Colorado Supreme Court 2 East 14th Avenue Denver, Colorado 80203	DATE FILED November 4, 2025 5:02 PM
Adams County District Court Honorable Teri Lynn Vasquez Case No. 2024CV030648	
Alexis Teran-Sanchez, Petitioner v. People of the State of Colorado, Respondent	COURT USE ONLY
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Petitioner's Opening Brief	

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with all requirements of C.A.R. 28, 32, and 57. The undersigned specifically certifies that:

This petition complies with the applicable word limit set forth in C.A.R. 28(g). It contains 7,093 words. I acknowledge this petition may be stricken if it fails to comply with any requirement of the foregoing rules.

/s/ NoahLani Litwinsella
NoahLani Litwinsella

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INTRODUCTION

Petitioner Alexis Teran Sanchez[1] was involved in a car accident. A jury acquitted him of careless driving but convicted him on several other charges based on flimsy evidence. The jury found Mr. Teran Sanchez guilty of driving while ability-impaired without any firm proof of intoxication, based on one witness's testimony that Mr. Teran Sanchez was "speaking very fast" and "had trouble focusing"—behavior the witness conceded was just as likely the result of being in a jarring car accident as anything else. And the jury found Mr. Teran Sanchez guilty of leaving the scene of the accident despite uniform testimony that he had checked on the other driver immediately after the accident, moved his car out of the intersection, and had already parked and exited his car by the time police arrived.

This trial was riddled with reasonable doubt. But the instructions given to the jury lowered the prosecution's bar to a level where those doubts did not bar a conviction. Specifically, under the 2023 Model Criminal Jury Instruction, the jurors were instructed that they need only be "firmly

[1] Petitioner's last name does not contain the hyphen currently shown in the case caption.

convinced" of guilt and that "the prosecution has failed to prove the crime charged" only if "there is a *real possibility* that the defendant is not guilty." (Emphasis added.) That instruction's impermissibly prejudicial impact was compounded by other statements made to the jury, including that it "need[ed]" to convict Mr. Teran Sanchez of driving while ability-impaired if it did not think he was guilty of driving under the influence.

A reasonable-doubt jury instruction is unconstitutional where "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 v. People*, 2022 CO 1, ¶ 2. As shown by Mr. Teran Sanchez's case, the 2023 Model Criminal Jury Instruction does just that.

Courts have criticized and debated over the "firmly convinced" and "real possibility" language in the 2023 Model Criminal Jury Instruction for decades. Yet none of those courts have analyzed how the instructions are "commonly understood" by ordinary, non-lawyer jurors. *Cage v. Louisiana*, 498 U.S. 39, 41 (1990). This Court has the opportunity to do just that by looking to evidence that shows how ordinary jurors *actually* respond to the

language in the model instruction—namely, empirical data from jury studies and evidence from ordinary usage of the relevant language.

The results are striking. A new jury study demonstrates that the 2023 Model Criminal Jury Instruction causes jurors to convict at as high or higher rates than the instructions already held to be unconstitutional in *Cage* and *Tibbels*. And pre-existing empirical analysis of the "real possibility" language suggests it can lead to convictions at a lower-than-preponderance standard.

This empirical evidence is consistent with modern usage of the phrase "real possibility," which is used to refer to a *substantial likelihood*—and, in the context of this instruction, would be understood by jurors to flip the burden onto the defendant to prove his or her innocence. The empirical evidence is also consistent with the modern usage of "firmly convinced," which is used to connote a level of certainty below "beyond a reasonable doubt."

The prosecution's evidence against Mr. Teran Sanchez was anemic and should have given rise to a host of reasonable doubts. The fact that Mr. Teran Sanchez was nevertheless convicted underscores that the 2023 Model Criminal Jury Instruction impermissibly lowered the prosecution's burden. The Court should thus reverse.

ISSUE PRESENTED

[REFRAMED] Whether the trial court's jury instruction on burden of proof and reasonable doubt, based on the 2023 Model Criminal Jury Instruction . . . violated petitioner's federal and constitutional rights to due process and a fair trial.

BACKGROUND

The accident and arrest. On May 31, 2023, nineteen-year-old Alexis Teran Sanchez was involved in a car accident north of Denver. Mr. Teran Sanchez "was driving straight down Pecos Street." Trial Transcript ("Tr.") at 162:13–15. Then, at the intersection of Pecos and 84th, an unlicensed driver made a left turn and the vehicles collided. *Id.* at 162:18–21.

After the accident, Mr. Teran Sanchez stopped, got out of the car, and checked on the other driver. Tr. at 203:8–17, 274:5–7. Mr. Teran Sanchez "was very scared [because] it was [his mother's] vehicle." *Id.* at 274:10–13. His car was blocking traffic, so he moved it out of the way. *Id.* at 164:13–16. Because the car's airbags were deployed, Mr. Teran Sanchez could not see a nearby parking lot entrance. *Id.* at 215:21–24, 274:21–275:2. He thus moved the car

"30 seconds" down the road, turned on his hazard lights, and got out of his car. *Id.* at 315:1–7, 203:8–17.

As Mr. Teran Sanchez was preparing to return to the scene of the accident, police officers in two different vehicles arrived and met him by his car. Tr. at 213:17–22, 214:19–23, 275:3–4. Mr. Teran Sanchez told the officers that he had been involved in an accident and that he had moved the car out of the way of the intersection. *Id.* at 230:18–231:1.

According to one of the officers, Mr. Teran Sanchez was "acting nervous," "talking fast," and "had trouble focusing" on the conversation. Tr. at 231:4–10. The officer testified that these "mannerisms" were "consistent with anxiety or somebody that's worked up over an accident." *Id.* at 219:5–7. The officer also noted that Mr. Teran Sanchez's eyes were "watery" and "bloodshot" and noted that an "accident or injuries can affect somebody's . . . eyes." *Id.* at 219:5–220:20. Notwithstanding the possibility that these symptoms were the result of the accident, the officer thought there was "potential intoxication" and testified that he smelled a "light or slight odor of an unknown alcoholic beverage." *Id.* at 219:5–220:19. The officer later

clarified that he was "concerned more about [Mr. Teran Sanchez's] mannerisms that are drug related than . . . alcohol." *Id.* at 225:1–2.

When asked, Mr. Teran Sanchez was adamant that "he was not drinking" and was not under the influence of drugs, either. Tr. at 220:20–23. No drugs or alcohol were found in the car that Mr. Teran Sanchez had been driving. *Id.* at 233:3–7. Moreover, the police officers did not offer Mr. Teran Sanchez any roadside test or a breathalyzer test. *Id.* at 231:25–232:2. Instead, the arresting officer demanded that a blood test be administered at the hospital. *Id.* at 224:19–24. Mr. Teran Sanchez felt he was being "racially profiled," and thus refused the blood test. *Id.* at 278:14–17.

Despite Mr. Teran Sanchez's denial that he was under the influence of drugs or alcohol, and despite the lack of any breathalyzer or blood test, an officer arrested Mr. Teran Sanchez "based on the indicia or the symptoms that [the officer] was seeing." Tr. at 220:24–221:6. Mr. Teran Sanchez was then charged with five counts: (1) driving under the influence, (2) careless driving resulting in injury, (3) failure to present proof of insurance, (4) leaving the scene of an accident, and (5) failure to fulfill duties after involvement in an accident involving injury. *Id.* at 34:22–35:5.

The trial and jury instructions. A one-day trial took place on January 23, 2024. Before *voir dire*, Mr. Teran Sanchez's counsel objected to the 2023 Model Criminal Jury Instruction on the reasonable-doubt standard. Tr. at 12:13–13:7. The court proceeded over the objection. *Id.* at 13:19–22. Accordingly, after the close of evidence, the court instructed the jury using the 2023 Model Criminal Jury Instruction, stating:

> Every person charged with a crime is presumed innocent. This presumption of innocence remains with the Defendant throughout the trial and should be given effect by you unless, after considering all of the evidence, you are convinced that the Defendant is guilty beyond a reasonable doubt.
>
> 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 are firmly convinced of the Defendant's guilt, then the Prosecution has proven the crime charged beyond a reasonable doubt. But if you think that 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.
>
> After considering all the evidence, if you decide the Prosecution has proven each of the elements of a crime charged beyond a

> reasonable doubt, you should find the Defendant guilty of that crime.
>
> After considering all the evidence, if you decide the Prosecution has failed to prove any one or more of the elements of a crime charged beyond a reasonable doubt, you should find the Defendant not guilty of that crime.

Tr. at 290:25–292:2.

In addition to the instruction provided at the end of the case, there were at least three times where the judge or the prosecution expressly or impliedly defined reasonable doubt.

First, in a conversation during *voir dire* about the burden of proof and the right to remain silent, the judge asked a juror how she would know which of her two children was responsible for breaking a lamp if they exercised their right to remain silent. Tr. at 54:10–55:4. The juror said she would "assess the situation and figure out [her] best guess." *Id.* at 55:5–6. The judge then repeated "[f]igure out your best guess," without correcting the juror, and proceeded to say the defense attorneys "could put their feet up, pull out a deck of cards, and start playing Go Fish, and the burden would never shift to them to disprove anything in this case." *Id.* at 55:7–20.

Second, at two different times, the prosecution told the jurors that they "need[ed] to be firmly convinced that Mr. Teran Sanchez committed those offenses." Tr. at 161:25–162:1; *see also id.* at 312:15–17 (similar).

Third, during its closing argument, the prosecution told the jury that if it was "not convinced that Mr. Teran Sanchez was driving under the influence," it "*need[ed]* to find him guilty of driving while ability impaired." Tr. at 309:7–10 (emphasis added).

Before closing, the prosecution dropped the charge of failure to present proof of insurance. Tr. at 235:25–236:3. The jury then entered deliberations on the remaining charges, at which point it asked: "How far do you have to be in order for it to be considered leaving the scene?" *Id.* at 325:1–3. In response, the jury was told, "You have all the information that you can consider in reaching your decision." *Id.* at 325:16–20.

After deliberations, the jury acquitted Mr. Teran Sanchez on the charges of careless driving, Tr. at 326:20–24, and driving under the influence, *id.* at 326:15–18. But the jury found Mr. Teran Sanchez guilty of the lesser included offense of driving while ability-impaired, as well as on the charges

of leaving the scene of an accident involving injury and failing to report an accident involving injury. *Id.* at 326:17–327:9.

Sentencing and appeal. On March 25, 2024, the trial court sentenced Mr. Teran Sanchez to 60 days in jail with work release authorized and imposed 24 months of supervised probation, among other limitations. Sentencing Hearing 12:13–14:9. The court agreed to grant a stay of execution pending appeal. *Id.* 9:20–9:24. On April 25, 2024, Mr. Teran Sanchez timely appealed his convictions. District Court Order on Appeal at 1. The Adams County District Court affirmed. *Id.* at 14. On September 2, 2025, this Court granted certiorari.

SUMMARY OF ARGUMENT

A reasonable-doubt jury instruction is unconstitutional if "there is a reasonable likelihood" that jurors understand the instruction "to allow a conviction based on a standard lower than beyond a reasonable doubt." *Tibbels v. People*, 2022 CO 1, ¶ 2. The 2023 Model Criminal Jury Instruction does just that, especially as employed in Mr. Teran Sanchez's trial.

1. Although courts around the country have come to differing conclusions about the constitutionality of instructions similar to this one,

none have evaluated data or analyses addressing how the instructions are "commonly understood" by ordinary jurors. *Cage v. Louisiana*, 498 U.S. 39, 41 (1990). Instead, each decision has centered on "parsing instructions for subtle shades of meaning," which is exactly what the Supreme Court has said jurors do *not* do. *Boyde v. California*, 494 U.S. 370, 380–81 (1990). Fortunately, other sources—namely, empirical evidence and ordinary modern usage—shed much more light on that question and demonstrate that the instruction used here was constitutionally infirm.

2. Empirical evidence about how ordinary potential jurors react to different reasonable-doubt instructions demonstrates that the instruction used here sets a standard that is as bad or worse than instructions that this Court and the Supreme Court have rejected. Specifically, a recent study that showed mock jurors the same fact pattern but different reasonable-doubt instructions demonstrated that the 2023 Model Criminal Jury Instruction caused participants to convict at comparable or higher rates than the instructions held to be unconstitutional in *Cage* and *Tibbels*. Further, pre-existing empirical research connects the "real possibility" language used in this instruction to convictions below even a preponderance of the evidence.

3. Consistent with the findings in this data, common usage of the phrases "real possibility" and "firmly convinced" suggests that ordinary jurors would understand those terms to allow conviction based on a lower standard. *See Victor v. Nebraska*, 511 U.S. 1, 12–13 (1994) (courts should look to how "a modern jury would understand" a jury instruction based on "modern lexicon"). In particular, common usage suggests that jurors would understand the "real possibility" language to mean a *substantial* likelihood that the defendant is not guilty, and would interpret "firmly convinced" to mean something more speculative than "beyond a reasonable doubt."

4. In a very close case like this one, where the prosecution's evidence was remarkably weak, the shortcomings of the 2023 Model Criminal Jury Instruction are particularly pronounced. That is especially true given that other statements to the jury would have amplified the message of a lower burden—and even suggested that jurors "needed" to convict on one of the charges. Even if the 2023 Model Criminal Jury Instruction does not lead to unconstitutional results in all cases, it did lead to such a result here.

This Court should reverse.

STANDARD OF REVIEW

Mr. Teran Sanchez objected to the jury instruction at trial. Tr. at 12:8–13:8. Under such circumstances, this Court "review[s] de novo the question of whether a trial court accurately instructed the jury on the law." *Tibbels,* ¶ 22.

ARGUMENT

The "reasonable-doubt standard" is an "indispensable" part of criminal law and is "constitutionally required" in all criminal cases. *In re Winship*, 397 U.S. 358, 362–64 (1970). To give effect to that standard, a jury must be provided with instructions that "correctly convey the concept of reasonable doubt." *Victor*, 511 U.S. at 5 (cleaned up).

To assess whether a given reasonable-doubt jury instruction is appropriate, courts ask "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Model or pattern instructions are "not authoritative" and do not get a free pass. *Krueger v. Ary*, 205 P.3d 1150, 1154 (Colo. 2009). Instead, for any instruction, the question is how "a modern jury would understand" the challenged instruction "in the context of the instructions as a whole." *Victor*, 511 U.S. at 13–17.

If a reasonable-doubt instruction uses "words" that, "as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard," it is unconstitutional. *Cage*, 498 U.S. at 41. In particular, if an instruction "arguably suggest[s] to the jurors that [the defendant] had some obligation to present evidence to create a reasonable doubt in the jurors' minds," the instruction "violate[s] [the defendant's] constitutional rights." *Tibbels*, ¶ 52. That is so because such instructions "turn[] the presumption of innocence on its head, improperly suggesting to the prospective jurors that they were to start with a presumption of guilt and then look for evidence to create in their minds a reasonable doubt, i.e., 'a reason' to acquit." *Id.* Instructions like this "lower the prosecution's burden of proof below the reasonable doubt standard" and "require automatic reversal." *Id.* at ¶ 22.

Different courts at different times have come to different conclusions when assessing the constitutional validity of reasonable-doubt instructions similar to the one provided in Mr. Teran Sanchez's case. *Infra* § I. But none of those decisions shed light on how the instruction used here would be "commonly understood" by "modern jurors." *Victor*, 511 U.S. at 14, 20.

By contrast, empirical evidence demonstrates that the instruction used here causes jurors to convict at rates comparable to or higher than other instructions that this Court and the Supreme Court have held to be unconstitutional. *Infra* § II. That result is consistent with how the most problematic phrases used in the instruction—"real possibility" and "firmly convinced"—are used in modern, everyday language. *Infra* § III. And the problems with the instruction are borne out in the facts of this case, in which Mr. Teran Sanchez was acquitted on some charges and convicted on others based on little more than one police officer's conjecture. *Infra* § IV.

A constitutionally viable reasonable-doubt instruction is one of the most "axiomatic and elementary" requirements of criminal law. *Winship*, 397 U.S. at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). Mr. Teran Sanchez was not afforded such an instruction, which led "the jury to convict on a lesser showing than due process requires." *Tibbels*, ¶ 25. That was structural error, *id.* at ¶ 22, and this Court should reverse.

I. Legacy cases have limited value in determining how modern jurors understand the challenged instruction.

Assessing jury instructions requires viewing them "with a realistic eye as to how jurors would likely have understood" the language. *Tibbels*, ¶ 42.

This involves looking at how "a *modern* jury would understand" the language, because language that may have been "generally understood" by judges or jurors at one point in time may be "confusing to a modern juror." *Victor*, 511 U.S. at 13 (emphasis added). And this is not a technical exercise like statutory interpretation; ordinary jurors do not "pars[e] instructions for subtle shades of meaning in the same way that lawyers might." *Boyde*, 494 U.S. at 381; *see McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014) (cautioning against judges' "reliance 'on our intuitions'" as to how non-lawyers view text because "what seems pellucid to a judge, a legally sophisticated reader, may be opaque to" non-lawyers).

Several courts have weighed in on the constitutional validity of jury instructions similar to the one provided here, arriving at different conclusions. For instance, in *State v. Perez*, 976 P.2d 427 (Haw. Ct. App. 1998), *aff'd in relevant part*, 976 P.2d 379 (Haw. 1999), the trial court gave a jury instruction that mirrored the 2023 Model Criminal Jury Instruction in several important respects, including use of the phrases "real possibility" and "firmly convinced." *Id.* at 439–40. The court of appeal reversed, reasoning that the instruction was constitutionally infirm for two reasons. First,

"advising the jury its verdict of 'not guilty' rests on whether it 'think[s]' there is a 'real possibility' the defendant is not guilty invites the jury to abandon the presumption of innocence." *Id.* at 441. And second, the "firmly convinced" language lowered the burden of proof because "it is possible to be firmly convinced of a fact, yet still retain a reasonable doubt." *Id.* at 442; *accord, e.g.*, *United States v. Porter*, 821 F.2d 968, 973 (4th Cir. 1987) (describing introduction of "the unnecessary concepts of being 'firmly convinced' of guilt and a 'real possibility' of innocence" as an "error" but one that was "compensated for" by "[o]ther instructions"). Indeed, requiring a finding that there is a "real possibility that the defendant is not guilty" to find "the prosecution has failed to prove the crime charged" is tautological.

Other courts assessing similar language in other instructions have reached the opposite conclusion, opining that "the juxtaposition . . . of the two concepts, 'firm conviction' and 'a reasonable doubt,'" tells the jurors that they must find "guilt that is devoid of any rational basis for questioning the truth of the allegations." *State v. Jackson*, 925 A.2d 1060, 1068 (Conn. 2007); *accord, e.g.*, *State v. Putz*, 662 N.W.2d 606, 611 (Neb. 2003); *United States v. Artero*, 121 F.3d 1256, 1257–58 (9th Cir. 1997).

What both sets of cases have in common is a limited analysis of how "modern jurors"—as opposed to judges or lawyers—"would understand" the instruction in light of "modern lexicon." *Victor*, 511 U.S. at 12–14. Most of the legacy decisions treat the analysis like a matter of statutory interpretation, parsing or "juxtapos[ing]" the specific language used, *e.g.*, *Jackson*, 925 A.2d at 1068, and relying on the opinions of other courts rather than drawing on evidence that might show how ordinary, non-lawyer jurors might understand the language, *e.g.*, *Putz*, 662 N.W.2d at 611–14 (collecting and string-citing "jurisprudential support" and "jurisprudential criticism" of the instruction).

The same was true of the process that led to adoption of the 2023 Model Criminal Jury Instruction used in Mr. Teran Sanchez's case. The instruction resulted from a divided vote from a six-judge panel. *See Meeting Minutes of December 9, 2022*, Model Criminal Jury Instructions Committee, https://www.coloradojudicial.gov/sites/default/files/2024-06/Minutes%20for%20MCJIC%2012_9_22%20Meeting.pdf. The committee noted several linguistic concerns with the prior instruction, such as the fact that the prior instruction's "a doubt which is not a vague, speculative or imaginary doubt"

language "was phrased in the negative." COLJI-Crim. E:03 (2023) cmt. 1 (cleaned up). But there is no indication that the committee considered any input from lay people or non-lawyers—much less surveys, data, or other evidence that would shed light on how ordinary jurors understand the text of the old or new instructions.

Formulating and interpreting jury instructions requires humility on the part of lawyers. Attorneys may be good at "parsing instructions for subtle shades of meaning," but that's probably not how jurors understand the instructions. *Boyde*, 494 U.S. at 381. And lawyers may be good at finding decades of case law to support or contradict a position, but there's always the risk that the instructions approved in those cases would be unconstitutionally "confusing to a modern juror." *Victor*, 511 U.S. at 13. The better way to apply "a realistic eye as to how jurors would likely have understood" an instruction is to look outside these areas to actual evidence that shows what ordinary jurors think. *Tibbels*, ¶ 42. Thankfully, here, there are two forms of evidence that shed light on that question: empirical data showing how prospective jurors react to the instruction when assessing a

hypothetical case and evidence about how the language is used and understood in everyday life.

II. Empirical evidence shows that the instruction's language could cause jurors to convict based on a lower, unconstitutional standard.

Courts have long been left to speculate regarding the constitutionality of the language included in the 2023 Model Criminal Jury Instruction. *Compare Perez*, 976 P.2d 427 (reasoning that the language of the instruction "invites the jury to abandon the presumption of innocence"), *with Victor*, 511 U.S. at 27 (Ginsburg, J., concurring in part) (opining, without citation, that the instruction "surpasses others I have seen"). Empirical evidence drawn from jury studies can provide an answer. *E.g.*, *Stoltie v. California*, 501 F. Supp. 2d 1252, 1261–62 (C.D. Cal. 2007), *aff'd* 538 F.3d 1296 (9th Cir. 2008) (citing empirical research in support of reforming a nearly identical reasonable-doubt instruction).

Here, empirical evidence demonstrates that there is a reasonable likelihood the 2023 Model Criminal Jury Instruction causes jurors to convict based on a standard lower than beyond a reasonable doubt. Specifically, when potential jurors were shown identical fact patterns but different reasonable-doubt instructions, those who were shown the 2023 Model

Criminal Jury Instruction were as likely, if not *more* likely, to convict than those shown instructions that both this Court and the Supreme Court have already determined unconstitutionally lowered the bar for conviction. Because hard evidence—not just conjecture—shows that the instruction was deficient as interpreted by ordinary jurors, this Court should reverse.

A. The 2023 instruction lowers the burden to the same degree as the instructions held unconstitutional in *Cage* and *Tibbels*.

Reasonable-doubt jury instructions are unconstitutional where they impermissibly lower the prosecution's burden of proof or place a burden on the defendant to prove innocence. *See Cage*, 498 U.S. at 41 (reasonable-doubt instruction unconstitutional where it would "allow a finding of guilt based on a degree of proof below that required by the Due Process Clause"); *Tibbels*, ¶ 51 (same where the instruction "unconstitutionally lowered the prosecution's burden of proof"). And the effect of a jury instruction on the burden of proof can be measured by providing jurors with an identical fact pattern but varying the reasonable-doubt instruction. *E.g.*, Michael D. Cicchini & Lawrence T. White, *Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication*, 17 Colum. L. Rev. Online 22 (Mar. 1,

2017). If a test instruction leads to more convictions than another instruction, it sets out a lower standard of proof. *Id.*

A recent jury study performed a first-of-its kind comparison between the language of the 2023 Model Criminal Jury Instruction and instructions previously held unconstitutional—specifically, the instructions from *Cage* and *Tibbels*—among others. E. Paige Lloyd & Abigail J. Langeberg, *The effect of jury instructions on verdict thresholds and guilt perception* (2025) (Psy ArXiv preprint), https://doi.org/10.31234/osf.io/vrfs7_v1.[2] If the test instruction led to more convictions on the same facts when compared to one already ruled unconstitutional, that would demonstrate that the instruction lowers the burden to a degree the United States Supreme Court and this Court have already held to be unconstitutional. That is exactly what this study found.

The study utilized reliable methods. It followed a previously validated methodology and fact pattern, which had been used to compare reasonable-doubt instructions in another study. Lloyd & Langeberg, *supra*, at 15–16 (citing Michael D. Cicchini, *Reasonable Doubt and Relativity*, 76 W&L L. Rev.

[2] Gibson, Dunn & Crutcher LLP provided funding for this study, and the undersigned provided feedback on the study's design. The authors retained final control of the study design, analysis, and conclusions.

1443 (Jan. 6, 2020)). Specifically, 896 mock jurors were shown trial testimony from three witnesses in a domestic violence case. The jurors were then given one of five reasonable-doubt instructions and asked to render a verdict. *Id.* at 14–21. Given that all other factors remained constant, significant variations in the conviction rate could be attributed to the reasonable-doubt jury instruction. *Id.* at 21–29; *see also* Cicchini & White (2017), *supra*.

The results of the study are stark: the 2023 Model Criminal Jury Instruction resulted in as high or *higher* conviction rates than the instructions ruled unconstitutional in *Tibbels* and *Cage*.

Instruction	Conviction Rate
2023 Model Criminal Jury Instruction	62.8%
Tibbels Jury Instruction	59.8%
Cage Jury Instruction	52.2%

Lloyd & Langeberg, *supra*, at 21, 25. Based on these figures, the 2023 Model Criminal Jury Instruction resulted in the greatest proportion of guilty verdicts. *Id.* When examining planned comparisons, the study's authors concluded that the 2023 Model Criminal Jury Instruction led to a significantly greater proportion of guilty verdicts as compared to *Cage*. *Id.* at 21–22, 25. A statistical analysis of all of the test instructions revealed that

there was no significant difference between the 2023 Model Criminal Jury Instruction and the unconstitutional instruction in *Tibbels*, although the *Tibbels* instruction did result in a greater number of convictions. *Id.* The study's "jurors" also were asked to describe their confidence in the defendant's guilt after rendering a verdict. *Id.* at 22. Participants were most confident that the defendant was guilty—again, based on reading the same factual scenario as all other participants—after being presented with the 2023 Model Criminal Jury Instruction, although this difference was not statistically significant. *Id.*

The data presented in this study demonstrate a reasonable likelihood that the 2023 Model Criminal Jury Instruction leads jurors to convict based on a standard lower than beyond a reasonable doubt. No prior court has had the benefit of this type of direct empirical support for its analysis. But the study results vindicate the concerns with the language of the 2023 Model Criminal Jury Instruction previously raised by courts. *Supra* § I. And they confirm the validity of this Court's decision in *Tibbels*, given that the *Tibbels* instruction resulted in higher conviction rates than the one ruled unconstitutional in *Cage*—even though the difference was not statistically

significant. *Id.* at 21–22, 25. In short, the data show that the 2023 Model Criminal Jury Instruction is as bad or worse than other instructions already held to be unconstitutional. It thus "lower[s] the prosecution's burden of proof below the reasonable doubt standard," and should be held to be unconstitutional. *Tibbels*, ¶ 22.

B. There is a "real possibility" of unconstitutional convictions.

The findings of this new study are broadly consistent with findings from prior studies looking at jury instructions. Most notably, a 1996 study tested three variations of the Federal Judicial Center's model reasonable-doubt instruction (among others), which is nearly identical to the 2023 Model Criminal Jury Instruction in relevant part. *See* Irwin A. Horowitz & Laird C. Kirkpatrick, *A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts*, 20 Law & Hum. Behav. 655 (1996). That study demonstrated that instructions with "real possibility" language similar to that used in the 2023 Model Criminal Jury Instruction led to convictions at a lower-than-preponderance standard.

Specifically, the study authors used the Federal Judicial Center's "firmly convinced" language in one instruction, "moral certainty" language in the second, and "does not waiver or vacillate" language in the third. Horowitz & Kirkpatrick, *supra*, at 660. All three instructions included the same "real possibility" language used in the 2023 Model Criminal Jury Instruction. *Id.* The authors then provided 16 six-person juries with one of the instructions—i.e., 48 juries rendered verdicts based on "real possibility" instructions after attending a simulated trial. *Id.* at 663.

Half of the juries with each instruction were presented with a simulated trial where the evidence was previously calibrated at less than a preponderance of the evidence—meaning the evidence should not have led to a finding of liability even in a civil case. Horowitz & Kirkpatrick, *supra*, at 661. Of the juries presented with this less-than-a-preponderance evidence and a "real possibility" instruction, one third reached guilty verdicts—despite the "reasonable doubt" standard and the paucity of evidence. *Id.* at 663. In other words, the instructions lowered the burden and led to convictions that should never have happened. One case that this Court cited favorably in *Tibbels*—*Stoltie*, 501 F. Supp. 2d at 1261–62—relied on this same

study in support of its conclusion that the Ninth Circuit should abandon the Federal Judicial Center's model reasonable-doubt instruction, which included the "real possibility" language.

That 1996 study left open a question, though: were these wrongful convictions attributable to the "real possibility" language or the varied language of the instruction?

The 2025 study provides data suggesting the "real possibility" language is to blame. The authors tested and compared the 2023 Model Criminal Jury Instruction and a version of the same instruction without the "real possibility" language. Lloyd & Langeberg, *supra*, at 14–19, 23, 25–26. The instruction with the "real possibility" language resulted in a greater number of convictions by 6.4%, although this number was not statistically significant. *Id.* at 23, 25–26. And compared to the version of the instruction without "real possibility," adding "real possibility" as part of the instruction significantly increased participants' perceptions of the defendant's guilt. *Id.*

Analysis of the "real possibility" language provides a clue as to why. Across the 896 participants, 89.73% understood the meaning of "real possibility" to include a "substantial possibility," rejecting the idea that it

only means "non-fictitious." Lloyd & Langeberg, *supra*, at 24, 26. The jurors further indicated that "a real possibility that the defendant is not guilty" would require an average of 58.23% (out of 100%) certainty to acquit. *Id.* at 24, 26–27. Finally, 37.39% of participants indicated the defense had some burden to show "a real possibility that the defendant is not guilty." *Id.*

In sum, empirical evidence strongly suggests that the 2023 Model Criminal Jury Instruction lowers and shifts the prosecution's burden in criminal cases. An instruction cannot be constitutional if it leads to *more* convictions than those already rejected by the courts for unconstitutionally lowering the bar. Nor can an instruction be constitutional if ordinary jurors understand it to shift the burden back to the defendant. The Court should thus reverse.

III. Modern usage suggests the model instruction's language may be understood by jurors to allow a conviction based on a standard lower than beyond a reasonable doubt.

"Words and phrases can change meaning over time," so when assessing how "a modern jury would understand" a jury instruction, it is helpful to look to how the words or phrases in that instruction are used in "modern lexicon." *Victor*, 511 U.S. at 12–13. The language from the 2023

Model Criminal Jury Instruction is drawn from an instruction designed in 1987 by the Federal Judicial Center. *See id.* at 24 (Ginsburg, J., concurring in part). But whatever that language may have meant to jurors in 1987, modern usage of the two most troubling phrases in the instruction—"real possibility" and "firmly convinced"—suggests that modern jurors would have interpreted the instruction to allow conviction based on a standard lower than reasonable doubt.

Start with "real possibility." Some cases have posited that "real," as used in that phrase, suggests to jurors only that the "possibility" must not be "imaginary" or "fanciful." *E.g.*, *Commonwealth v. Russell*, 23 N.E.3d 867, 874–75 (Mass. 2015). But "real possibility" in modern usage across a range of contexts is much more likely to denote a *substantial* possibility. For instance:

- "As for how much it'll cost, Bryant has been preparing the community for what could be an $850 price tag …. That price isn't final … but it's a real possibility." Mitchell Clark, *Pebble Might Be Coming Back — as a Small Android Phone*, The Verge (Mar. 22, 2023), https://tinyurl.com/yx2jspdj.
- "But you should know there is a very real possibility this program fails." STRANGER THINGS: *The Monster and the Superhero* (Netflix, May 27, 2022).

- "There is a real possibility that there's really something wrong . . . there is a strong suggestion, baby without a question that after all, I'm up to no good." THE ORCHARD, *Rhett Miller – Out of Love* (YouTube, June 5, 2012), https://tinyurl.com/36cs9xnp.
- "Acquittal despite a guilty verdict is rare, but is a real possibility in this case." Han Zhang, *An Uncertain Future for a Chinese Scientist Accused of Espionage*, The New Yorker (Apr. 13 2022), https://tinyurl.com/yc8b8bw8.

In each of these instances (and countless others) the phrase "real possibility" is used to indicate a *substantial* likelihood as opposed to the sort of non-fanciful likelihood that some courts have posited. If modern jurors applied that same understanding to the jury instruction used in this case, their takeaway would have been that they could acquit only if "there is a [substantial likelihood] that the defendant is not guilty," Tr. at 291:13-19—which "turn[s] the presumption of innocence on its head" and requires defendants like Mr. Teran Sanchez to provide "evidence to create in [jurors'] minds a reasonable doubt." *Tibbels*, ¶ 52.

The "real possibility" clause is especially significant because it comes at the end of the instruction. The "recency effect"—a well-documented

psychological phenomenon—demonstrates that decision-makers give more weight to recently acquired information, such as information at the end of a list. *See* Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. Rich. L. Rev. 1139, 1149 (2016) (citing sources); *see also* Lloyd & Langeberg, *supra*, at 26–27 (same). Thus, to a modern juror, the improper meaning of the "real possibility" clause will be particularly damaging given its placement.

Next, consider the phrase "firmly convinced." Courts that have rejected challenges to the use of that phrase in jury instructions have opined that "'firmly convinced' is essentially synonymous with 'beyond a reasonable doubt.'" *E.g.*, *State v. Antwine*, 743 S.W.2d 51, 63 (Mo. 1987). But modern usage suggests that "firmly convinced" entails a substantially lower level of certainty, encompassing even inherently uncertain forward-looking predictions:

- "I am pretty firmly convinced that *Succession* is not going to let any of the Roy kids walk away happy." Judy Berman, *Succession's 'Church and State' Was a Funeral for Kendall's Soul*, TIME (May 21, 2023), https://tinyurl.com/yc88k2wu.

- "I am firmly convinced that our firm will emerge well-positioned to help our clients and communities recover." Meghan Roos, *Economy Will Rebound in Second Half of 2020 as States Reopen for Business, Goldman Sachs Report Predicts*, Newsweek (Apr. 15, 2020), https://tinyurl.com/fctj85an.
- "I'm firmly convinced that the first time the first customer buys a first ticket for the first true high-speed rail trip on US soil, there will be no going back." James Fallows, *Even Under Trump, California (Yes, That Hellscape) Will Keep Moving the World Forward*, WIRED (Oct. 31, 2024), https://tinyurl.com/3sjy7aa4.

All of these uses of "firmly convinced" suggest that the phrase denotes a level of certainty that falls below "beyond a reasonable doubt." TV viewers cannot be sure beyond a reasonable doubt about how a plot arc will resolve—but modern usage shows they can be "firmly convinced" of that prediction. Likewise, CEOs cannot be sure beyond a reasonable doubt how their companies will do in the future, but they can be "firmly convinced" of how things will pan out. All this suggests that the modern understanding of "firmly convinced" connotes some lower level of certainty and, when used

in a jury instruction, would "allow a conviction based on a standard lower than beyond a reasonable doubt." *Tibbels*, ¶ 53.

The two best sources for providing a "realistic" picture of "how jurors would likely have understood [the] statements" in the instruction here are empirical evidence and everyday modern usage. *Tibbels*, ¶ 42. Both of those sources point in the same direction and indicate that the instruction used in Mr. Teran Sanchez's case impermissibly lowered the prosecution's burden. This Court should thus reverse the conviction.

IV. Even if the 2023 model instruction does not violate defendants' due-process rights in all cases, it did so here.

To determine the validity of a reasonable-doubt instruction, courts "ask 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*, ¶ 43 (emphasis added). In *Tibbels*, the trial court twice read from the former pattern jury instruction. *Id.* at ¶¶ 9–15. But additional statements to the jury equating reasonable doubt to a floor-to-ceiling crack in a home's foundation nonetheless rendered the jury's instruction on reasonable doubt unconstitutional. *Id.*; *see also id.* at ¶ 59.

Nothing in the "instructions as a whole [or] the trial record" in this case ameliorated the tendency of the 2023 Model Criminal Jury Instruction to unconstitutionally lower and shift the prosecution's burden. *Tibbels*, ¶ 43. If anything, other statements to the jury at trial made things worse.

Specifically, during closing arguments, the prosecution instructed the jury that if it was "not convinced that Mr. Teran Sanchez was driving under the influence," it "*need[ed]* to find him guilty of driving while ability impaired." Tr. at 309:7–10 (emphasis added). That statement—which followed the 2023 Model Criminal Jury Instruction and was not corrected by the trial court at any point—unconstitutionally lowered the prosecution's burden by suggesting that a conviction was *required*. In other words, the prosecution made it clear that the jury had no discretion to find reasonable doubt on this point, and the jury followed that directive. *See id.* at 326:15–18.

Moreover, during *voir dire* on the burden of proof and the right to remain silent, the trial judge asked a juror how she would know which of her two children was responsible for breaking a lamp if they exercised their right to remain silent. Tr. at 54:10–55:4. The juror said she would "assess the situation and figure out [her] best guess." *Id.* at 55:5–6. The judge did not

correct the juror, much less specify that the prosecution's burden could not be satisfied by a juror's "best guess," and instead just moved on to say the defense "could put their feet up" and the burden would still remain with the prosecution. *Id.* at 55:7–20. The jury's "best guess" is not the standard for proof beyond a reasonable doubt. If the jury is guessing, the prosecution has failed to meet its burden.

All of this made a world of difference in Mr. Teran Sanchez's case. He was convicted of driving under the influence despite all relevant witnesses, counsel, and the trial court agreeing his symptoms were consistent with the trauma of his crash. In fact, there was no evidence of intoxication other than a non-expert police officer's shaky surmise—and that conjecture was wholly inconsistent with the fact that Mr. Teran Sanchez was acquitted of driving carelessly. Moreover, Mr. Teran Sanchez was convicted of leaving the scene of the accident despite uncontradicted testimony that he had simply pulled his car over to get out of an intersection and was not trying to flee when officers arrived. There were a host of reasonable doubts in this case. The fact that Mr. Teran Sanchez was nevertheless convicted underlines that the instructions given to the jury were deficient.

CONCLUSION

Mr. Teran Sanchez's conviction rested on unfounded speculation at each step, from the police officer's guess that Mr. Teran Sanchez's nervous energy was the result of intoxication rather than shock from a car accident, to the trial court's conjecture that the model instruction was fine, despite a lack of any evidence that would show how ordinary jurors would understand it. Convictions under the reasonable-doubt standard should rest on a firmer foundation than that. This Court should reverse.

Respectfully submitted this 4th day of November, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that, on November 4, 2025, a true and correct copy of this pleading was served via the Colorado Courts E-Filing system upon:

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