

<p><b>SUPREME COURT, STATE OF COLORADO</b>  Ralph L. Carr Colorado Judicial Center  2 East 14th Avenue  Denver, CO 80203</p>	<p>DATE FILED  November 27, 2025 10:23 PM</p>
<p>Certiorari to the District Court, Adams County,  24CV30648, Hon. Teri L. Vasquez  County Court, Adams County, 23T5869, Hon.  Joshua T. Nowak</p>	
<p><b>Plaintiff-Appellant</b>  <b>THE PEOPLE OF THE STATE</b>  <b>OF COLORADO</b></p> <p><b>v.</b>  <b>Defendant-Appellee</b>  <b>ALEXIS TERAN-SANCHEZ</b></p>	
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<p style="text-align: center;"><b>ANSWER BRIEF</b></p>	

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

**The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).**

It contains 5,989 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

**The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).**

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

**I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.**

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## TABLE OF CONTENTS

ISSUE PRESENTED .....	6
STATEMENT OF THE CASE.....	6
SUMMARY OF THE ARGUMENT .....	8
ARGUMENT.....	12
I. PRESERVATION AND STANDARD OF REVIEW.....	12
II. TRIAL COURTS RETAIN FLEXIBILITY TO DEFINE “REASONABLE DOUBT” .....	13
III. COLJI-CRIM E:03 .....	15
IV. FEDERAL AUTHORITY SUPPORTS THE USE OF “REAL POSSIBILITY” AND “FIRMLY CONVINCED” IN COLJI-CRIM E:03 .....	17
V. THE RATIONALE OF COLORADO DECISIONS APPROVING THE USE OF COLJI-CRIM E:03 IS SOUND.....	21
VI. THE DEFENDANT’S APPEAL TO “MODERN” USAGE IS OUTSIDE THE RECORD, UNAVAILING, AND CONTRARY TO PRECEDENT.....	24
VII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING REASONABLE DOUBT .....	30
CONCLUSION .....	36

## TABLE OF AUTHORITIES

### Cases

<i>Burrell v. Delaware</i> , 332 A.3d 412 (Del. 2024) .....	27
<i>Cage v. Louisiana</i> , 498 U.S. 39 (1990) .....	21
<i>Cath. Health Initiatives Colo. v. Earl Swensson Assocs., Inc.</i> , 403 P.3d 185 (Colo. 2017) .....	12
<i>Com. v. Russell</i> , 23 N.E. 867 (Mass. 2015) .....	30
<i>Commonwealth v. Drummond</i> , 285 A.3d 625 (Pa. 2022) .....	27
<i>Ellison v. Thornell</i> , 721 F. Supp. 3d 820 (D. Ariz. 2024) .....	27
<i>Fendley v. People</i> , 107 P.3d 1122 (Colo. App. 2004) .....	29
<i>Galvan v. People</i> , 476 P.3d 746 (Colo. 2020) .....	9, 15
<i>Garcia v. People</i> , 455 P.3d 1065 (Colo. 2019) .....	15
<i>Harris v. Bowersox</i> , 184 F.3d 744 (8 <sup>th</sup> Cir. 1999) .....	21
<i>In re Winship</i> , 397 U.S. 358 (1970) .....	13
<i>Johnson v. People</i> , 436 P.3d 529 (Colo. 2019) .....	9, 13
<i>Krueger v. Ary</i> , 205 P.3d. 1150 (Colo. 2009) .....	15
<i>Panos Inv. Co. v. Dist. Ct. In &amp; For Larimer Cnty.</i> , 662 P.2d 180 (Colo. 1983) .....	28
<i>People in Interest of J.G.</i> , 370 P.3d 1151 (Colo. 2016) .....	12
<i>People v. Flockhart</i> , 304 P.3d 227 (Colo. 2013) .....	33
<i>People v. Jones</i> , 434 P.3d 760 (Colo.App. 2018) .....	32
<i>People v. Melara</i> , 572 P.3d 619 (Colo.App. 2025) .....	9, 22, 26
<i>People v. Phillips</i> , 91 P.3d 476 (Colo. App. 2004) .....	14
<i>People v. Ray</i> , 302 P.3d 289 (Colo.App. 2012) .....	29
<i>People v. Schlehuber</i> , 572 P.3d 641 (Colo.App. 2025) .....	10, 22, 26, 30
<i>People v. Schnorenberg</i> , 570 P.3d 1036 (Colo. 2025) .....	12
<i>Petition of Edilson</i> , 637 P.2d 362 (Colo. 1981) .....	11, 29
<i>Pettigrew v. People</i> , 501 P.3d 813 (Colo. 2019) .....	11, 14, 36
<i>Rumnock v. Anschutz</i> , 384 P.3d 1262 (Colo. 2016) .....	29
<i>State v. Davis</i> , 975 N.W. 2d 1 (Iowa 2022) .....	30
<i>State v. Ellison</i> , 140 P.3d 899 (Ariz. 2006) .....	30
<i>State v. Ferguson</i> , 236 N.E.3d 824 (Ohio 2024) .....	27
<i>State v. Jackson</i> , 925 A.2d 1060 (Conn. 2007) .....	30
<i>State v. Perez</i> , 976 P.2d 427 (Haw. Ct. App. 1998) .....	29

<i>Taylor v. Kentucky</i> , 436 U.S. 478 (1978) .....	32
<i>U.S. v. Artero</i> , 121 F.3d 1256 (9 <sup>th</sup> Cir. 1997) .....	21
<i>United States v. Barrera-Gonzales</i> , 952 F.2d 1269 (10 <sup>th</sup> Cir. 1992) .....	19
<i>United States v. Brand</i> , 80 F.3d 560 (1 <sup>st</sup> Cir. 1996) .....	21
<i>United States v. Bustillo</i> , 789 F.2d 1364 (9 <sup>th</sup> Cir. 1986) .....	21
<i>United States v. Conway</i> , 73 F.3d 975 (10 <sup>th</sup> Cir. 1995) .....	20
<i>United States v. Hunt</i> , 794 F.2d 1095 (5 <sup>th</sup> Cir. 1986) .....	19
<i>United States v. Little</i> , 119 F.4th 750 (10 <sup>th</sup> Cir. 2024).....	9, 27
<i>United States v. Petty</i> , 856 F.3d 1306 (10 <sup>th</sup> Cir. 2017) .....	20
<i>United States v. Rodriguez</i> , 162 F.3d 135 (1 <sup>st</sup> Cir. 1998) .....	21
<i>United States v. Velasquez</i> , 980 F.2d 1275 (9 <sup>th</sup> Cir. 1992) .....	18
<i>United States v. Williams</i> , 20 F.3d 125 (5 <sup>th</sup> Cir. 1994) .....	21, 23
<i>Victor v. Nebraska</i> , 511 U.S. 1 (1994).....	passim
<b>Statutes</b>	
C.R.S. § 42-4-1301 .....	7, 33
C.R.S. § 42-4-1601 .....	7
C.R.S. § 42-4-1606(1) .....	7
<b>Rules</b>	
C.A.R. 10(a) .....	27
<b>Other Authorities</b>	
COLJI-Crim E:03 (2022) .....	passim

## ISSUE PRESENTED

Whether the trial court properly instructed the jury on the principle of reasonable doubt consistent with the pattern jury instruction in COLJI-Crim E:03 (2022)?

## STATEMENT OF THE CASE

Defendant was arrested and charged with Driving Under the Influence, C.R.S. § 42-4-1301, among other offenses, stemming from his involvement in a two-car collision in Adams County, Colorado, on May 31, 2023. [TR 1/23/24 pp. 207:14-208:12; 213:19-214:1]; [CF 23T5869 p. 1].<sup>1</sup> The matter proceeded to trial on January 23, 2024. At trial, the defendant objected to the court instructing the jury in accordance with the 2022 revision of COLJI-Crim E:03, the pattern jury instruction on reasonable doubt. The defendant argued, without elaboration, that the language of the instruction “impermissibly state[d] the burden of proof.” [TR 1/23/24 pp. 12:13-13:7]. The trial court disagreed and ultimately

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<sup>1</sup> The county and district court case files were not transmitted as one file. Instead, a separate court file was provided for each case. The People therefore cite to the applicable court file by its respective case number for clarity.

instructed the jury on the concept of reasonable doubt consistent with the pattern jury instruction. [TR 1/23/24 pp. 13:19-12:2]; [CF 23T5869 p. 127]; COLJI-Crim E:03 (2022). The defendant was convicted at trial of Driving While Ability Impaired, C.R.S. § 42-4-1301(1)(b), Leaving the Scene of an Accident, C.R.S. § 42-4-1601(1),(2)(a), and Failure to Report an Accident Involving Injury, C.R.S. § 42-4-1606(1). [CF 23T5869 pp. 181-187].

On appeal, the district court rejected the defendant's argument that the trial court's reasonable doubt instruction impermissibly lowered the People's burden of proof. [CF 24CV30648 pp. 524-526]. First, the district court found that the facts below stood in contrast to this Court's decision in *Tibbels v. People*, 501 P.3d 792 (Colo. 2022). [CF 24CV30648 p. 525]. Specifically, the district court highlighted that the *Tibbels* decision did not pass on the propriety of the pattern "reasonable doubt" instruction itself but rather found fault with the trial court's *own analogy* of reasonable doubt, which "undermined" the pattern reasonable doubt instruction. *Id.*; *see Tibbels*, 501 P.3d at 795. Here, according to the district court, the trial court simply instructed the jury on reasonable doubt consistent with

the pattern jury instruction and provided no further analogies or examples. [CF 24CV30648 p. 525].

Second, the district court noted that the phrases “real possibility” and “firmly convinced” (phrases to which the defendant objected on appeal) had been approved by the Colorado Model Jury Instruction Committee and that similar instructions had withstood identical challenges in federal courts as well. [CF 24CV30648 pp. 525-526]. Finally, the district court highlighted how the trial court repeatedly made clear to the jury that the defendant’s guilt must be proven beyond a reasonable doubt at various stages of trial. *Id.* Considering the court’s other comments in the trial proceeding and the instructions as a whole, the district court concluded that the use of the instruction was appropriate and affirmed the defendant’s conviction. *Id.* This appeal followed.

## SUMMARY OF THE ARGUMENT

The trial court’s use of the 2022 formulation<sup>2</sup> of reasonable doubt in COLJI-Crim E:03 was appropriate and no error occurred. Trial courts

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<sup>2</sup> The Colorado Model Jury Instructions Committee initially updated

retain considerable discretion over the formulation of jury instructions, and no specific words or phrases are required. *Johnson v. People*, 436 P.3d 529, 532 (Colo. 2019); *see also Victor v. Nebraska*, 511 U.S. 1, 5 (1994). Use of pattern jury instructions, although not a failsafe against challenges on appeal, is generally considered sufficient to instruct juries on relevant principles of law. *See Galvan v. People*, 476 P.3d 746, 757 (Colo. 2020)

Furthermore, definitions of “reasonable doubt” nearly identical to the instruction employed by the trial court and contained in COLJI-Crim E:03 have enjoyed longstanding federal support, *see, e.g. United States v. Little*, 119 F.4th 750, 782 (10<sup>th</sup> Cir. 2024), and the specific instruction at issue has recently been affirmed by the Colorado Court of Appeals in two published opinions. *People v. Melara*, 572 P.3d 619 (Colo.App. 2025);

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COLJI-Crim E:03 in 2022 to include the “firmly convinced” and “real possibility” language that is the subject of this appeal. The committee further modified the instruction to its current form in 2023, adding a sentence regarding evidence or lack of evidence as it pertains to reasonable doubt. Defendant does not challenge this portion of the instruction, nor does he argue that the trial court erred by failing to include that portion of the current instruction in this case. Because the 2022 and current versions of COLJI-Crim E:03 are identical for purposes of this appeal, the People refer to the 2022 version for simplicity.

*People v. Schlehuber*, 572 P.3d 641 (Colo.App. 2025). The rationale of these opinions is sound, and the Court should approve them.

The defendant does not engage with any of these authorities in any substantive manner but rather urges that the “modern” understanding of the phrases “real possibility” and “firmly convinced” reflects something less stringent than what is required to sustain a conviction beyond a reasonable doubt. Defendant asserts this “modern” understanding obviates the precedential value of controlling case law considering the issue. Instead, the defendant presents modern-day cultural references to the phrases (“real possibility” and “firmly convinced”) and states in conclusory fashion that these references prove his point. Defendant ignores several recent cases that expressly contradict his argument. These recent cases establish that even modern interpretations of these phrases are sufficient to describe the People’s burden of proof.

The defendant further devotes a substantial portion of his brief to the results of a “study” (which he also refers to throughout as “evidence”) which his own attorneys commissioned and paid for, and which is tailored to this particular appeal. This “evidence” was never presented at trial—

its first appearance before any court, anywhere, is before this Court. As such, it sits squarely outside the record and therefore is not to be considered in this appeal. *See Petition of Edilson*, 637 P.2d 362 (Colo. 1981) (“Evidence which was not presented to the trial court will not be considered on review.”)

Turning to the trial court’s actions, the district court correctly determined that no reasonable juror would have understood the trial court’s reasonable doubt instruction to permit a conviction on anything less than reasonable doubt. The trial court defined reasonable doubt in terms expressly endorsed by the Colorado Model Jury Instruction Committee. Applying the proper “functional” test and considering the totality of the circumstances, *see Pettigrew v. People*, 501 P.3d 813, 822 (Colo. 2019), the trial court’s instructions accurately informed the jury of the law, and the trial court specifically avoided attempts to define or analogize reasonable doubt further, consistent with this Court’s admonition in *Tibbels*. The defendant’s attempts to characterize comments by the trial court and the People to the contrary lack critical context and are meritless.

## ARGUMENT

### I. PRESERVATION AND STANDARD OF REVIEW

The People agree this issue was preserved for appeal. A trial court's decision whether to give a particular instruction is reviewed for an abuse of discretion. *People in Interest of J.G.*, 370 P.3d 1151, 1161 (Colo. 2016). "A trial court abuses its discretion when its ruling is 'manifestly arbitrary, unreasonable, or unfair, or based on a misapprehension of the law.'" *People v. Schnorenberg*, 570 P.3d 1036, 1040 (Colo. 2025) (quoting *Cath. Health Initiatives Colo. v. Earl Swensson Assocs., Inc.*, 403 P.3d 185, 187 (Colo. 2017)).

Whether a trial court correctly instructs a jury on the law is a matter reviewed de novo. *Tibbels*, 501 P.3d at 797. An instruction which correctly presents the prosecution's burden of proof will not be reversed, but one which lowers the prosecution's burden of proof below the reasonable doubt standard results in structural error requiring automatic reversal. *Id.*

## II. TRIAL COURTS RETAIN FLEXIBILITY TO DEFINE “REASONABLE DOUBT”

It is axiomatic that a criminal conviction requires proof beyond a reasonable doubt, a principle “nothing short of ‘indispensable.’” *Johnson*, 436 P.3d at 531-532 (quoting *In re Winship*, 397 U.S. 358, 361 (1970)). Nevertheless, “the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course.” *Victor* 511 U.S. 1 at 5.

Trial courts in Colorado generally define “reasonable doubt” for juries in conformity with the pattern instructions contained in the Colorado Model Criminal Jury Instructions. *See* COLJI-Crim. E:03 (2022). However, this Court has repeatedly stated that no talismanic words or phrases are required to define reasonable doubt, provided that the principle is adequately explained in the jury instructions as a whole. *Johnson*, 436 P.3d at 532; (quoting *Victor*, 511 U.S. at 5 (“[S]o long as the court instructs the jury on the necessity that the defendant’s guilt be proved beyond a reasonable doubt ... the Constitution does not require that any particular form of words be used ....”)); *Pettigrew*, 501 P.3d at 822.

Courts therefore retain flexibility in defining reasonable doubt for a jury. *Id.* at 821; *Tibbels*, 501 P.3d at 797. An instruction is not erroneous for its use (or omission) of certain words or phrases unless, by so doing, a reasonable likelihood exists that the jury understood the instruction to permit a conviction on a standard less than beyond a reasonable doubt. *Id.*

The determination of whether a trial court properly instructs a jury is a “functional test,” *Pettigrew*, 501 P.3d at 822, which asks whether “there is a reasonable likelihood that the jury understood the court’s statements, in the context of the instructions as a whole and the trial record, to allow a conviction based on a standard lower than beyond a reasonable doubt.” *Tibbels*, 501 P.3d at 800. Whether this reasonable likelihood exists depends on the nature of the statements, the context in which the statements were made, any other explanations or instructions given by the trial court, and the trial court’s final charge to the jury. *Id.* Finally, in assessing jury instructions on appeal, reviewing courts presume that “the jury understood and heeded the trial court's instructions.” *People v. Phillips*, 91 P.3d 476, 484 (Colo. App. 2004).

### III. COLJI-CRIM E:03

Model jury instructions such as Colorado's exist to provide courts with guidance in instructing juries on relevant principles of law. Of course, merely tracking model instructions does not, by itself, render a court's instructions of law impervious to allegations of plain error, *see Garcia v. People*, 455 P.3d 1065, 1069 (Colo. 2019), and the ultimate responsibility to accurately instruct a jury lies with the trial court. *Krueger v. Ary*, 205 P.3d 1150, 1154 (Colo. 2009). Nevertheless, model jury instructions are intended as guidelines and should be considered by trial courts, as they "have been approved in principle by [the Colorado Supreme Court] and serve as beacon lights to guide trial courts." *Galvan*, 476 P.3d at 757. Where an instruction accurately tracks the language of authority such as statutes or pattern instructions, they are unlikely to mislead a jury. *See id.*

Here, the trial court instructed the jury on reasonable doubt consistent with the pattern jury instruction contained in COLJI-Crim E:03:

The burden of proof in this case is upon the Prosecution.  
The Prosecution must prove to the satisfaction of the jury

beyond a reasonable doubt the existence of each and every element necessary to constitute the crime charged. This burden requires more than proof that something is highly probable but it does not require proof with absolute certainty.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilt. If you were firmly convinced of the Defendant's guilt, then the Prosecution has proven the crime charged beyond a reasonable doubt. But if you think there is a real possibility that the Defendant is not guilty, then the prosecution has failed to prove the crime charged beyond a reasonable doubt.

[TR. 1/23/24, p.291:6-19]; [CF. 23T5869 p. 127].

This formulation of “reasonable doubt” was adopted in 2022 by Colorado’s Model Jury Instructions Committee (hereinafter “the committee”). Although the revision “in no way casts aspersions on the validity of the prior version of this instruction,” *see* COLJI-Crim. E:03 cmt. 1 (2022), the committee felt that updates were prudent in response to concerns over the “hesitate to act” language contained in the prior instruction<sup>3</sup> and because it was phrased in the negative. Additionally, the committee felt the new version provided more context. *Id.*

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<sup>3</sup> Although the committee ultimately dispensed with the “hesitate to act” language in the prior version of COLJI-Crim E:03, the committee noted that the use of this phrase had been explicitly approved by the Supreme

#### IV. FEDERAL AUTHORITY SUPPORTS THE USE OF “REAL POSSIBILITY” AND “FIRMLY CONVINCED” IN COLJI-CRIM E:03

The committee’s reformulation of COLJI-Crim E:03 was not, however, created from whole cloth. Rather, the committee drew guidance from both the Supreme Court and a wealth of federal case law discussing the propriety of certain phrases to define reasonable doubt including, as relevant here, the phrases “firmly convinced” and “real possibility.” *See id.*, citing *Victor, supra*, and *United States v. Taylor*, 997 F.2d 1551, 1557 (D.C. Cir. 1993).

In *Taylor*, the trial court used a reasonable doubt instruction not unlike the one at issue here, which juxtaposed the phrases “firmly convinced” with “real possibility.”<sup>4</sup> On appeal, the *Taylor* court rejected

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Court. *See Victor*, 511 U.S. at 20 (stating that the Court has “repeatedly approved” instructions defining reasonable doubt as “a doubt that would cause a reasonable person to hesitate to act”).

<sup>4</sup> The instruction read, in relevant part, “In criminal cases, the government's proof must be...beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If based on your consideration of the evidence you're firmly convinced that a defendant is guilty of the crime charged, it is your duty to find him guilty. If on the other hand you

the defendant's arguments that the instruction: (1) lessened the prosecution's burden of proof; (2) shifted the burden to the defense; and (3) created a reasonable likelihood that the jury applied the instruction in an unconstitutional manner. 997 F.2d at 1557-1558. Agreeing with the Ninth Circuit, the D.C. Circuit reasoned, "[t]he phrases 'firmly convinced' and 'hesitate to act' are essentially two ways of conveying the same definition of reasonable doubt" and thus, the instruction did not lower the prosecution's burden of proof. *Id.* (citing *United States v. Velasquez*, 980 F.2d 1275, 1278 (9th Cir. 1992)).

The *Taylor* court next reasoned that instructing the jury that it must acquit if there was a "real possibility" of the defendant's innocence did not shift the burden of proof to the defendant. *Id.* This formulation did not suggest the defendant must be the source of the "real possibility of innocence;" and furthermore the trial court (in *Taylor*) instructed the jury on the presumption of innocence and the prosecution's burden of proof, eliminating any concern that the jury might think the defendant was

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think there is a real possibility that a defendant is not guilty, you must give him the benefit of a doubt and find him not guilty."

required to show the “real possibility” of his own innocence. *Id.* (citing *United States v. Hunt*, 794 F.2d 1095 (5th Cir. 1986) (characterizing challenge to “real possibility” language as “meritless, if not frivolous.”); *United States v. Barrera-Gonzales*, 952 F.2d 1269, 1273 (10th Cir. 1992)).

Far beyond *Taylor*, however, federal jurisprudence overwhelmingly approves the use of the phrases “real possibility” and “firmly convinced” to define reasonable doubt. Beginning with the Supreme Court, Justice Ginsburg’s concurrence in *Victor* identified the phrase “real possibility,” juxtaposed with the phrase “firmly convinced,” as perhaps the best way to instruct juries about the quantum of proof necessary to sustain a conviction. Discussing a federal pattern jury instruction nearly identical to the current COLJI-Crim. E:03, she stated:

this instruction plainly informs the jurors that the prosecution must prove its case by more than a mere preponderance of the evidence, yet not necessarily to an absolute certainty. The ‘firmly convinced’ standard for conviction, repeated for emphasis, is further enhanced by the juxtaposed prescription that the jury must acquit if there is a ‘real possibility’ that the defendant is innocent. This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly.

511 U.S. at 27 (Ginsburg, J. concurring in part and concurring in the judgment).

In the three decades since *Victor*, federal case law has consistently approved the formulation of reasonable doubt which the committee inserted into COLJI-Crim E:03. As the committee pointed out, “no circuit court has found that a ‘reasonable doubt’ instruction which juxtaposes the terms ‘firmly convinced’ and ‘real possibility’ constitutes reversible error. COLJI-Crim. E:03 cmt. 1 (2022).

Many post-*Victor* cases still cite Justice Ginsburg’s concurrence with approval, and every federal authority the People have found has either explicitly rejected challenges identical to those the defendant raises in this case or held, at minimum, that the use of such language to define reasonable doubt does not warrant reversal. *See, e.g. Little*, 119 F.4th at 782 (holding that “real possibility” language did not shift burden of proof to defendant); *United States v. Petty*, 856 F.3d 1306, 1310 (10<sup>th</sup> Cir. 2017) (“real possibility” formulation is a correct and comprehensible statement of the reasonable doubt standard.”) (quoting *United States v. Conway*, 73 F.3d 975, 980 (10<sup>th</sup> Cir. 1995)); *Harris v. Bowersox*, 184 F.3d 744, 751 (8<sup>th</sup>

Cir. 1999); *United States v. Rodriguez*, 162 F.3d 135, 146 (1st Cir. 1998)<sup>5</sup>; *U.S. v. Artero*, 121 F.3d 1256, 1257-1258 (9th Cir. 1997) (“real possibility” language does not lessen prosecution’s burden); *United States v. Brand*, 80 F.3d 560, 566 n. 8 (1st Cir. 1996); *United States v. Williams*, 20 F.3d 125, 131 (5th Cir. 1994) (finding “no infirmity” in use of the phrase “real possibility”); *United States v. Bustillo*, 789 F.2d 1364, 1368 (9th Cir. 1986).

## V. THE RATIONALE OF COLORADO DECISIONS APPROVING THE USE OF COLJI-CRIM E:03 IS SOUND

In addition to overwhelming federal approval of identical (or nearly identical) instructions, two divisions of our court of appeals have already addressed and explicitly approved the use of COLJI-Crim E:03’s formulation of reasonable doubt. These decisions comport with established principles of jury instruction and recognize the weight of

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<sup>5</sup> *Rodriguez* is noteworthy in its distinction, echoed by other courts, between this formulation of “reasonable doubt” and the definition the Supreme Court rejected in *Cage v. Louisiana*, 498 U.S. 39, 40 (1990). “The phrase ‘real doubt’ does not suffer the infirmity of requiring the jury to have ‘grave uncertainty,’ ‘substantial doubt,’ and a ‘real tangible substantial basis’ for doubt, before they can acquit, as the unconstitutional instruction did in [*Cage*].” 162 F.3d at 146.

federal authority on the subject. This Court should therefore adopt the rationale in those decisions.

In *People v. Melara*, 572 P.3d 619 (Colo.App. 2025), a division of the Court of Appeals considered whether the omission of language permitting a jury to consider the “lack of evidence” in determining a case lowered the prosecution’s burden and constituted structural error. 572 P.3d at 628. In rejecting the defendant’s claim, the division considered the entire model instruction (the same as challenged here), and found that the instruction “is an accurate statement of the law...[T]he instruction emphasized that, to find Melara guilty beyond a reasonable doubt, the jury must be ‘firmly convinced of [Melara's] guilt,’ and that even proof that something is ‘highly probable’ is not sufficient to satisfy the reasonable doubt burden.” *Id.*

On the same day, another division of the court of appeals squarely addressed the challenge the defendant makes in this case in *People v. Schlehuber*, 572 P.3d 641 (Colo.App. 2025). There, among other contentions, the defendant challenged the use of the phrases “real possibility” and “firmly convinced” in the trial court’s reasonable doubt

instruction, taken verbatim from COLJI-Crim E:03. The division began by noting that “this juxtaposition — between believing there is a ‘real possibility’ the defendant is not guilty, on one hand, and being ‘firmly convinced’ of the defendant's guilt, on the other — has been consistently approved by federal courts as an accurate expression of the reasonable doubt standard.” 572 P.3d at 650. Furthermore, “the phrase ‘real possibility’ correctly directs the jury not to acquit the defendant simply because it can conceive of *some* fanciful possibility that the defendant is not guilty.” *Id.* (emphasis original) (citing *Williams*, 20 F.3d at 131 and *Victor*, 511 U.S. at 17).

The rationale of these cases is sound, and this Court should adopt the same stance, at least with respect to the defendant’s arguments in this case. Both *Melara* and *Schlehuber* recognize that model jury instructions, while helpful and highly instructive, are not “safe harbors” insulating jury instructions from challenge. Both opinions further predicate their holdings on the fundamental principle articulated in *Victor* that although not required, reasonable doubt definitions are permissible and appropriate when used with care. Finally, both cases

recognize that, while no talismanic language is required, the language contained in COLJI-Crim E:03 that the defendant challenges here has consistently withstood scrutiny, up to and including the present day, and accurately reflects the People's burden of providing proof beyond a reasonable doubt.

#### **VI. THE DEFENDANT'S APPEAL TO "MODERN" USAGE IS OUTSIDE THE RECORD, UNAVAILING, AND CONTRARY TO PRECEDENT**

Despite the voluminous federal authority contrary to his position, as well as the recent case law in Colorado undermining his argument, the defendant does not substantively engage with any of it. Rather, the defendant argues in sweeping fashion that these authorities must give way to what he terms a "modern" understanding of the phrases he disputes. The brunt of his argument derives from either contemporary pop culture references or an exposition of a self-serving "study" which falls outside of the record and is therefore not appropriate for consideration on appeal. Furthermore, the legal authority the defendant does cite is unavailing.

Initially, the defendant's premise that the phrases "firmly convinced" and "real possibility" are somehow outdated and therefore constitutionally deficient invites the sort of talismanic, hyper-technical analysis fundamentally at odds with the reality that no specific words or phrases need be used to define reasonable doubt. *See Victor*, 511 U.S. at 5. True, courts should strive to present legal concepts in ways that a jury will comprehend them. But that does not mean reviewing courts need engage in precise etymological analyses of words or phrases to determine if there is a more advisable way to phrase something for "modern" audiences. To do so neuters the inherent flexibility that trial courts enjoy in defining the law for juries.

Beyond the fundamental flaw in his premise, the merits of the defendant's argument simply do not hold water. For instance, he points to YouTube videos, scripted television series, and unrelated internet articles for the proposition that the phrases "real possibility" and "firmly convinced" mean something less than what case law says they do. *Opening Brief*, pp. 29-32. However, acontextual references to television, YouTube, or arbitrary internet articles do not (and cannot) obviate

decades of case law to the contrary. Neither can such references be considered germane dialectal authority (much less legal precedent) on the matter. Laying that aside, the defendant's argument itself is conclusory. He hazards that the use of these phrases ("real possibility" and "firmly convinced") means something other than what courts have said they mean, simply because the defendant says so. *See Opening Brief*, p. 30 (In each of these instances...the phrase "real possibility" is used to indicate a *substantial* likelihood...) (emphasis original); p. 32 ("All of these uses...suggest that the phrase denotes a level of certainty that falls below 'beyond a reasonable doubt.'").

The defendant's argument that the "modern" understanding of these phrases renders COLJI-Crim E:03 constitutionally infirm is also undercut by the simple recency of actual, published case law to the contrary. As of 2025, two divisions of our court of appeals have interpreted the phrases "firmly convinced" and "real possibility" as used in COLJI-Crim E:03 to appropriately describe the People's burden of proving a case beyond a reasonable doubt. *See Melara, Schlehuber, supra*. The vast weight of federal and out-of-state authority over just the past three years stands for

the same proposition. *See, e.g. Little*, 119 F.4th 750, 782; *Ellison v. Thornell*, 721 F. Supp. 3d 820, 888 (D. Ariz. 2024); *Burrell v. Delaware*, 332 A.3d 412, 432-433 (Del. 2024); *State v. Ferguson*, 236 N.E.3d 824, 828 (Ohio 2024); *Commonwealth v. Drummond*, 285 A.3d 625, 642 (Pa. 2022) (approving Justice Ginsburg’s concurrence in *Victor*). These decisions all reflect the reality that the phrases “firmly convinced” and “real possibility” continue to accurately convey the meaning of reasonable doubt when used in jury instructions, even as used in modern speech.

Second, the defendant devotes a substantial portion of his brief to “evidence” in the form of a “first-of-its-kind comparison,” *Opening Brief*, p. 22, which he claims provides “empirical data showing how prospective jurors react” to different reasonable doubt instructions. *Id.*, p. 19. This newly minted study apparently invited subjects to assess a given fact pattern in light of different reasonable doubt instructions and quantified the rates at which participants would “convict” under the fact pattern. *Id.* pp. 22-25. As the defendant concedes, this study was funded by his counsel’s firm, and counsel had some level of involvement in the study’s design. *Id.* at 22 n. 2. In short, the study appears to have been prepared

convenient to, and in anticipation of, the arguments to be raised in this appeal.

Appellate courts do not act as factfinders, neither do they accept litigant-funded survey data as a basis for determining a matter of law. It is a well-worn and inviolate principle of appellate practice that reviewing courts confine themselves strictly to matters raised and argued in lower courts. *See* C.A.R. 10(a) (defining “Composition of the Record on Appeal”). Facts and evidence raised for the first time on appeal—which the defendant concedes he is attempting to do here—are necessarily not subjected to the crucible of cross-examination nor evaluation by lower courts to discern their reliability or relevance to an issue.<sup>6</sup>

For this reason, evidence which exists outside the court record cannot and will not be considered by reviewing courts. *See Panos Inv. Co. v. Dist. Ct. In & For Larimer Cnty.*, 662 P.2d 180, 182 (Colo. 1983) (“Simply stated, we will not consider issues and evidence presented for

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<sup>6</sup> Indeed, a cursory examination of the cited study reveals several debatable decisions regarding its methods, designs, and underlying premises which are not the subject of this appeal, but which would certainly be appropriate for cross-examination in a pre-trial hearing before a trial court.

the first time in original proceedings.”); *accord Rumnock v. Anschutz*, 384 P.3d 1262 n. 4 (Colo. 2016); *Edilson*, 637 P.2d at 364 (“Evidence which was not presented to the trial court will not be considered on review.”); *see also People v. Ray*, 302 P.3d 289, 295-296 (Colo.App. 2012) (denying request to supplement record with matters outside the scope of C.A.R. 10); *Fendley v. People*, 107 P.3d 1122, 1125 (Colo. App. 2004) (“We are limited to the record presented and may consider only arguments and assertions supported by the evidence in the record.”). Simply put, the defendant’s argument relies on evidence which lies entirely outside the record and thus should not be considered by this Court.

To the extent that the defendant does cite legal authority for the proposition that these phrases are constitutionally deficient, his authorities are unavailing. For example, the defendant cites *State v. Perez*, 976 P.2d 427 (Haw. Ct. App. 1998), wherein a division of the Intermediate Court of Appeals of Hawaii held that use of the term “firmly convinced” in defining reasonable doubt was insufficient to communicate the principle accurately. However, this single case pales in comparison to the vast weight of case law to the contrary. Moreover, the defendant fails

to note that a significant number of litigants have specifically cited *Perez* for the *same* purpose and in support of the *same* arguments the defendant raises here, yet *Perez's* analysis has been rejected in literally *every* instance that the People can find. *See, e.g. Schlehuber, supra; State v. Jackson*, 925 A.2d 1060, 1065-1066 (Conn. 2007); *Com. v. Russell*, 23 N.E. 867, 873 (Mass. 2015) (“The reasoning of the *Perez* case has not gained traction in other jurisdictions... We join those courts in declining to follow the *Perez* case.”); *State v. Davis*, 975 N.W. 2d 1, n.8 (Iowa 2022); *State v. Ellison*, 140 P.3d 899, 916 (Ariz. 2006).

## VII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING REASONABLE DOUBT

Turning to the trial court’s actions in this case, its instruction to the jury simply does not constitute error of any kind. Employing the “functional” test endorsed by *Tibbels* and *Pettigrew*, a review of the record as a whole demonstrates that the trial court instructed the jury on several occasions that the defendant was presumed innocent, did not have to prove his innocence, and that the People’s burden was to prove that the defendant committed the charged crimes beyond a reasonable doubt. [TR

1/23/24 pp. 37:5-13; 55: 7-12; 56:7-16; 291:6-12; 295:13-19]; [CF 23T5869 pp. 121-123, 127, 139, 141-145].

The trial court’s reasonable doubt instruction tracked the language contained in COLJI-Crim E:03. Particularly in view of the wealth of authority approving this formulation, it cannot reasonably be argued that the trial court acted “outside the bounds of the rationally available choices” in formulating its jury instruction in this manner. *See Streu v. City of Colorado Springs ex rel. Colorado Springs Utilities*, 239 P.3d 1264, 1268 (Colo. 2010) (articulating abuse of discretion standard). As the district court noted, the trial court specifically refrained from attempting to provide additional context or explanation of reasonable doubt through the use of abstract hypotheticals, thus critically distinguishing this case from the erroneous, informal description of reasonable doubt which this Court found constitutionally deficient in *Tibbels*.

The defendant counters by first assuming that the COLJI-Crim-E:03 formulation is unconstitutional, and therefore the trial court had a duty to “ameliorate” this deficiency in its other instructions. *Opening Brief*, p. 34. He appears to cite *Tibbels* for this proposition; however, as discussed,

*Tibbels* found fault with a trial court’s own ad-libbed hypothetical illustrations of reasonable doubt, *not* with the pattern jury instruction itself. 501 P.3d at 802 (“For this reason as well, the example that the court gave violated *Tibbels*'s constitutional rights.”). Thus, to the extent that the defendant appears to suggest that *Tibbels* supports the notion that the pattern jury instruction is an insufficient formulation of reasonable doubt, he is incorrect.

The defendant cites two instances in the trial record to argue to the contrary, but his citations lack critical context and do not advance his argument. First, the defendant asserts that the prosecutor lowered her own burden by stating that the jury “need[ed] to find him guilty of driving while ability impaired. *Opening Brief*, p. 34. However, statements of counsel are not evidence, nor are they instructions of law. *Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978) (“[A]rguments by counsel cannot substitute for instructions by the court.”); *accord People v. Jones*, 434 P.3d 760, 770 (Colo.App. 2018) (“It is the duty of the trial court — not counsel — to ‘correctly instruct the jury on all matters of law for which there is sufficient evidence to support giving instructions.’”) (citations omitted).

Furthermore, the trial court expressly instructed the jury that arguments of counsel were not evidence, and that the jury must abide by the instructions it provided. [CF 23T5869 p. 121] (“While the attorneys may comment on some of these rules, you must follow the instructions I give you.”); [TR 1/23/24 p. 157:17-21]. There is no evidence in the record to suggest that the jury acted contrary to this instruction and understood the prosecutor’s comments to be instructions of law, and the jury is presumed to have understood and followed this admonition. *People v. Flockhart*, 304 P.3d 227, 235 (Colo. 2013).

Moreover, the statement itself would not reasonably have been understood to lower the People’s burden of proof when considered in the context of the prosecutor’s argument. The prosecutor’s statement that the jury “need[ed]” to find the defendant guilty of driving while ability impaired was made in the context of a comparison of the elements of driving under the influence and the lesser-included offense of driving while ability impaired. *Compare* C.R.S. § 42-4-1301(1)(a)/(b). Specifically, the prosecutor argued that if the jury did not believe the defendant was “substantially impaired” for purposes of driving while intoxicated, he was,

at the very least, impaired to the “slightest degree” which, if believed, would require a verdict of guilty on the lesser-included offense of driving while ability impaired. [TR 1/23/24 p. 309:3-16].

At no point did the prosecutor argue that such a finding was required by law, nor that her burden was lowered. Indeed, the prosecutor explicitly reminded the jury, both in opening and closing statements, that she carried the burden of proving the defendant’s guilt beyond a reasonable doubt and referred to the court’s jury instruction on the issue. [TR 1/23/24 pp. 161:21-25; 312:13-17]. Thus, properly understood in its context, the prosecutor’s comments simply amounted to rhetorical argument that the evidence supported a verdict of guilt on the lesser-included offense, if not the greater offense. No reasonable juror would have understood this comment otherwise, much less as an erroneous instruction of law.

Second, the defendant takes issue with an exchange between the trial court and a prospective juror during voir dire. *Opening Brief*, p. 34-35. Again, the defendant presents this exchange in a vacuum, ignoring the broader context of the conversation. The court conducted its exchange

with the prospective juror in the context of discussing the right to remain silent, *not* with respect to the concept of reasonable doubt. [TR 1/23/24 pp. 54:5-55:12]. In fact, the trial court never undertook to define or provide additional definitions or explanation of reasonable doubt for the jury at all during voir dire. Furthermore, the court immediately followed up this discussion by repeating that the “burden [of proof] will be entirely on the [p]rosecution” and “never shifts over to the [d]efense at any point.” *Id.*

The court followed that exchange by discussing the presumption of innocence and right to remain silent with other potential jurors. [TR 1/23/24 pp. 55:7-60:24]. In short, the statements the defendant deems problematic were, in reality, questions asked with an aim toward ensuring that the venire could adequately comprehend and apply various principles of law.

Considered in the context of the trial and instructions as a whole, there is no reasonable likelihood that any juror understood the trial court’s comments to lower the prosecution’s burden of proof. The trial court never tied a particular definition of reasonable doubt to any of the

exchanges the defendant cites in his Opening Brief. To the contrary, the trial court *affirmatively* reminded the jury during voir dire that the burden of proof rested upon the People alone, and that the defendant did not have to prove his innocence. [TR 1/23/24 pp. 156:7-11; 291:6-19].

In sum, the entirety of the trial court's instructions, when considered in the context of the trial as a whole, accurately communicated the People's burden of proof. *See Pettigrew*, 501 P.3d at 822. There was no instance in which a reasonable juror would have believed that they were permitted to render a verdict of guilt in an unconstitutional fashion. The trial court's use of the COLJI-Crim. E:03, under the circumstances of this case, reinforced this principle and did not create a reasonable likelihood that the jury understood it to allow a conviction based on a standard lower than "beyond a reasonable doubt." *See Tibbels*, 501 P.3d at 800. Nor did the instruction shift the burden to the defendant. *Taylor*, 997 F.2d at 1557. The defendant's argument therefore fails.

## CONCLUSION

For the foregoing reasons and authority, the People respectfully request this Court affirm the decision of the district court approving the

trial court's instructions of law to the jury and affirming the defendant's convictions.

Respectfully submitted,

BRIAN MASON, District Attorney  
Seventeenth Judicial District

By /s/ Todd Bluth

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## **CERTIFICATE OF SERVICE**

I certify that on November 27, 2025, a true and correct copy of the foregoing **ANSWER BRIEF** was served via CO Courts E-Filing on all parties who appear of record and have entered their appearances herein according to CO Courts E-Filing.

**/s/ Todd Bluth**