of the crime charged.

After considering the evidence concerning the affirmative defense with all the other evidence in this case, if you are not convinced beyond a reasonable doubt of the defendant's guilt, you must return a not guilty verdict.

Instruction Number 23

It is an affirmative defense to the crime of Murder in the First Degree that [a person] used "deadly physical force" upon another person:

1. in order to defend himself or a third person from what he reasonably believed to be the use or imminent use of unlawful physical force by the other person, and

2. he used a degree of force which he reasonably believed to be necessary for that purpose, and

3. he reasonably believed a lesser degree of force was inadequate, and

4. he had reasonable grounds to believe and did believe that he or another person was in imminent danger of being killed or of receiving serious bodily injury.

"Deadly physical force" means force, the intended, natural, and probable consequence of which is to produce death, and which does in fact, produce death.

Instruction 24

It is an affirmative defense to the crimes of Criminal Attempt (to Commit Murder in the First Degree), its lesser included offense of Criminal Attempt (to Commit Murder in the Second Degree) and Assault in the First Degree, that the defendant or a complicitor used physical force upon another person:

1. in order to defend himself or a third person from what he reasonably believed to be the use or imminent use of unlawful physical force by the other person, and

2. he used a degree of force which he reasonably believed to be necessary for that purpose.

Instruction 25

> 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 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.

Instruction 25 was given over Petitioner's objection.

The jury acquitted Petitioner of murdering Vann and attempting to murder Green, but the jury found him guilty of accessory to murder and of committing both attempted first degree murder and first degree assault for the shootings of Bell and Marshall-Fields. The district court sentenced him to 108 years in prison.

Proceedings in the Colorado Court of Appeals. On direct appeal, among many other claims, Petitioner asserted that Instruction 25 shifted the burden of proof requiring him to prove that he acted in reasonable self-defense. Petitioner argued that the language instructing jurors to decide "whether or not" he acted on a reasonable belief of imminent danger and "whether or not" he acted as a reasonable

person would have acted under like circumstances, placed the burden on him to prove the reasonableness of his actions. The Colorado Court of Appeals rejected his claim because the instructions "unambiguously instructed the jury as to the proper burden of proof ...." Pet. App. B, 20. Instruction 25 "merely stated that a subjective belief of danger must be accompanied by reasonable grounds for that belief." Pet. App. B, 20.

III. Proceedings in the Colorado Supreme Court.

Petitioner asked the Colorado Supreme Court to review many claims, and the court agreed to hear two issues, including whether Instruction 25 shifted the burden of proof. *See* Pet. App. A, 2. The Colorado Supreme Court began its review of that issue by recognizing that in addition to Instruction 25, the trial court had provided the jury with an instruction explaining the prosecution's burden of proof with regards to the elements of each offense, which included committing the elements without the affirmative defense. Pet. App. A, 3. In a separate instruction, the trial court had also instructed the jury that the evidence had raised an affirmative defense, the prosecution had the burden to prove Petitioner's guilt beyond a reasonable doubt as to that affirmative defense as well as other elements of the crime charged, and that if, after considering the evidence of the affirmative defense with the other evidence in the case the jury was not convinced beyond a reasonable doubt as to the Petitioner's guilt, it was required to return a not guilty verdict. Pet. App. A, 3.

The Colorado Supreme Court rejected Petitioner's argument that Instruction 25 shifted the burden of proof. The court found that "Instruction No. 25 neither

stated, nor even implied, anything about the availability or applicability of the defense." Pet. App. A, 4. Instruction 25 just referenced and provided further detail on a concept in the "immediately preceding affirmative defense instruction, which itself expressly spelled out the prosecution's burden to disprove the defense beyond reasonable doubt, by detailing the findings necessarily included in the conditions of the defense." Pet. App. A, 4–5. In sum, the "jury was expressly instructed of the prosecution's burden to disprove the affirmative defense multiple times ... including in the very affirmative defense instruction whose terms were the subject of explanation in Instruction No. 25." Pet. App. A, 5.

IV. Unrelated but relevant proceedings in Petitioner's state capital case.

Marshall-Fields was expected to testify against Petitioner in this trial. But he and his fiancé were murdered before he could do so. In a separate capital case not at issue here, a jury convicted Petitioner of murder and other crimes for his role in the killing of Marshall-Fields and his fiancé, Vivian Wolfe. Pet. App. B, 3. In Petitioner's capital case, Petitioner's convictions for attempted murder in this case were used in the penalty phase as one of several sentence aggravators. Pet. App. B, 4. Petitioner was sentenced to death in that case. Pet. App. B, 4.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to grant certiorari to review its decision in *Boyde v. California*, 494 U.S. 370 (1990). According to the Petitioner, the standard for reversal that should apply in reviewing a challenged jury instruction is whether the jury *could*

have applied an instruction unconstitutionally, rather than *Boyde*'s standard which asks whether the jury was "reasonably likely" to have applied an instruction unconstitutionally. But Petitioner has not identified a genuine need to revisit *Boyde*. Nor has Petitioner presented an availing basis to overturn *Boyde*. And the issue Petitioner raises, in any event, is not presented by this case. On all fronts, therefore, this Court should deny the petition.

I. Petitioner does not present a genuine issue requiring this Court's resolution.

Petitioner asserts that this Court should revisit the "reasonable likelihood" standard established in *Boyde*. But as this Court has repeatedly applied *Boyde* in subsequent cases, it has already revisited and never questioned the validity of that standard. *See, e.g.*, *Kansas v. Carr*, ___ U.S. ___, 136 S.Ct. 633, 642–43 (2016), *Waddington v. Sarasud*, 565 U.S. 179, 190 (2009); *Ayers v. Belmontes*, 549 U.S. 7, 24 (2006). Additionally, at least 3,204 lower court cases have cited *Boyde*. Despite the voluminous number of cases citing *Boyde*, Petitioner has presented no conflict between the circuits or state courts over how to apply *Boyde*'s standard. Nor has Petitioner identified any law from the circuits expressing disapproval of *Boyde* or a need to reevaluate its holding. This Court should deny certiorari because Petitioner does not present a genuine and pressing issue that requires this Court's intervention.

II. There is no availing reason for revisiting *Boyde*.

In *Boyde*, this Court addressed what standard should apply to jury instructions that are ambiguous and subject to an erroneous interpretation. 494 U.S. at 380. After

acknowledging that its prior cases had been "less than clear," this Court emphasized the need for a "single formulation." *Id.* at 379. The Court determined that the proper standard was whether there was a "reasonable likelihood" the jury applied the instruction in a way that caused a constitutional error to occur. *Id.* at 380. Such a standard "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.*

Petitioner argues that *Boyde* should be reversed because it conflicts with this Court's subsequent *Apprendi* line of cases. But all of those cases concern whether sentence enhancers were effectively elements, therefore requiring submission for fact-finding to the jury under the beyond a reasonable doubt standard rather than to a judge. Pet., 11 (citing *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616, 622 (2016); *Alleyene v. United States*, 570 U.S. 99, 113–18 (2013); *Southern Union Co. v. United States*, 567 U.S. 343, 352 (2012); *Cunningham v. California*, 549 U.S. 270, 288–94 (2007); *United States v. Booker*, 543 U.S. 220, 755–56 (2005)); *see also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Those cases cast no doubt on *Boyde's* validity.

Apprendi dictates when an issue must go before the jury, it does not encompass any and all errors potentially implicating how a jury reached its verdicts as Petitioner's analogy requires. For example, it would seem a stretch to believe that *Apprendi* applies to claims challenging the improper admission of evidence just because such an error *could have* impacted a jury's verdict. Likewise, the question in

Apprendi—whether an element must be found by a jury rather than a judge—is independent and distinct from the question about what standard should apply in determining whether a jury could have misread an ambiguous instruction. *Apprendi* and its progeny do not undermine the validity of *Boyde*.

III. This is a poor vehicle for assessing the question presented for review.

This case also does not present the question Petitioner asks this Court to review. Petitioner argues that because in denying relief the Colorado Supreme Court said "there was little chance that the jury could have been misled by such a subtle and nuanced interpretation, especially in light of other express instructions concerning the prosecution's burden," the Colorado Supreme Court acknowledged a *possibility* that the jury interpreted and applied Instruction 25 as shifting the burden to Petitioner to demonstrate certain aspects of self-defense or defense of others, before the jury could consider those affirmative defenses. Pet., 13–14. In Petitioner's view, under "pre-*Boyde* case law, that should be enough to render [his] convictions unconstitutional." Pet., 14.

But the Colorado Supreme Court never found that the Instruction 25 was ambiguous, much less that there was an actual possibility that a juror could have read it as shifting to Petitioner the burden of proving his self-defense claim. According to the Court, "Instruction No. 25 neither stated, nor even implied, anything about the availability or applicability of the defense." Pet. App. A, 4. And the Colorado Supreme Court's statement that "there was little chance that the jury would have believed

Instruction 25 as shifting the burden of proof," was itself a finding that there was no possibility the jury would have misunderstood that the People had the burden. Pet. App. A, 5. As the court explained, Instruction 25 referenced and provided further detail on a concept in the "immediately preceding affirmative defense instruction, which itself expressly spelled out the prosecution's burden to disprove the defense beyond reasonable doubt, by detailing the findings necessarily included in the conditions of the defense." Pet. App. A, 4–5. Therefore, as the Colorado Supreme Court's analysis rested on its conclusions that there was no ambiguity in the instruction or a possibility that the jury would have read the instruction as shifting the burden of proof, overturning *Boyde* would not change the result of this case.

And even if the Colorado Supreme Court's sentence could be read in the manner Petitioner contends, this case still does not turn on the question presented because the Colorado Supreme Court found there was no possibility that the jury would have read Instruction 25 as shifting the burden of proof given the other written instructions. Pet. App. A, 4. As the court explained, the "jury was expressly instructed of the prosecution's burden to disprove the affirmative defense multiple times ...." Pet. App. A, 5. Instruction 25 only "referenced, and embellished on a concept contained in, the immediately preceding affirmative defense instruction, which expressly spelled out the prosecution's burden to disprove the defense beyond a reasonable doubt ...." Pet. App. A, 4–5. In context, the Colorado Supreme Court never found that there was a reasonable theoretical possibility that Instruction 25 shifted

the burden of proof. This case does not squarely raise the issue Petitioner asks this Court to review.

Finally, this case is a particularly poor vehicle because a decision would not impact future cases in Colorado. In rejecting Petitioner's claim, the Colorado Supreme Court distinguished the instruction from those it found ambiguous in *People v. Janes*, 982 P.2d 300 (Colo. 1999). *See* Pet. App. A, 4. The court reversed in *Janes* because the "jury could have concluded" that an ambiguous jury instruction unduly shifted the burden to the defendant to prove the conditions of an affirmative defense present in that case. *Janes*, 982 P.2d at 303. As Colorado has applied the lower pre-*Boyde* bar Petitioner asks this Court to adopt, a decision from this Court would not impact future cases in Colorado.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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