No. _____
(21A649)

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN GONZALES,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA FOR THE SECOND APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Per *In re Winship*, 397 U.S. 358 (1970), the state must prove each element of the offense beyond a reasonable doubt "and a jury instruction violates due process if it fails to give effect to that requirement." *Middleton v. McNeil*, 541 U.S. 433, 437 (2004).

California has cut this "each element" requirement from its criminal jury instructions. They now only say that the prosecution must prove a defendant "guilty" beyond a reasonable doubt.

California, which holds more felony jury trials than any U.S. jurisdiction, is the lone jurisdiction that does not include "each element" or equivalent language in its instructions. The California Supreme Court holds that this is not error, squarely conflicting with the high courts of New York and Pennsylvania on the question presented:

Does the failure to instruct juries in criminal trials that the prosecution must prove each element of the charged crime beyond a reasonable doubt violate *Winship*?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brian Gonzales respectfully seeks a writ of certiorari to review the judgment of the California Court of Appeal, District Two.

PARTIES

Brian Gonzales was the defendant/appellant in the proceedings below. The State of California was the plaintiff/appellee in the proceedings below.

OPINIONS BELOW

The California Court of Appeal issued its unpublished opinion in Cause Number B306537 on November 23, 2021. App. 1a-29a. Petitioner filed a timely petition for review in the California Supreme Court on December 30, 2021. App. 30a.

JURISDICTION

The California Supreme Court denied review on February 9, 2022. App. 30a. On April 26, 2022, this Court issued an order extending the time for filing a petition for a writ of certiorari to 150 days from that date, thus to and

including July 9, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(A).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury[.]"

United States Constitution, Amendment XIV, Section 1:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law[.]"

INTRODUCTION

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 363-64 (1970). As a corollary, "a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime" beyond a reasonable doubt. *Cabana v. Bullock*, 474 U.S. 376, 384 (1986).

California has deleted from its criminal pattern jury

instructions the requirement that the prosecution prove each element of the crime beyond a reasonable doubt. Its reasonable doubt instructions only state in relevant part that the prosecution must "prove a defendant guilty beyond a reasonable doubt." App. 44a; CALCRIM 220. Because the burden of proof extends to each element, not just "guilt" holistically, this instruction sets out a necessary but not sufficient condition for juries to convict.

This defect is worsened when considering the charge as a whole. California's instructions for substantive counts only state "the People must prove," followed by the elements. Jury instructions scholars find this "aggregate elements" pattern is ambiguous because it fails to specify whether "prove" applies to each element or the elements as a whole. Because empirical research shows that jurors are predisposed to assess cases holistically, they are even more likely to be misled by these holistic instructions.

California's defective instructions deprive defendants of a fair trial in at least two ways. First, the instructions

allow jurors to convict upon proof the defendant is holistically "guilty beyond a reasonable doubt," even if they would have found one or more elements were not proved beyond a reasonable doubt. Second, by omitting the "each element" requirement, California created a danger that jurors will shortcut the deliberative process of considering each element of the offense and simply vote on the outcome, thus undermining a critical procedural safeguard.

These defects are especially problematic in emotionally charged cases such as petitioner's, where he confessed to double homicide. Though that conclusively established those elements, he contested others going to intent and special circumstances, which were more susceptible to reasonable doubt. But California's instructions allow jurors to overlook weaker elements and convict where satisfied that the aggregate elements were proved beyond a reasonable doubt.

This Court has held that "a State cannot manipulate its way out of *Winship*." *Jones v. United States*, 526 U.S. 227, 241, 243 (1999). California manipulated its way out of

Winship by eliminating this constitutionally mandated requirement. There was no legitimate reason for this. It needlessly made clear instructions ambiguous, creating what should be an intolerable risk of misleading jurors into voting to convict on a lesser standard of proof.

Despite this, the California Supreme Court has ratified its pre-*Winship* precedent and held that defendants are "not entitled" to an instruction that the People must prove each element of the offense beyond a reasonable doubt. *People v. Ochoa*, 26 Cal.4th 398, 444 n.13 (2001) (citing *People v. Reed*, 38 Cal.2d 423, 430 (1952)).

This directly conflicts with high courts of New York and Pennsylvania, which held that failing to give this instruction is reversible error. There are not more conflicts only because every federal circuit and state but California has long recognized *Winship* is unambiguous settled law and complied with it by incorporating "each element" or equivalent language (e.g., "every element") into their

criminal pattern instructions. App. 93a-120a.[1]

Though California is the lone jurisdiction that disregards *Winship*, this issue is vitally important because California holds more felony jury trials annually than any other U.S. jurisdiction, and almost double all federal district courts combined. App. 121a-123a. And because this instruction is given in death penalty prosecutions[2] as well as in life-without-parole prosecutions such as petitioner's, the stakes for these defendants are enormous.

California is actively defying bedrock constitutional requirements this Court crystallized over 50 years ago. Unless this Court grants review, California's defective instructions will continue to dilute the burden of proof and taint the deliberation process for the thousands of

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[1] This is a survey conducted by petitioner's counsel of every state and federal jurisdiction's relevant pattern criminal instructions. All but California have at least substantially complied with *Winship* by stating the burden of proof beyond a reasonable doubt extends to "each," "all," "every," or "the following" element(s).

[2] California has issued a moratorium on executions but not on death penalty prosecutions.

defendants who exercise their right to trial by jury every year.

STATEMENT OF THE CASE

A. Trial

After an abusive relationship, Emily Fox broke up with petitioner and told him to move his things from her apartment. App. 7a-8a. Weeks later, while driving his nephew home, petitioner decided to stop at Fox's apartment to pick up his clothes and for his nephew take a bathroom break. App. 8a.

Fox met them in the hallway outside the apartment accompanied by Jerred Scott. App. 9a. Fox told petitioner that Scott was her new boyfriend. Petitioner, who was depressed over the breakup and believed he and Fox would reunite, drew a pistol from his waistband. Petitioner testified that he always armed himself in that neighborhood because it was a gang area. App. 9a. Scott ran, petitioner caught up to him in the stairwell, and forced him to return to the hallway at gunpoint. App. 9a-10a. On return, when

petitioner realized Fox was calling police on him, he "snapped" and "blacked out and started shooting," killing Fox and Scott. App. 10a.

Petitioner was charged with two counts of murder with kidnapping and double-murder special circumstances. App. 2a-3a. Petitioner conceded criminal liability but contested two of the prosecution's claims. First, he asserted that his blacking out from emotional trauma negated deliberation and constituted heat of passion under California law, thus he was guilty of a lesser homicide offense than first degree murder. App. 6a, 14a-15a. In support, petitioner moved to introduce a psychologist's testimony that in persons such as petitioner, when facing overwhelming emotional trauma, the brain's limbic system overcomes their ability to deliberate. This was offered to counter jurors' "commonsense" belief that such claims are incredible. The court denied the request. App. 6a, 13a-15a.

Second, petitioner asserted that the prosecution did not prove the kidnapping special circumstance because he had

only forced Scott to return from the stairwell to the hallway where the encounter began, thus he did not move Scott a substantial distance. *See* App. 9a-10a.

The post-evidence instructions required the jurors to resolve several multi-element issues. But the jurors were nowhere informed that the prosecution must prove each element of the offenses and special circumstances beyond a reasonable doubt; the reasonable doubt instructions in pertinent part only stated that the People must "prove a defendant *guilty* beyond a reasonable doubt." App. 44a; CALCRIM 220 (emphasis added). The instructions for the substantive counts stated, "To prove that the defendant is guilty of this crime [or special circumstance], the People must prove that," followed by the elements. App. 68a, 75a, 84a; CALCRIM 520, 570, 1215. The jury was not instructed whether the burden of proof beyond a reasonable doubt applied to each element or the aggregate elements.

Petitioner did not object to the instructions, but California law holds that the appellate court "may review

any instruction . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." Cal. Pen. Code, § 1259; *People v. Andersen*, 26 Cal. App. 4th 1241, 1249 (1994) ("Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits"); *People v. Ramos*, 163 Cal. App. 4th 1082, 1087 (2008) (addressing merits of this issue despite no objection).

The jury found petitioner guilty of both counts and both special circumstances true. Petitioner was sentenced to life imprisonment without the possibility of parole. App. 13a.

B. Appeal

In the California Court of Appeal, petitioner argued that the trial court violated his Sixth and Fourteenth Amendment rights for failing to instruct the jury that the prosecution was required to prove each element of the charged offenses and special circumstances beyond a reasonable doubt. App. 28a.

Petitioner also argued, among other things, the court violated his right to present a defense by excluding his psychological expert. App. 13a-17a.

The court rejected those claims. As to the instructional issue, it held that because the California Supreme Court already held that failing to instruct the jury that each element must be proved beyond a reasonable doubt was not error, *People v. Covarrubias*, 1 Cal.5th 838 (2016), it was bound to follow that precedent. App. 28a.

Petitioner filed a petition for review in the California Supreme Court raising the above federal constitutional issues and, alternatively, arguing that because the Judicial Council of California had improvidently deleted the "each element" requirement from criminal pattern instructions, the court should instruct the Council to redraft it. The court denied the petition on February 9, 2022. App. 30a.

REASONS FOR GRANTING THE PETITION

I. The California Supreme Court's Holding Conflicts With The High Courts Of New York And Pennsylvania

A. California Supreme Court

The California Supreme Court has never analyzed this issue under *Winship* and never changed its pre-*Winship* stance that defendants are not entitled to an "each element" instruction. In 1952, the court rejected the defendant's claim that California's "general" instructions were erroneous for failing to specify that "each element of the crime must be proved beyond a reasonable doubt." *People v. Reed*, 38 Cal.2d at 430. The year after *Winship*, citing *Reed* but not *Winship*, the court again held that "an instruction respecting proof of each element beyond a reasonable doubt need not have been given." *People v. Orchard*, 17 Cal. App. 3d 568, 576-77 (1971). Three decades later, again citing *Reed* and ignoring *Winship*, the court held, "It would be correct to instruct that the People must prove every element of the offense beyond a reasonable doubt, but a defendant is not entitled to that

instruction." *People v. Ochoa*, 26 Cal.4th at 444 n.13; *see also People v. Thomas*, 52 Cal.4th 336, 356 & nn.21-22 (2011) (same); *Covarrubias*, 1 Cal.5th at 911 (same). The court has repeatedly declined to review the current CALCRIM version of the instructions,[3] most recently when it denied petitioner's request. App. 30.

B. New York, Pennsylvania, and other jurisdictions

Directly conflicting with the California Supreme Court, the high courts of Pennsylvania and New York held that omitting "each element" language from criminal jury instructions is reversible error.

In *Commonwealth v. Bishop*, 372 A.2d 794 (Pa. 1977), the trial court denied a defense request to instruct the jury "that the Commonwealth has the burden to prove 'each and every element' (of murder of the first degree) beyond a

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[3] The court in *Thomas* referred to murder instruction CALJIC 8.10, "In order to prove this crime, *each of the following elements must be proved*." *Thomas,* 52 Cal.4th at 356 n.22 (emphasis added). But CALJIC has been superseded and that language was deleted from CALCRIM.

reasonable doubt." *Id*. at 795. Citing *Winship*, the Pennsylvania Supreme Court emphasized that the burden of proof beyond a reasonable doubt "extends to every material element of the crime charged and that if the Commonwealth fails to carry this burden beyond a reasonable doubt *as to any one element*, the accused must be acquitted." *Id.* at 796 (emphasis in original). The court observed that even though the jury had been instructed on the presumption of innocence, the burden of proof generally, and the elements of the crime were accurately set out, "[n]owhere . . . in the entire charge did the court explain that the presence of each of the elements of the conduct charged must be proven by the Commonwealth beyond a reasonable doubt." *Id.* at 796. Indeed, it said, "no direction at all was given as to the proper application of the burden to the component parts of the crime in question." *Ibid*. The court rejected the Commonwealth's claim that "convincing evidence of guilt" rendered this harmless error. *Id*. at 797. The court held that "the refusal to charge the jury that the Commonwealth has

the burden to prove beyond a reasonable doubt every essential element of the criminal conduct charged was prejudicial error" because the defense had "an absolute right to have the jury instructed not only as to the quantum of proof required to establish guilt but also that the requirement extended to each of the material elements of the offense." *Id.* at 796-97 (citations and footnote omitted).

New York's high court reached the same conclusion in *People v. Newman,* 385 N.E.2d 598 (N.Y. 1978). There, the trial court gave pretrial instructions stating the prosecution must prove each element of the crime beyond a reasonable doubt, but it failed to so instruct the jury after the close of evidence. *Id.* at 599. Citing *Winship*, the court stated that "[i]t hardly seems necessary to point to the fundamental nature of the constitutional precept that each essential element of a crime must be proved beyond a reasonable doubt." *Ibid.* The court observed that "at no point was the jury advised in the charge that the burden of proving guilt beyond a reasonable doubt attached to each material

element of the crimes rather than merely to some generalized concept of the crimes as a whole." *Id.* at 600. Because this "fundamental . . . constitutional precept" was not explained to the jury after the close of evidence, the court reversed. *Id.* at 599-601.

Finally, though not properly characterized as conflicts, several federal circuit opinions have recognized that failure to instruct juries that each element must be proved beyond a reasonable doubt is error. In *United States v. Alston*, 551 F.2d 315 (1976), the court found that the trial court made several instructional errors, including the "failure to include in its charge . . . that each [element] must be proved beyond a reasonable doubt." *Id.* at 320. But the court concluded that because other errors warranted reversal, it "need not decide whether it alone would constitute reversible error." *Ibid.* (footnote omitted). In *United States v. Ali*, 63 F.3d 710 (8th Cir. 1995), the court found that failure to give an "each and every element" instruction in the charge would have been plain error, but it was cured by the trial court's giving the

instruction during deliberations after receiving an unrelated jury question. *Id*. at 715. And in *United States v. Powell*, 449 F.2d 994, (1971) Chief Judge Bazelon stressed that the "standard of persuasion is so important at criminal trials that I consider it to be an error for the judge ***ever*** to omit such an instruction." *Id*. at 999 (Bazelon, C.J., concurring) (emphasis in original).

II. California Courts Are Actively Defying *Winship*

The fundamental principles this Court crystallized in *Winship* and progeny plainly govern this issue's resolution. This likely explains why there are not more conflicts with California's anachronistic holding. Every U.S. jurisdiction but California recognized that *Winship* established a bedrock constitutional rule, which they enshrined in their criminal pattern jury instructions, most decades ago. App. 93a-120a. Scholarly works confirm that California's defective instructions allow jurors to convict defendants on a diluted standard of proof.

A. Legal principles

The reasonable-doubt standard "provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *In re Winship*, 397 U.S. at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). *Winship* thus "explicitly h[e]ld" that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364.

This Court has repeatedly underscored that "constitutional protections of surpassing importance . . . indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (footnote omitted) (citing *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 278

(1993)).

A corollary of these bedrock principles is that "a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime" beyond a reasonable doubt. *Cabana v. Bullock*, 474 U.S. at 384. Similarly, in criminal trials, "the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement." *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (citing *Sandstrom v. Montana*, 442 U.S. 510, 520-21 (1979)); *see also United States v. Rowland*, 826 F.3d 100, 115 (2d Cir. 2016) ("A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law").

B. California's jury instructions fail to give effect to *Winship*'s requirement that the state prove each element beyond a reasonable doubt

1. The reasonable doubt instruction describes the burden only in holistic terms

California's reasonable doubt instruction repeatedly

describes the state's burden in holistic terms while giving no hint that it extends to each element. First, it states that the presumption of innocence "requires that the People prove a defendant *guilty* beyond a reasonable doubt." App. 44a; CALCRIM 220 (emphasis added). After this, the instruction uses several other holistic terms: "an abiding conviction that the *charge* is true," "whether the People have proved their *case* beyond a reasonable doubt," and "[u]nless the evidence proves the defendant *guilty* beyond a reasonable doubt." App. 44a (emphasis added). Because the burden extends to each element and not just "guilt" holistically, this instruction sets out a necessary but not sufficient condition for conviction.

This holistic language is even more misleading to jurors because "[e]mpirical research confirms that fact finders process evidence holistically in the form of theories or stories." Michael S. Pardo, Comment, *Juridical Proof, Evidence, and Pragmatic Meaning: Toward Evidentiary Holism*, 95 Nw. U.L. Rev. 399, 402 nn.10 & 18 (2000) (citing

studies).[4] Indeed, jurors "impose a whole claim condition . . . on themselves unless expressly instructed not to." David S. Schwartz & Elliot Sober, *The Conjunction Problem and the Logic of Jury Findings*, 59 Wm. & Mary L. Rev. 619, 680 (2017). So by couching the state's burden solely in holistic rather than elemental terms, this instruction fuels biases that laypeople bring into the jury room.

The plain text of the instruction thus fails to comply with *Winship*. It tells the reader they need only to find that the defendant is "guilty" of the "crime" or "charge" beyond a reasonable doubt while giving no hint that the burden extends to each of the elements. And given jurors' preexisting biases, they are even more likely to understand this instruction as directing them to convict based on a holistic finding of guilt beyond a reasonable doubt.

Of course, a single instruction "may not be judged in

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[4] *See also* Nancy Pennington & Reid Hastie, *A Cognitive Model of Juror Decision Making: The Story Model*, 13 Cardozo L. Rev. 519 (1991) (presenting findings that jurors impose narrative story organization on trial information, which can determine jurors' verdicts).

artificial isolation, but must be viewed in the context of the overall charge." *Kansas v. Marsh*, 548 U.S. 163, 179 n.6 (2006) (citation omitted). But as shown below, this defect is only magnified when considering the whole charge.

2. The substantive instructions are at best ambiguous as to whether the burden extends to each element or to the elements in the aggregate

The other relevant instructions set out the substantive crimes and special circumstances. The pattern consistently used in these instructions is "the People must prove that," followed by the elements. The murder instruction stated in pertinent part, "To prove that the defendant is guilty of this crime, the People must prove that," followed by the elements. App. 68a; CALCRIM 520. The kidnapping special circumstance stated, "To prove that the defendant committed kidnapping, the People must prove that," followed by the elements. App. 84a; CALCRIM 1215; see also App. 73a; CALCRIM 540A (first degree felony murder); App. 75a; CALCRIM 570 (voluntary manslaughter).

Here again, the instructions reference the burden

holistically (e.g., "guilty" of "this crime"). They continue, "the People must prove," followed by the elements, but jurors were given no guidance whether "prove" applied to each element individually or to the elements in the aggregate. The Pennsylvania Supreme Court recognized this defect when it observed there that "no direction at all was given as to the proper application of the burden to the component parts of the crime in question." *Bishop*, 372 A.2d at 796.

This defect is also confirmed by Professors Schwartz and Sober, who analyzed patterns in state and federal instructions. They explained how instructions employing an "aggregate elements" pattern can lead jurors into reaching a verdict based on the totality of the elements rather than as to each element:

> The pattern we identify as "aggregate elements" consists of jury instructions that break out the elements but use language suggesting that the finding requires the elements to be viewed in the aggregate. [T]he aggregation language implies a whole claim condition [as opposed to an each element condition].[5]

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[5] As an example of the aggregate elements pattern,

Schwartz & Sober, *supra*, 59 Wm. & Mary L. Rev. at 683.

They found this pattern ambiguous because it "merely list[s] elements without stating whether the burden of proof applies to the elements individually or as a whole." *Id.* at 683. Another scholar observed that the "ambiguities" of an instruction using the same pattern[6] "are legion and obvious." Dale Nance, *Probability and Inference in the Law of Evidence: Postscript: A Comment on the Supposed Paradoxes of a Mathematical Interpretation of the Logic of Trials*, 66

Schwartz and Sober quoted Alaska's civil negligence instruction:

> In order to find that the plaintiff is entitled to recover, you must decide it is more likely true than not true that:
>
> 1. the defendant was negligent;
> 2. the plaintiff was harmed; and
> 3. the defendant's negligence was a substantial factor in causing the plaintiff's harm.

Id. at 683-84.

[6] "In order to prove the essential elements of plaintiff's claim, the burden is on the plaintiff to establish, by a preponderance of the evidence in the case, the following facts: First, that the defendant was negligent in one or more of the particulars alleged; and second, that the defendant's negligence was a proximate cause of some injury and consequent damage sustained by the plaintiff."

B.U.L. Rev. 947, 951 (1986).

California's substantive instructions are formally identical to "aggregate elements" patterns in these scholars' research because, by merely stating that "the People must prove, then listing the elements, they "break out the elements but use language suggesting that the finding requires the elements to be viewed in the aggregate." Schwartz & Sober, *supra*, 59 Wm. & Mary L. Rev. at 683. California's substantive instructions are at best ambiguous as to whether the burden applies to each individual element or the elements in the aggregate.

Therefore, the charge as a whole fails to "give effect" to this Court's requirement that the prosecution prove each element beyond a reasonable doubt. *Middleton v. McNeil*, 541 U.S. at 437 (holding that the state "must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement) (citing *Sandstrom*, 442 U.S. at 520-21).

As shown below, these defective instructions have at

least two practical effects that deny defendants a fair trial.

3. The instructions dilute the state's burden of proof by permitting conviction on a finding of cumulative guilt beyond a reasonable doubt even where one or more elements are not so proved

The Supreme Court of Pennsylvania explained how failing to give an "each element" instruction renders jurors susceptible to convicting defendants even where one or more elements weren't sufficiently proved. The court held that without such an instruction, it is

> entirely possible that . . . the jury concluded that the Commonwealth might meet its burden if the ***cumulative*** evidence of guilt was such that they were convinced beyond a reasonable doubt although they were not convinced beyond a reasonable doubt as to one or more of the elements of the offense. This is not the correct standard and differs significantly from the requirement that each and every element of the crime meet this same measure of substantiation.

Bishop, 372 A.2d at 796-97 (emphasis in original, citations and footnote omitted).

California's holistic instructions likewise allow jurors to convict where they conclude the state proved its case cumulatively beyond a reasonable doubt even if they would

have had reasonable doubt as to one or more elements. In such cases, jurors would be voting to convict where acquittal is proper.

This scenario is even more likely where some elements are overwhelmingly established while others have far less support. As Professor Simon observed, "In cases where the evidence is overwhelming with respect to some elements of the crime, but there is only scant evidence to establish a specific element, there is a danger that, due to coherence effects [holistic reasoning], the fact-finder will find the defendant guilty despite the absence of evidence on the particular element." Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. Chi. L. Rev. 511, 585 n.283 (2004).

That danger is particularly acute in highly charged cases where jurors focus on more lurid evidence and are less likely to consider more "mundane" elements unless explicitly instructed to do so. Here, while elements alleging petitioner unlawfully killed the victims were conclusively established,

he contested others that were far more amenable to reasonable doubt. This included whether he deliberated before shooting, as required to establish first degree murder, and whether he moved Scott a substantial distance, as required by the kidnapping special circumstance.[7] But jurors conscientiously applying California's pattern instructions are free to overlook these weaker elements and convict where satisfied that the crime or special circumstance was cumulatively proved beyond a reasonable doubt.

California had no legitimate reason to delete this constitutionally required instruction. When Maine amended its homicide statute to relieve it "of its due process burden to prove every element of the crime beyond a reasonable doubt," this Court held that "a State cannot manipulate its way out of *Winship*." *Jones v. United States*, 526 U.S. at 243

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[7] The deliberation element was susceptible to reasonable doubt because petitioner testified at length that he blacked out due to emotional trauma. App. 2a-3a, 6a, 14a-15a. The asportation/substantial distance element was susceptible to reasonable doubt because petitioner forced Scott to move a short distance back to the hallway where he first encountered petitioner. App. 2a, 9a-10a.

(citing *Mullaney v. Wilbur*, 421 U.S. 684, 692-96 (1975)).

California "manipulate[d] its way out of *Winship*" by creating what should be an intolerable risk of misleading jurors to convict on a diluted burden of proof rather than *Winship*'s more stringent standard. *In re Winship*, 397 U.S. at 364 ("It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned").

4. The instructions mislead jurors into shortcutting the deliberative process by failing to consider each element of the crime before reaching a verdict

Along with the above, *Winship*'s "each element" requirement necessarily implies that, rather than simply vote on the outcome, deliberating jurors should consider and decide whether each element of a charge is proved beyond a reasonable doubt. But when the California Judicial Council, the body overseeing California's pattern jury instructions, deleted this requirement, it subverted this procedural safeguard. *Cf. Speiser v. Randall*, 357 U.S. 513, 520-21 (1958) (holding that the state "must provide procedures

which are adequate to safeguard against infringement of constitutionally protected rights" and "the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied").

This is best illustrated by the Judicial Council's own rationale when it *added* this requirement to California's civil instructions. The Judicial Council recognized that the absence of an "each element" requirement where general verdicts are used created "a danger that the jury will shortcut the deliberative process of carefully looking at each element of each claim or defense and simply vote" on the outcome. CACI 5022 (Directions for Use) (2022). To obviate that danger, the Judicial Council added this requirement to its civil instructions to ensure jurors would approach their task as if "questions on each element of each claim or defense had to be answered."[8] *Ibid*.

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[8] The Judicial Council stated that this instruction "lessen[s] the possibility that the 'paradox of shifting majorities' will happen," which occurs with non-unanimous

The Judicial Council excised the "each element" requirement from its pattern criminal instructions, asserting "the reference to the elements is not legally necessary."[9] App. 124a-125a. Still, its reasoning confirms that the "each element" requirement preserves an essential procedural safeguard for criminal defendants, even while refusing to extend it to them.

An "each element" instruction thus at a minimum informs jurors that they should engage in more thorough deliberations by considering and deciding each element of the state's case before reaching a verdict. In *Ramos v. Louisiana*, 140 S. Ct. 1390, 1401 (2020), this Court recognized that "more thorough deliberations" was a benefit of unanimous juries. It seems that more thorough

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verdicts. CACI 5022. This shows that the "each element" requirement provides another procedural safeguard to civil juries. But it does not change the fact that, without that requirement, there is a danger that jurors will fail to separately consider each element of the claim.

[9] Judicial Council of California, *Task Force on Criminal Jury Instructions, Report Summary*, 4, 10 (July 13, 2006) https://www.courts.ca.gov/documents/082506item2.pdf (last accessed July 2, 2022).

deliberations is not just a benefit flowing from *Winship*, but a requirement of it.

III. This Issue Is Vitally Important Because California Holds More Criminal Jury Trials Than Any Other U.S. Jurisdiction And Its Defective Instructions Are Given In Virtually All Those Trials

A. The defective instructions affect thousands of felony defendants tried by jury every year

Though California is the lone outlier that fails to even substantially comply with *Winship*, this case merits review because California holds thousands of felony jury trials every year, more than any other state and about double all federal district courts *combined*. For example, according to official reports, in pre-pandemic fiscal year 2019, all federal district courts held 1,689 felony jury trials[10] while California held 3,221 felony jury trials, as well as 2,030 misdemeanor jury

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[10] U.S. District Courts, *Criminal Judicial Facts and Figures*, tbl. 5.4 (Sept. 30, 2021) https://www.uscourts.gov/sites/default/files/data_tables/jff_5.4_0930.2021.pdf, https://www.uscourts.gov/statistics/table/54/judicial-facts-and-figures/2021/09/30 (last accessed July 2, 2022).

trials.[11] App. 121a-123a.

Because California gives these constitutionally defective instructions in virtually all those trials, the issue is vital to the thousands of California defendants who put their fate in the hands of juries every year.

B. California will continue giving these defective instructions unless this Court grants review

There is little chance that California authorities will fix these instructions on their own. As already shown, the California Supreme Court has repeatedly held to its pre-*Winship* view that defendants are "not entitled" to an instruction "that the People must prove every element of the offense beyond a reasonable doubt." *Ochoa*, 26 Cal.4th at 444 n.13. The court has also repeatedly declined to review the current CALCRIM version of the instructions, most recently when it denied petitioner's request.

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[11] Judicial Council of California, *2021 Court Statistics Report*, 87 https://www.courts.ca.gov/documents/2021-Court-Statistics-Report.pdf (last accessed July 2, 2022).

California's lower appellate courts also uniformly find no error. Some, despite recognizing this is a federal constitutional issue, have declared it frivolous. *See, e.g., People v. Henning*, 178 Cal. App. 4th 388, 406 & n.3 (2009) ("The time has come for appellate attorneys to take this frivolous contention off their menus," adding that "taxpayers will not have to pay [court-appointed] appellate counsel for having made this argument").

IV. This Is A Suitable Vehicle

This case presents a clean legal question asking whether California's pattern criminal jury instructions violate *Winship* and progeny. The relevant instructions given at petitioner's trial tracked CALCRIM instructions given to all California criminal juries, thus this Court's ruling here would conclusively resolve the statewide problem.

The question presented needs no further development in state court because those courts have spoken. Further, the issue involves a straightforward application of this Court's

principles to the instructions' text.

Since petitioner admitted to the shootings, most historical facts were undisputed, also facilitating resolution of the legal issue.

The issue is also outcome determinative. Given that jurors assess guilt holistically, they were more likely to misapply California's holistic instructions where, as here, the most emotionally compelling elements were conclusively established while elements he contested and that jurors might view as less consequential (such as asportation) were far more amenable to reasonable doubt. California's instructions allowed jurors to overlook this and convict petitioner of the greatest charges based on a holistic assessment of them. *See* Simon, *supra*, 71 U. Chi. L. Rev. at 585 n.283.

Federal constitutional rights should not vary by geography. But because California courts have never meaningfully addressed this issue, these constitutionally defective instructions leave thousands of defendants who put

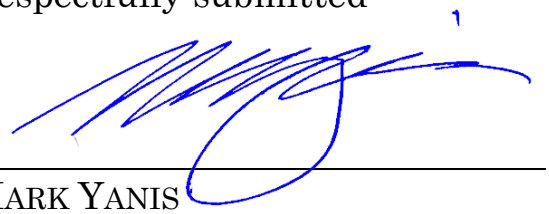
their fate in the hands of juries vulnerable to wrongful convictions, longer sentences, and truncated deliberations. Even if this Court does not ultimately find the instructions unconstitutional, these people are at the very least entitled to have this issue fairly resolved under the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: July 6, 2022

Respectfully submitted



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