NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GREGORY M. HAWES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this Court's decision in *Patterson v. New York* (1977), which permitted placing the burden on a criminal defendant to establish mitigating facts lessening a penalty, has been abrogated by *Apprendi v. New Jersey* (2000) and *Alleyne v. United States* (2013), which made clear that a state must prove every element of an offense beyond a reasonable doubt, including those facts that establish the statutory punishment, and especially those that facts that aggravate a mandatory minimum or statutory maximum sentence?

II. Whether, when state court interpretations of state law point in opposite directions, with differing federal constitutional consequences, must a federal habeas court defer to one interpretation over the other in its deferential review under 28 U.S.C. § 2254(d)?

PROCEEDINGS BELOW

State of Wyoming v. Hawes, District Court for the Sixth Judicial District, Campbell County, State of Wyoming, Criminal Docket No. 6327, Verdict entered August 16, 2013.

Hawes v. State, Supreme Court of Wyoming, No. S-14-0018, 335 P.3d 1073, Direct appeal, Oct. 14, 2014

State of Wyoming v. Hawes, District Court for the Sixth Judicial District, Campbell County, State of Wyoming, Criminal Docket No. 6327, Post-conviction order entered January 23, 2017.

Hawes v. State of Wyoming, Wyoming Supreme Court, No. S-17-0038, Post-conviction decision entered February 22, 2017.

Hawes v. Wilson, District Court for the Eighth Judicial District, Goshen County, State of Wyoming, Docket No. CV-2018-60, Post-conviction order entered April 10, 2019.

Hawes v. Pacheco, U.S. District Court, District of Wyoming, Post-conviction decision entered July 16, 2019.

Hawes v. Pacheco, Tenth Circuit Court of Appeals, No. 19-8047, Post-conviction opinion entered August 10, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Gregory M. Hawes, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on August 10, 2021.

OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit in this case was published as *Hawes v. Pacheco*, 7 F.4th 1252 (10th Cir. 2021). A copy appears in the Appendix at A1.

JURISDICTION

The United States District Court for the District of Wyoming had jurisdiction over Mr. Hawes's petition for a writ of habeas corpus under 28 U.S.C. § 2254. On July 16, 2019, it entered its final judgment denying the petition and declining to issue a certificate of appealability. Mr. Hawes filed a notice of appeal on August 12, 2019, within the time provided under Fed. R. App. 4(a)(1)(A), and on February 3, 2020, the United States Court of Appeals for the Tenth Circuit granted a certificate of appealability. The court of appeals' continuing jurisdiction arose under 28 U.S.C. § 1291 and 28 U.S.C. § 2253(a), (c)(1)(A). It denied Mr. Hawes' appeal on August 10, 2021. He timely sought rehearing en banc, which request was denied on November 12, 2021. (Appendix at A21.) This Court granted Mr. Hawes' request to

extend the time to file a petition for certiorari until March 14, 2021. (Appendix at A23.) It has jurisdiction pursuant to 28 U.S.C. §§ 1254(1).

STATE AND FEDERAL PROVISIONS INVOLVED

Wyo. Stat. Ann. § 6-2-201. Kidnapping; penalties; effect of release of victim

a) A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business or from the vicinity where he was at the time of the removal, or if he unlawfully confines another person, with the intent to:

(i) Hold for ransom or reward, or as a shield or hostage;

(ii) Facilitate the commission of a felony; or

(iii) Inflict bodily injury on or to terrorize the victim or another.

(b) A removal or confinement is unlawful if it is accomplished:

(i) By force, threat or deception; or

(ii) Without the consent of a parent, guardian or other person responsible for the general supervision of an individual who is under the age of fourteen (14) or who is adjudicated incompetent.

(c) If the defendant voluntarily releases the victim substantially unharmed and in a safe place prior to trial, kidnapping is a felony punishable by imprisonment for not more than twenty (20) years.

(d) If the defendant does not voluntarily release the victim substantially unharmed and in a safe place prior to trial, kidnapping is a felony punishable by imprisonment for not less than twenty (20) years or for life except as provided in W.S. 6-2-101.

28 U.S.C. § 2254. State custody; remedies in Federal courts

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

In this habeas action, a three-judge panel of the Tenth Circuit granted Mr. Hawes a Certificate of Appealability to determine whether the state of Wyoming's kidnapping statute, Wyo. Stat. Ann. § 6-2-201, violates the Sixth and Fourteenth Amendments. A split merits panel concluded that it did not. Appellant Gregory Hawes now petitions for review of two important questions of federal law.

1. Mr. Hawes brought this habeas action under 28 U.S.C. § 2254 to challenge his conviction and sentence of thirty years to life for kidnapping in the state of Wyoming. The state's kidnapping statute, Wyo. Stat. Ann. § 6-2-201, provides that "a person is guilty of kidnapping if he unlawfully removes . . . or confines another person," with certain proscribed intents. It then establishes two potential statutory penalty ranges, distinguishing defendants who free a victim from those who do not:

> (c) If the defendant voluntarily releases the victim substantially unharmed and in a safe place prior to trial, kidnapping is a felony punishable by imprisonment for not more than twenty (20) years.
>
> (d) If the defendant does not voluntarily release the victim substantially unharmed and in a safe place prior to trial, kidnapping is a felony punishable by imprisonment for not less than twenty (20) years or for life . . . .

This question of "safe release" has a dramatic impact on the nature of offense: if subsection (c) applies, the defendant faces "not more than twenty (20) years;" but if subsection (d) applies, that twenty years becomes the mandatory minimum, and he faces up to a lifetime of incarceration.

The Wyoming Supreme Court first considered these penalty provisions in 1989, six years after § 6-2-201's enactment. In that case, *Loomer v. State*, the state court concluded that a jury's verdict that the defendant had unlawfully removed or confined a person (with the requisite criminal intent), was *alone* sufficient to subject a defendant to the penalty range set forth in subsection (d), *without any further proof* required of the state to prove the facts contemplated by that section. 768 P.2d 1042, 1046 (Wyo. 1989). Put another way, *Loomer* read subsection (d) as presenting a default penalty, while the penalty provision of subsection (c) "describe[d] *mitigating circumstances* rather than elements of the offense." *Id.* (emphasis added). And, looking to this Court's decision in *Patterson v. New York*, 432 U.S. 197 (1977), the state supreme court asserted that "[t]he burden of showing mitigating circumstances which are not an element of the offense may be placed on a defendant without violating due process requirements." *Id.* at 1047.

Accordingly, under *Loomer*, a jury does not determine beyond a reasonable doubt the facts that subsection (d) provides for triggering the statutory mandatory

minimum and lifetime maximum sentencing range (i.e., that the defendant *did not* "voluntarily release the victim . . ."). Rather, the burden is placed on *the defendant* to prove the factual predicate in subsection (c) (i.e., that he *did* "voluntarily release the victim . . ."). A defendant who proves safe release faces no mandatory minimum term of imprisonment, whereas a defendant who does not prove safe release faces a mandatory minimum of twenty years.

Loomer was the Wyoming Supreme Court's first, but by far not last, word on § 6-2-201. As the dissent below comprehensively surveyed (Appendix at A12-13), in the years following *Loomer* the Wyoming Supreme Court often has taken a markedly different approach to interpreting and applying § 6-2-201. Specifically, it has described subsection (d) as the "enhancement portion of the kidnapping statute," *McDermott v. State*, 870 P.2d 339, 346 (Wyo. 1994), and repeatedly characterized kidnapping committed under subsection (d), i.e., *without* safe release, as "aggravated kidnapping," compared to kidnapping committed under subsection (c), i.e., *with* safe release, as mere "kidnapping" or "simple kidnapping." *See, e.g.*, *id.* at 347 (describing conviction under § 6-2-201(d) as "the crime of aggravated kidnapping).

But as the dissent further explained (Appendix at 10-14), while this "aggravated" framework may be self-evident in interpreting the statute, it is, in fact, *impossible* under *Loomer*. Rather, *Loomer* held that there is only one crime—

kidnapping—punishable by 20 years to life unless the defendant proves mitigating factors. Subsection (d) cannot represent an element of an "aggravated" crime or "enhancement" provision at the same time that *Loomer* instructs the provision is the *default* punishment, without any further proof required. The state's case law interpreting its kidnapping statute, § 6-2-201, therefore, is internally irreconcilable. And, as discussed below, in a habeas proceeding as here, where the state courts' interpretations have differing federal constitutional impacts, these alternative interpretations matter greatly in resolving the *federal* constitutional question.

2. In 2013 the state of Wyoming tried Mr. Hawes on a kidnapping charge.[1] The charging document identified subsection (d) as the penalty range the government sought (i.e., 20 years' to life). (Appendix at A62-63.) But, consistent with *Loomer*, at trial the jury was never asked to make a determination, beyond a reasonable doubt, that the state had proven what subsection (d) contemplates for that penalty to be applied, i.e., that Mr. Hawes did not "voluntarily release the victim substantially unharmed and in a safe place prior to trial." Instead, the trial court instructed the jury that it was *Mr. Hawes*, and not the government, who bore the burden to *disprove* those aggravating facts. (Appendix at 67.) The jury found Mr.

[1] The relevant procedural history also is recounted in detail in the Tenth Circuit's opinion and order granting a COA below. (Appendix at A5-7, A26-32.)

Hawes guilty on the kidnapping count, and further found that he did not prove safe release. Accordingly, he faced a penalty range of "not less than twenty (20) years or for life." § 6-2-201(c), (d).

3. In the years that followed, Mr. Hawes exhausted his direct appeals, and then, proceeding pro se, began to seek post-conviction relief from his kidnapping conviction. In doing so, he has consistently maintained that, in relying on *Loomer* the state of Wyoming unconstitutionally placed the burden on him at trial to prove safe release, instead of requiring the state to prove the facts establishing the twenty years to life penalty range in subsection (d).[2]

As relevant here, in early 2017, the state trial court denied Mr. Hawes's post-conviction petition, rejecting on the merits his argument that it was unconstitutional to assign him the burden of proof on the question of safe release. (Appendix at A53-55.) Looking to *Loomer* and *Patterson*, it noted that the Wyoming Supreme Court had long instructed courts to allocate the burden that way for kidnapping offenses. That is, the court explained, safe release was a mere "mitigating" factor, and requiring "defendants to prove mitigation, rather than requiring the State to prove

[2] As the Tenth Circuit recognized below, Mr. Hawes' challenge to the constitutionality of § 6-2-201 had been adjudicated on the merits in the state courts. (Appendix at A15 n.5.) *See* 28 U.S.C. § 2254(b).

aggravation, is constitutionally permitted." The Wyoming Supreme Court summarily affirmed. (Appendix at A50-52.)

Mr. Hawes timely pursued habeas relief in federal court, and eventually, in 2019, the district court dismissed his § 2254 petition with prejudice. (Appendix at A45-49.) As did the state court, the federal habeas court rejected Mr. Hawes' argument that safe release is an element of kidnapping that the government must prove beyond a reasonable doubt. The federal court agreed with the state post-conviction court's description of safe release as a "mitigating" factor, for which the burden of proof permissibly could be placed on the defendant.

4. Thereafter, a three-judge panel of the Tenth Circuit granted a COA on the question of whether Wyo. Stat. Ann. § 6-2-201 violates the Sixth and Fourteenth Amendments, and, relatedly, whether the jury instructions at Mr. Hawes's trial unconstitutionally relieved the state of its burden of proof to establish the penalty range of twenty years to life. (Appendix at A26-27, A37, A41-43.) A split merits panel ultimately affirmed the district court's denial of Mr. Hawes' habeas petition. (Appendix at A2, A10.)

The panel majority resolved this case on its view of the deference accorded to state court determinations of state law in the habeas context—that is, that a state court's interpretation of state law binds a federal habeas court. (Appendix at A7-9

(citing, *e.g.*, *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).) And, it concluded, because the state trial and post-conviction courts simply applied *Loomer* here, that court had to defer to that description of safe release as a "mitigating" fact, and that Mr. Hawes had not shown a violation of clearly established federal law *under that interpretation* of state law. (*Id.* at A8-9) It disregarded entirely (*id.* at A9-10 & n.13) the dissent's observation that the Wyoming Supreme Court's case law post-*Loomer* pointed in a very different direction, and that the court, in fact, had "inconsistently interpreted and applied § 6-2-201 over the past 30 years." (*id.* at A13 & n.9.)

In contrast, the dissent concluded that "when, as here, the state's highest court has interpreted its own statute in an inconsistent and conflicting manner," deference to "any particular interpretation" was unwarranted, and that, "[r]ather than ignore the inconsistencies or designate one interpretation as deserving of deference," this court should interpret the statute anew. (*Id.* at A13-14). And, given that Respondents did not contend that the kidnapping statute was constitutionally applied to Mr. Hawes in the absence of *Loomer*'s interpretation, and because a de novo reading made plain that safe release is *the* determinative element in establishing the legally prescribed penalty range for a defendant's conduct, one for which the state bore no burden of proof at Mr. Hawes' trial, the dissent concluded habeas relief was warranted. (*Id.* at A14 & n.10.) This petition follows.

REASONS FOR GRANTING THE WRIT

I. This Court's decision in *Patterson v. New York* has been abrogated by *Apprendi* and *Alleyne*, and the Court should say so.

The decisions below relied on the Wyoming Supreme Court's characterization, in *Loomer*, of safe release as a "mitigating" factor. That description in *Loomer*, in turn, rested on this Court's decision in *Patterson v. New York*. Both cases, however, preceded this Court's landmark decisions in *Apprendi* and *Alleyne* by decades. Both *Apprendi* and *Alleyne*, however, undermine the foundation on which the state court's decision rests—i.e., *Patterson*—and this case presents a good opportunity for this Court to say so.

A. This Court has made clear that facts that trigger the penalty for a crime are elements that must be found by a jury beyond a reasonable doubt.

This Court has long recognized that the Sixth Amendment's jury trial right and Fourteenth Amendment's due process protections require each element of a crime to be proved to the jury beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). In a trio of cases, *Mullaney v. Wilbur*, *Apprendi v. New Jersey*, and *Alleyne v. United States*, the Court further made clear that this requirement includes those facts which establish the statutory punishment, and especially those which aggravate either the mandatory minimum or statutory maximum.

First, in *Mullaney v. Wilbur*, this Court invalidated a state homicide law that *presumed* all intentional murders to be committed with malice aforethought (and thus punishable by life imprisonment), *unless* the defendant could rebut this presumption with proof that he acted in the heat of passion (in which case the conviction was reduced to manslaughter, and the maximum sentence became 20 years). 421 U.S. 684, 696 (1975). The Court did so, it explained, because the reasonable doubt standard was not "limited to those facts that constitute a crime as defined by state law;" it also attached to "those which bear solely on the extent of punishment." *Id.* at 697-99.

In *Apprendi v. New Jersey*, the Court reiterated that the Sixth and Fourteenth Amendments' protections are indeed concerned "as much with the category of substantive offense as with the degree of criminal culpability assessed." 530 U.S. 466, 477-78, 495 (2000) (citing *Mullaney*, 421 U.S. at 698). Accordingly, the Court held that "any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490 (emphasis added).[3]

[3] In the years since, this Court has only ever recognized two narrow exceptions to *Apprendi*'s general rule, neither of which is implicated here: that is, that prosecutors need not prove to a jury the fact of a defendant's prior conviction, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), or facts that affect whether a

Thirteen years later, in *Alleyne v. United States*, this Court explained that "the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum." 570 U.S. 99, 112 (2013). That's because, the Court explained, "[i]t is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed." *Id.* And, "because the legally prescribed range *is* the penalty affixed to the crime, it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." *Id.* (emphasis in original) (citations omitted).

B. *Patterson v. New York* is an outlier, and, as the principal dissent in *Apprendi* plainly stated, irreconcilable with that decision, a tension only amplified by *Alleyne*.

Two years after *Mullaney*, this Court decided *Patterson v. New York*, which, like *Mullaney*, involved another state homicide statute. 432 U.S. 197 (1977). There, a New York statute defined murder simply as an intentional killing, and then placed the burden on the defendant to prove an affirmative defense of an extreme emotional disturbance. *Id.* at 205-06. What made the New York statute different from the Maine statute in *Mullaney*, the *Patterson* Court said, was that it did not

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defendant with multiple sentences serves them concurrently or consecutively, *Oregon v. Ice*, 555 U.S. 160 (2009). *See United States v. Haymond*, 139 S. Ct. 2369, 2377 n.3 (2019) (plurality op.) (recounting exceptions).

presume any element defining the offense or punishment satisfied unless the defendant proved otherwise. *Id.* at 215-16. Indeed, as the *Apprendi* court later recognized, under the state law in *Patterson*, the state was still required "to prove every element of [the] offense of murder *and its accompanying punishment*." 530 U.S. at 485 n.12 (emphasis added). Only *after* it had done so, did *Patterson* countenance placing an *additional* burden on the defendant to establish an affirmative defense that would lessen the applicable penalty. 432 U.S. at 205-06, 215-16.

The state court in *Loomer* relied on *Patterson* in reading § 6-2-201 as establishing safe release as a "mitigating" factor, rather than as an element that triggers one of two vastly different statutory penalty ranges. Whatever vitality that reasoning had in 1989, it has been fatally undermined by this Court's decisions in *Apprendi* and *Alleyne*.

Most prominently, as the principal dissent in *Apprendi* observed, "[a]lthough [*Patterson*] characterized the factual determination under New York law as one going to the mitigation of culpability, as opposed to the aggravation of the punishment, it is difficult to understand why the rule adopted by the Court in today's case . . . would not require the overruling of *Patterson*." 530 U.S. at 531 (O'Connor, J. dissenting). Indicative of this implicit abrogation observed by the *Apprendi* dissent, when the Court decided *Alleyne* thirteen years later, it did not mention *Patterson* at

all. Instead, the majority opinion stated simply that "the essential Sixth Amendment inquiry is whether a fact is an element of the crime." 570 U.S. at 114. And, as *Alleyne* made clear, aggravating facts that produce a higher sentencing range are, by definition, "element[s] of a distinct and aggravated crime." *Id.* at 114, 116. Facts which "must, therefore, be submitted to the jury and found beyond a reasonable doubt." *Id.* at 116.[4]

That *Apprendi* and *Alleyne* drew this line is unsurprising. As the latter explains, these constitutional protections are firmly rooted in both "common-law and early American practice." *Id.* at 111-12. Indeed, as particularly relevant here, *Alleyne* noted that "the legally prescribed [sentencing] range *is* the penalty affixed to the crime," from which it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense. *Id.* at 112. Or, as Bishop put it

[4] The *Apprendi* majority reconciled *Patterson* as being limited by the principle that states could not "reallocate burdens of proof by labeling as affirmative defenses at least some elements of the [state's] crimes." 530 U.S. at 485 n.12 (discussing Patterson, 432 U.S. at 205-06, 210). To the contrary, there were "obviously constitutional limits beyond which the States may not go in this regard." *Id.* The Sixth and Fourteenth Amendments, *Apprendi* makes plain, is one of those limits. 530 U.S. at 476-77, 484-85. Moreover, the majority went on to observe that, were the state to "simply reverse[] the burden" of the fact at issue, "effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not," the Court explained that it would be required to question whether such provision was constitutional. 530 U.S. at 491 n.16.

in an early leading treatise, if a fact was essential to the penalty, it was an element. *Id.* (discussing when "a statute prescribes a *particular punishment* to be inflicted on those who commit it under special circumstances which it mentions, or with particular aggravations") (quoting J. Bishop, Criminal Procedure § 598, at 360-61 (2d ed. 1872)).

This case presents a compelling opportunity for the Court to reaffirm this long-standing foundational practice, and confirm what four Justices explained twenty years ago in dissent: that *Patterson* cannot be reconciled with the Court's reasoning in *Apprendi* (and *Alleyne*), and should be overruled.

C. The safe release provisions of Wyoming's kidnapping statute plainly establish elements, which, under *Apprendi* and *Alleyne*, must be found by a jury beyond a reasonable doubt.

As noted above, § 6-2-201 provides that "a person is guilty of kidnapping if he unlawfully removes . . . or confines another person," with certain proscribed intents. The statute provides no penalty for this act standing alone, but rather goes on to establish *two possible* statutory penalty ranges, which again, depend on whether or not the defendant safely released the victim:

> (c) If the defendant voluntarily releases the victim substantially unharmed and in a safe place prior to trial, kidnapping is a felony punishable by imprisonment for not more than twenty (20) years.

> (d) If the defendant does not voluntarily release the victim substantially unharmed and in a safe place prior to trial, kidnapping is a felony punishable by imprisonment for not less than twenty (20) years or for life . . . .

This question of safe release, i.e., which penalty provision applies, quite plainly goes "to the length of [the] sentence." *Apprendi*, 530 U.S. at 483. And the factual basis set forth in subsection (d), clearly "increase[s] the prescribed range of penalties to which a criminal defendant is exposed," *Apprendi*, 530 U.S. at 483, 490, and, indeed, "triggers a mandatory minimum," *Alleyne*, 570 U.S. at 112. That means it is a fact that must "be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 570 U.S. at 116; *accord Apprendi*, 530 U.S. at 490.

But no Wyoming jury ever makes that determination. Rather, following *Loomer*, Wyoming courts *presume* that the defendant did not voluntarily release the victim substantially unharmed in a safe place prior to trial, and *default* to applying subsection (d)'s twenty years to life range. The state bears no burden to prove the facts that subsection (d) says must exist to trigger that range. Instead, the state flips the burden to a criminal defendant to instead prove, by a preponderance of evidence, that he *did* voluntarily release the victim substantially unharmed in a safe

place prior to trial. *See Loomer*, 768 P.2d at 1046-47 (establishing this burden shifting-framework). Under *Alleyne* and *Apprendi*, this is plainly impermissible.[5]

As *Apprendi* makes "clear beyond peradventure," the fact that the question of safe release goes to setting the permissible statutory sentencing range does not remove it from the Sixth and Fourteenth Amendments' "constitutional protections of surpassing importance." *See Apprendi*, 530 U.S. at 484-85 (explaining how the requirement of jury findings beyond a reasonable doubt extend to determinations that go to the length of sentence). Moreover, *the way* in which safe release establishes the statutorily-permitted penalty under § 6-2-201 actually highlights its constitutional significance.

Most prominently, the question of safe release determines the applicable mandatory minimum. A defendant who proves safe release faces no mandatory

[5] This approach also violates *Mullaney*, as the applicable penalty for kidnapping depends *entirely* on the question of safe release. And importantly, the statute sets forth a specific factual scenario that must be satisfied before subsection (d)'s twenty years to life range is satisfied. *Mullaney* makes clear that such a provision cannot be presumed satisfied and then flipped to the defendant to disprove. *See* 421 U.S. at 698. But that is precisely what the state does under § 6-2-201 when, as here, it: (1) charges a violation of § 6-2-201(d) (with its 20 years to life range); (2) absolves the prosecution of *any* burden of proof for the facts the statute requires to establish that range; and then, (3) instead, flips the burden of proof to the criminal defendant to prove a different penalty range under subsection (c) (i.e., zero to 20 years).

minimum term of imprisonment, whereas a defendant who does not prove safe release faces a mandatory minimum of 20 years. But the state shoulders no burden of proof to establish the facts in subsection (d) that set that mandatory minimum, and a jury never makes a finding about them beyond a reasonable doubt. This is in patent conflict with *Alleyne*. *See* 570 U.S. at 112 ("[B]ecause the legally prescribed range *is* the penalty affixed to the crime . . . it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense.") (emphasis in original); *cf. Blakely v. Washington*, 542 U.S. 296, 304 (2004) (explaining that a jury must find beyond a reasonable doubt every fact "'which the law makes essential to [a] punishment'" that a judge might later seek to impose).

Simply put, the question of safe release is the sole factor in establishing which of two penalty ranges apply. It is the sole factor determining whether a defendant faces *no* mandatory minimum, or one of *twenty years*. It is the sole factor that authorizes a statutory maximum lifetime imprisonment. And subsection (d) makes plain what facts must exist for that higher range, with its mandatory minimum and lifetime maximum, to apply: "the defendant [did] not voluntarily release the victim substantially unharmed and in a safe place prior to trial." It violates the Sixth and Fourteenth Amendments for a jury never to make that determination beyond a reasonable doubt. *Cf. Ring v. Arizona*, 536 U.S. 584, 602 (2002) ("If a State makes an

increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt.").

D. This is an important question, and this case is a good vehicle for resolving it.

A number of additional reasons further counsel in favor of this Court's review. For one thing, this Court's review is necessary to clarify that *Patterson* has been abrogated or overruled, something only this Court can do. *See, e.g.*, *United States v. Haymond*, 139 S. Ct. at 2378 (recognizing that *Alleyne* abrogated *Harris v. United States*, 536 U.S. 545 (2002) and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)). For another, this is an important and recurring issue, as few aspects of criminal trials are more fundamental than the government's burden to prove every element of the offense. *See, e.g.*, *In re Winship*, 397 U.S. at 364. Finally, the post-conviction posture of this case presents no bar to review. As demonstrated above, *Patterson*'s abrogation follows from clearly established federal law as set forth in *Apprendi* and *Alleyne*. In concluding otherwise, the state and federal courts below applied the wrong law, which makes the adjudications contrary to and an unreasonable application of clearly established federal law under § 2254(d). Put

simply, this Court's intervention on this issue is necessary, and, over two decades after *Apprendi*, this case presents a good vehicle for review.

II. This case also presents an opportunity for this Court to clarify an important interpretive principle of federal habeas law, namely, when state court interpretations of state law are irrevocably inconsistent, and those interpretations have differing federal constitutional consequences, must a federal habeas court defer to one interpretation over the other.

Under § 2254(d)(1), habeas relief of course is only available if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." A decision is an unreasonable application of federal law "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000).

State courts, of course, are the expositors of state law, and a federal habeas court must defer to their interpretations of state law. This standard is articulated in *Estelle v. McGuire*, where this Court explained "that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). To do so, however, means determining the governing

interpretation of the state statute of conviction at issue in a habeas proceeding. And sometimes that is not so clear.

To be sure, *Estelle* recognizes what *is not* the province of federal habeas courts: "to reexamine state-court determinations on state-law questions." 502 U.S. at 67-68. But here, re-examination of state law is not what Mr. Hawes sought in habeas review. Rather, in highlighting the divergences in the Wyoming Supreme Court's case law interpreting and applying § 6-2-201 over the decades, he explained why blind deference to a *Patterson*-rooted "mitigating circumstances" framework was unwarranted. As the dissent below plainly explained, the point is not that there are "error[s], apparent or otherwise, in these Wyoming cases"—it is that there are "significant inconsistencies." (Appendix at A12.) Indeed, the dissent recounted a plethora of Wyoming Supreme Court decisions that are inherently at odds with *Loomer*. (Appendix at A12-13). *See, e.g.*, *Gould v. State*, 151 P.3d 261, 264 & n.5 (Wyo. 2006) (explaining that "Wyo. Stat. Ann. § 6–2–201(a)(iii) and (d) (1988) set out the definition of aggravated kidnapping") (emphasis added); *Royball v. State*, 210 P.3d 1073, 1074 (Wyo. 2009) (describing the charge as "kidnapping in violation of 6–2–201(a)(i), (b)(i) and (c)") (emphasis added); *Herrera v. State*, 64 P.3d 724, 725 (Wyo. 2003) (noting that plea agreement "reduce[d] the 'aggravated' kidnapping charge to 'simple' kidnapping, thereby reducing the possible sentence length")

(emphasis added). And given this "sheer number of inconsistent cases and results," the dissent concluded that "the Wyoming Supreme Court has inconsistently interpreted and applied § 6-2-201 over the past 30 years." (Appendix at A13.)

The deference *Estelle* contemplates rests on there being a definitive resolution of a legal issue by the state courts. After all, as the dissent explained, "determining the governing interpretation of the state statute of conviction at issue in a habeas proceeding is a threshold inquiry of habeas review." (*Id.* at A13-14 & n.9.) But "when, as here, the state's highest court has interpreted its own state statute in an inconsistent and conflicting manner," deference to any particular interpretation is unwarranted. (*Id.* at A14.)

Conversely, *Estelle* also recognized what *is* the province of federal habeas courts: "to decid[e] whether a conviction violated the Constitution, laws, or treaties of the United States." And as to this *federal* question—one that here involves the requirements of the Sixth and Fourteenth Amendments—this Court has made clear that federal courts must not simply accept a state's characterization of its own laws. To the contrary, as this Court explained in *Apprendi*, a state's characterization of a fact as "bear[ing] solely on the extent of punishment" is not enough to remove it from the Sixth Amendment's protections. 530 U.S. at 485. Instead, the "essential Sixth Amendment inquiry is whether a fact is an element of the crime," *Alleyne v.*

United States, 570 U.S. 99, 114 (2013), and *that inquiry* "is one not of form, but of effect," one for which "labels do not afford an acceptable answer," *Apprendi*, 530 U.S. at 494 (citations omitted).

Here, a plethora of Wyoming Supreme Court decisions (recounted by the dissent at Appendix at A12-13), reinforce what this actual *effect* of safe release is—it is the "enhancement portion of the kidnapping statute," the sole factor in establishing which of two radically different statutory penalties apply, including the 20-year-to-life penalty for an "aggravated" offense. This question of safe release quite plainly goes "to the length of [the] sentence," *Apprendi*, 530 U.S. at 484 (citation omitted), and the factual basis set forth in subsection (d) clearly "increase[s] the prescribed range of penalties to which a criminal defendant is exposed," *Apprendi*, 530 U.S. at 483, 490, and, indeed, "triggers a mandatory minimum," *Alleyne*, 570 U.S. at 112. And the *federal* constitutional significance of *that effect* is plain—it means safe release is an element that must be submitted to the jury and found beyond a reasonable doubt. *See Alleyne*, 570 U.S. at 113-14, 116 (explaining that aggravating facts that trigger a mandatory minimum sentence and produce a higher sentencing range are "element[s] of a distinct and aggravated crime"); *see also Apprendi*, 530 U.S. at 483-85, 494-95 & n.19 (explaining the elemental nature of facts that impact the length of sentence).

By ignoring the Wyoming Supreme Court's contradictory descriptions of § 6-2-201's safe release provision, the majority opinion overemphasized habeas deference and undermines this Court's direction that the federal constitutional protections *at issue here* turn on the *effect* of a state law, not a state court's characterization of it. This case highlights the need for this Court's intervention to establish how a federal habeas court should decide whether a state conviction violated clearly established federal law, when the state law concerning that conviction points in two very different directions. This additional question only enhances the need for review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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