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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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ARGUMENT

1. Respondent's argument that this Court has "never questioned" the validity of the *Boyde* standard highlights the need for the Court to revisit that standard in light of the Court's revitalized approach to the primacy of the jury's role in criminal proceedings under the Sixth Amendment.

Respondent argues there is no need for the Court to revisit the standard announced in *Boyde v. California*, 494 U.S. 370, 380 (1990), because the Court "has already revisited and never questioned the validity of that standard." (BIO at 7.) Respondent ignores the fact that in the months after *Boyde* and until *Estelle v. McGuire*, 502 U.S. 62, 72 & n.4 (1991), this Court continued to apply the previous standard. *See Cage v. Louisiana*, 498 U.S. 39, 41 (1990); *Yates v. Evatt*, 500 U.S. 391, 401 (1991); *see also Estelle*, 502 U.S. at 72 & n.4. It does not appear that in any of the later cases cited by the State, the issue of the validity of the *Boyde* standard was raised. *See Kansas v. Carr*, 136 S. Ct. 633, 643 (2016) (applying *Boyde* standard); *Waddington v. Sarausad*, 555 U.S. 179, 191 (2009)[1] (same); *Ayers v. Belmontes*, 549 U.S. 7, 14 (2006) (same).

Mr. Ray's Petition for Certiorari, however, specifically asks this Court to reconsider the holding of the slim majority in *Boyde* and hold that the reasonable-likelihood standard articulated therein does not survive *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny. Respondent's myopic focus on the specific holding of *Apprendi* misses the forest for the trees. (BIO at 8-9 (discussing specific holding of *Apprendi* and subsequent cases).) The *Apprendi* line of cases remind us that "juries

[1] Respondent's Brief in Opposition erroneously cites the case name as *Sarasud* and the citation as 565 U.S. 179. (BIO at 7.)

in our constitutional order exercise supervisory authority over the judicial function by limiting the judge's power to punish." *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019) (plurality opinion).

The *Apprendi* cases thus seek to return our criminal-justice jurisprudence to the idea, basic to our constitutional system, that the jury serves as an unmatched protection for accused individuals. The right to trial by jury in criminal cases is of such fundamental importance that it appears both in the body of the Constitution and in the Bill of Rights. Article III, section 2 guarantees that "[t]he trial of all Crimes . . . shall be by Jury[.]" The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI; *see generally Duncan v. Louisiana*, 391 U.S. 145, 151-53 (1968) (discussing history of right to jury in criminal cases).

This Court has previously recognized the paramount significance of the right to trial by jury:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of

> the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

Duncan, 391 U.S. at 155–56 (footnote omitted).

Apprendi discussed that the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment jury-trial guarantee combine to "indisputably entitle a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi*, 530 U.S. at 477 (quotation marks omitted; alteration in original). Like *Duncan*, *Apprendi* recognized the deep roots of the requirement that only a jury could convict an individual:

> "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours...." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769).

530 U.S. at 477.

The Petition explains that the Colorado Supreme Court's opinion in Mr. Ray's appeal violates the Sixth Amendment because it allows for the possibility that the convictions were returned by a jury that interpreted Instruction No. 25 to

unconstitutionally shift the burden of proof to Mr. Ray. (Pet. at 11-12.) Thus, Mr. Ray argues, while the *Apprendi* rule has been litigated most often with respect to factfinding by trial court judges, its animating principle applies just as forcefully on appeal to legal standards that have the effect of allowing convictions and punishments even where there is no valid jury verdict to support them. (Pet. at 11-12.) Respondent does not dispute that application of the *Boyde* standard would sometimes yield this unconstitutional result. Nor does Respondent grapple with the contention that such an outcome violates the principle in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), that a reviewing court cannot engage in speculation about what a jury did, and that to do so would mean that the wrong entity is judging the defendant guilty. (Pet. at 11-12.)

Thus, Respondent has not undermined the conclusion that given the Court's emphasis over the last two decades on the constitutional imperative that the determination whether an individual is guilty of having committed a crime must be made by a properly instructed jury, the *Boyde* standard is no longer valid.

2. Respondent's arguments for why this case is supposedly a poor vehicle for deciding whether the *Boyde* standard violates *Apprendi* and its progeny is based on a misreading of the Colorado Supreme Court's decision and a misreading of Colorado case law generally.

A. Contrary to Respondent's repeated contention, the Colorado Supreme Court did not find that there was "no possibility" the jury would interpret the challenged instruction to unconstitutionally shift the burden of proof to Mr. Ray.

Respondent acknowledges that Mr. Ray's argument in the state courts was "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." (BIO at 4-5.) And Respondent does not dispute that the only time the Colorado Supreme Court directly addressed this argument, it applied a quantitative analysis to determine the issue:

> To the extent the defendant suggests that the instruction's use of the phrase "whether or not" relieved the prosecution of its burden by 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 v. People, 440 P.3d 412, 416 (Colo. 2019) (emphasis added). Respondent also does not dispute that the Colorado court's "little chance" standard is in line with this Court's "reasonable likelihood" standard announced in *Boyde v. California*, 494 U.S. 370, 380 (1990).

Instead, Respondent contends that Mr. Ray's case is supposedly a "poor vehicle for assessing the question presented for review" because, Respondent argues, what the Colorado Supreme Court meant by "little chance" was really "no possibility":

> 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.

(BIO at 9-10 (emphases added).[2])

[2] The language Respondent quotes as "the Colorado Supreme Court's statement" is in fact found nowhere in the Colorado Supreme Court's opinion in this case. Any substantive difference between it and what the Colorado Supreme Court did hold, however, is probably immaterial.

Respondent incorrectly conflates "little chance" with "no possibility." The Colorado Supreme Court nowhere stated that there was no possibility the jury could have interpreted the instruction to shift the burden to Mr. Ray. To the contrary, the Court expressly recognized there was a chance or possibility this unconstitutional result actually occurred (albeit an unlikely one). *Ray*, 440 P.3d at 416. A legal standard such as the *Boyde* standard that allows an appellate court to tolerate such a possibility by holding that it most likely did not occur cannot survive scrutiny under *Apprendi* and its progeny. It is this invitation to *ad hoc* review—at the heart of the *Boyde* dissent, 494 U.S. at 393-95 (Marshall, J., Brennan, J., Blackmun, J., and Stevens, J., dissenting)—and concomitant usurpation of the jury's role to determine whether the prosecution's evidence was sufficient to meet the standard of proof beyond a reasonable doubt that is at issue in Mr. Ray's request for certiorari review.

B. Respondent's argument that Colorado courts still apply the pre-*Boyde* standard is misleading and contrary to Colorado case law.

Respondent's contention that the decision Mr. Ray seeks would not impact future cases in Colorado (BIO at 11) is without merit. Colorado appellate courts routinely apply the *Boyde* standard. Less than one month before the Colorado Supreme Court decision challenged here, that court reaffirmed that Colorado courts apply this standard. *Johnson v. People*, 436 P.3d 529, 533, *reh'g denied* (Colo. Mar. 25, 2019) ("When reviewing an ambiguous jury instruction like the one here, we ask whether there is a reasonable likelihood that the jury applied the contested instruction in an unconstitutional manner.") (citing *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). This is consistent with a long line of Colorado cases. *See*, *e.g.*, *People v.*

Rodriguez, 794 P.2d 965, 981 (Colo. 1990) (quoting *Boyde* for instructional-error standard that "the proper inquiry in such a case is whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence" (emphasis in *Rodriguez*)); *People v. Harlan*, 8 P.3d 448, 491 (Colo. 2000) (citing *Estelle* reasonable-likelihood standard), *as modified on denial of reh'g* (Sept. 11, 2000), *and overruled on other grounds by People v. Miller*, 113 P.3d 743 (Colo. 2005)[3]; *People v. Waller*, 412 P.3d 866, 878 (Colo. App. 2016) (same); *People v. Munoz*, 240 P.3d 311, 316 (Colo. App. 2009) ("In determining whether a challenged instruction on the reasonable doubt standard satisfies the Due Process Clause, a reviewing court should ask 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates' the Constitution." (quoting *Estelle* and *Boyde*)); *People v. Gomez-Garcia*, 224 P.3d 1019, 1025 (Colo. App. 2009) (applying *Estelle* reasonable-likelihood standard); *People v. Sherman*, 45 P.3d 774, 778 (Colo. App. 2001) (holding that this Court clarified in *Estelle* "that the appropriate standard of review for an ambiguous instruction was as set forth in *Boyde v. California* . . ., namely, 'whether

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[3] Respondent argues that in *People v. Janes*, 982 P.2d 300, 303 (Colo. 1999), the Colorado Supreme Court supposedly reversed a conviction "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." (BIO at 11.) But in fact, *Janes* held that the erroneous instruction at issue actually misled the jury. 982 P.2d at 304 ("[W]e conclude that the jury instructions, when read as a whole, confused or misled the jury as to the burden of proof applicable to the affirmative defense . . . .").

there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution").[4]

Thus, Respondent's argument that this case is not a good vehicle is incorrect. Like other appellate courts around the country, Colorado courts apply the reasonable-likelihood standard articulated in *Boyde* and reaffirmed in *Estelle*, which, Mr. Ray contends, is now incompatible with this Court's modern Sixth-Amendment jurisprudence. This Court should review Mr. Ray's case to revisit the *Boyde* standard in light of *Apprendi* and its progeny and hold that the Sixth Amendment requires appellate courts to reverse convictions whenever instructional jurors could have convicted based on instructional error.

CONCLUSION

For the foregoing reasons and those set forth in Mr. Ray's Petition for Writ of Certiorari, this Court should grant certiorari review.

Respectfully submitted,

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[4] Of course, Colorado courts must follow this Court's holdings on an issue of federal constitutional law. Respondent does not assert that Colorado has maintained the pre-*Boyde* standard on state constitutional grounds. *Cf. Massachusetts v. Medina*, 723 N.E.2d 986, 992 n.4 (Mass. 2000) (recognizing that Massachusetts does not follow the federal standard articulated in *Boyde* but rather analyzes claims of burden-shifting errors in instructions by inquiring whether a "reasonable juror could have used the instruction incorrectly").