No. 23-5513

IN THE SUPREME COURT OF THE UNITED STATES

RICKEENA HAMILTON,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF THE QUESTIONS PRESENTED

I

Did the jury instructions on a charged and lesser-included homicide offense shift the burden to the petitioner to prove her innocence in violation of due process principles when those instructions allowed a conviction for either offense only if the State proved all elements of the offense beyond a reasonable doubt?

II

Did the jury instructions on a charged and lesser-included homicide offense violate the petitioner's rights to a fair trial and to present a defense when they accurately defined the elements of those offenses, explained the sole element that distinguished those two offenses, and required holistic consideration of all the instructions without singling out any one to the exclusion of others?

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The order of the Tennessee Supreme Court denying the petitioner's application for permission to appeal (Pet. App. B) is unreported. The opinion of the Tennessee Court of Criminal Appeals (Pet. App. A) is also unreported and may be found at 2022 WL 4494108.

JURISDICTIONAL STATEMENT

The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a), and her petition is timely. The Tennessee Supreme Court denied the petitioner's application for permission to appeal on April 17, 2023. (Pet. App. B.) On July 6, 2023, the petitioner filed an application in this Court to extend the time to file a petition for writ of certiorari. This Court granted the application and extended the time to file until August 31, 2023. The petitioner filed the petition for writ of certiorari on August 30, 2023.

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitutional Provisions

The Fifth Amendment to the United States Constitution guarantees due process of law by the federal government: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." The Fourteenth Amendment to the United States Constitution guarantees the same from state governments: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to a fair trial:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Tennessee Statutes—Offense Definitions

Tennessee Code Annotated § 39-13-210(a)(1) defines the offense of second-degree murder as "[a] knowing killing of another." Tennessee Code Annotated § 39-13-211(a) defines the offense of voluntary manslaughter as "the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner."

Tennessee Statutes—Burdens of Proof

Tennessee Code Annotated § 39-11-201 provides:

> (a) No person may be convicted of an offense unless each of the following is proven beyond a reasonable doubt:
>
> > (1) The conduct, circumstances surrounding the conduct, or a result of the conduct described in the definition of the offense;
> >
> > (2) The culpable mental state required;
> >
> > (3) The negation of any defense to an offense defined in this title if admissible evidence is introduced supporting the defense . . . .
>
> (b) In the absence of the proof required by subsection (a), the innocence of the person is presumed.
>
> (c) A person charged with an offense has no burden to prove innocence.
>
> (d) Evidence produced at trial, whether presented on direct or cross-examination of state or defense witnesses, may be utilized by either party.

STATEMENT OF THE CASE

Rickeena Hamilton killed Timothy "Chaz" Cox by stabbing him in the neck after the two scuffled briefly at a Knoxville bar. *Hamilton*, 2022 WL 4494108, at *1. She fled the scene and later threw the knife into a dumpster. *Id.* A Knox County grand jury charged her with one count of second-degree murder and one count of tampering with evidence. *Id.* A Knox County jury found her guilty as charged. *Id*. at *9.

I. Murder

On June 17, 2018, Chaz Cox went to Bull Feathers bar with his father, Timothy Cox. *Hamilton*, 2022 WL 4494108, at *1. They were eventually joined by their coworker, David Nabors, and the victim's mother, Tracy Cox. *Id.* Later, a group that included Hamilton and Olia Hutson arrived. *Id.* The group, which was celebrating a birthday and acting "all wild and crazy," sat at a table near the pool tables where Chaz Cox and his party had gathered. *Id.* A woman from the group approached Tracy Cox and kissed her on the mouth. *Id.* The woman then kissed Nabors, Timothy Cox, and Chaz Cox on their mouths. *Id.* The woman remained with the Cox party for a brief time and walked away of her own accord. *Id.*

While Tracy Cox was standing near the end of the pool tables and the dartboard room, Hamilton approached her, began rubbing her arm, and asked whether Hamilton's friend had offended her. *Id.* Tracy Cox replied that everything was fine, she should "let it go," and it was not a "big deal." *Id.* Hamilton continued rubbing Tracy Cox's arm, asking, "Well, are you sure she didn't offend you?" *Id.* Tracy Cox was not "comfortable" with the exchange but attempted to remain cordial and told Hamilton everything was fine. *Id.*

Hamilton continued to apologize, all the while continuing to rub Tracy Cox's arm. *Id.* at *2. Timothy Cox asked Hamilton to return to her group, but Hamilton refused. *Id.* Timothy Cox raised his voice and pointed to Hamilton's group, telling her to return to her friends and leave his group alone. *Id.* Nabors, who was gathering change, heard Timothy Cox say, "Get away." *Id.* Nabors turned to see that Hamilton and Timothy Cox were "face to face." *Id.*

As Nabors approached Hamilton and Timothy Cox, Chaz Cox approached Hamilton from her right side. *Id.* Chaz Cox punched Hamilton twice on the side of her head, and they both fell to the floor and began fighting, with Hamilton on top of Chaz Cox. *Id.* Seconds after Chaz Cox

punched Hamilton, Timothy Cox and Nabors began pulling him and Hamilton apart. *Id.* Timothy Cox held Hamilton while Nabors held Chaz Cox down on the floor. *Id.* As Timothy Cox held Hamilton, her shirt rode up so that her abdomen and a portion of her upper torso and "breast area" were exposed. *Id.* Hannah Powell, the bar manager, heard the commotion and ran back to the pool table area to find Chaz Cox on the ground and Timothy Cox holding Hamilton, who was saying, "Let go of me. I'm good." *Id.* Powell ordered everyone involved to leave the bar. *Id.*

Chaz Cox got up off the floor and walked toward the front of the bar. *Id.* at *2-3. Once his son left the area, Timothy Cox released Hamilton. *Id.* At this point, Timothy Cox, Tracy Cox, David Nabors, Olia Hutson, and Hannah Powell all believed the fight was over. *Id.* at *2.

But seconds after Chaz Cox left the area of the fight, Hamilton quickly approached and stabbed him in the neck while his arms were down at his sides. *Id.* at *3, 8. Hamilton thrust her knife so deeply into Chaz Cox's neck that the entire blade entered his neck and the hilt "came all the way to the skin and made contact and abraded the skin." *Id.* at *8. The blade perforated his carotid artery and penetrated the back of his pharynx, the area of the throat dividing the airway and the digestive system, causing massive blood loss. *Id.*

Hamilton said, "Yeah, b***h. What now?" *Id.* She then hopped or skipped backward toward the front door, facing Chaz Cox, laughing, and yelling, "I got you. Ha-ha. I got you. I'll get you and you." *Id.* at *3. A few moments later, Hamilton exited the bar then reentered, took several steps inside, threw a pool ball, and fled. *Id.* at *2-3. Hamilton, who was still holding a knife in her hand, told Timothy Cox, "[I]f you step outside, I'm going to cut you up too." *Id.* at *2. Timothy Cox did not believe, based on her actions, that Hamilton was in fear. *Id.*

Chaz Cox, who had walked toward the front door without realizing he was bleeding, reached for his neck, lost consciousness, and fell to the floor. *Id.* at *3-4. His stab wound created

an "arterial gush" or a systematic high-pressure flow, causing a flow of blood that looked like a cord hanging from his neck. *Id.* at *8. Bar patrons with medical training attempted to stop the bleeding, but Chaz Cox ultimately died due to blood loss. *Id.* at *2-3, 6-7.

Olia Hutson, who had left the bar upon seeing that Chaz Cox was receiving assistance, saw Hamilton standing in the parking lot, holding a bloody knife, and screaming something like "Yeah, yeah. That's what you get." *Id.* at *4. Hutson asked Hamilton what happened, and Hamilton responded, "They ganged me." *Id.* When Hutson asked what she meant, Hamilton stated, "The daddy . . . was holding me back. Did you see it?" *Id.*

Hamilton instructed Hutson to get her "out of here." *Id.* Hutson drove them away while Hamilton hung outside the car and yelled "[s]ome profanity, some slurs. Like—like, 'Yeah. That's what you b****es get.' Stuff like that." *Id.* Tracy Cox, who had come outside, saw Hamilton hanging out of the passenger side window. *Id.* at *3. Hamilton "had her hat in her hand, swinging it around, yelling like she's done something so grand when she'd just killed my son." *Id.* Tracy Cox did not believe Hamilton was in fear but rather "happy about it[ ] like it was something good that she had done." *Id.*

II. Jury Instructions

The trial court first told the jury to consider all instructions "in harmony" and to not "single out one or more to the exclusion of others." (Resp. App., 003.) Before reading the elements of second-degree murder and voluntary manslaughter, the trial court emphasized that a finding of guilt on either offense required the State to prove all offense elements beyond a reasonable doubt. (Resp. App., 004-05)

Immediately after reading and defining the two elements of second-degree murder—that the defendant (1) unlawfully killed the victim and (2) acted knowingly—the trial court explained

that "a state of passion produced by adequate provocation" is the element that distinguished the lesser offense of voluntary manslaughter from second-degree murder. (Resp. App., 004-05.) The voluntary manslaughter instruction also included as that offense's third element "that the killing resulted from a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." (Resp. App., 006.) The trial court explained that the jury should consider the lesser offense of voluntary manslaughter if it had reasonable doubt as to the petitioner's guilt of the charged offense of second-degree murder. (Resp. App., 005.)

The instructions defined reasonable doubt as "doubt created by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt." (Resp. App., 020.)

Throughout its instructions to the jury, the trial court repeatedly emphasized the petitioner's presumption of innocence and the State's burden to prove all offense elements beyond a reasonable doubt. (Resp. App., 004-15, 019-20, 024, 026.)

III. Direct Appeal

On appeal, the petitioner argued that the jury instructions for second-degree murder, voluntary manslaughter, and sequential consideration of offenses violated her rights to due process and a fair trial, citing *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *Patterson v. New York*, 432 U.S. 197 (1977). *Hamilton*, 2022 WL 4494108, at *18-22. But the Tennessee Court of Criminal Appeals rejected those arguments, confirming that "state of passion produced by adequate provocation" is an element of voluntary manslaughter that the State had to prove beyond a reasonable doubt, rather than a partial defense to second-degree murder. *Id*. at *19-21. The court also approved the instruction on sequential consideration of offenses because, immediately after the instruction on the elements of second-degree murder, the instructions defined provocation as

the element that distinguished the lesser-included offense of voluntary manslaughter, thereby requiring the jury to pass on that element when it considered second-degree murder. *Id*. at *22.

REASONS FOR DENYING THE WRIT

The petitioner insists that her jury instructions violated due process principles and her rights to a fair trial and to present a defense by (1) requiring her to prove her innocence of the charged offense of second-degree murder and (2) precluding a verdict on the lesser offense of voluntary manslaughter—the target of her defense theory. But she is wrong.

States have broad authority to identify the elements of offenses they wish to punish. The homicide offense definitions in the pattern jury instructions given at the petitioner's trial are well within the constitutional boundaries of that broad authority. And the instructions certainly placed no burden on the petitioner to prove her innocence. To the contrary, they repeatedly emphasized the presumption of innocence afforded to the petitioner. (Resp. App., 019-20, 024.) And they expressly placed the burden of proving all offense elements beyond a reasonable doubt on the State. (Resp. App., 004-15, 019-20, 024, 026.)

This case is no vehicle to consider whether Tennessee's pattern jury instructions violated the petitioner's right to present a defense because she did not present that issue and the state court did not decide that issue on direct appeal. In any event, the petitioner's complaint that her jury instructions precluded a verdict on the lesser offense of voluntary manslaughter does not present an important federal question. The trial court told the jury to consider all instructions together in harmony without singling out any one to the exclusion of others. (Resp. App., 003.) And the instruction for second-degree murder further invited the jury to consider voluntary manslaughter by explaining in detail the distinguishing element of voluntary manslaughter—that the killing resulted from a state of passion produced by adequate provocation. (Resp. App., 004-05.) That

explanation preceded the instruction on sequential consideration of offenses, which directed the jury to consider voluntary manslaughter if it had a reasonable doubt about the petitioner's guilt of second-degree murder. (Resp. App., 005, 011-12.)

Considered in this context, the instruction on sequential consideration of offenses did not preclude a verdict on voluntary manslaughter. Rather, the jury simply rejected the petitioner's theory of provocation given her extremely disproportionate reaction to a momentary scuffle with the victim that had clearly ended when the petitioner rushed the victim from across the room, stabbed him in the neck before he could even raise his hands, and then taunted him as she skipped away, leaving him to bleed out on the floor.

I. Tennessee's Homicide Definitions Fall Well Within Established Constitutional Limits on States' Broad Authority to Identify Offense Elements They Wish to Punish.

The petitioner correctly observes that, in Tennessee, second-degree murder requires proof of a knowing killing, while voluntary manslaughter also requires the same proof plus provocation producing a state of passion in the accused. Tenn. Code Ann. §§ 39-13-210, -211. But she strays with the claim that these offense elements, when instructed together, "impose a burden on defendant of disproving his [*sic*] guilt" of second-degree murder." (Pet., 9.) The petitioner simply conflates her defense *strategy* to prove a lesser offense to the exclusion of the greater offense with a *burden* of doing so. (Pet., 9-15.)

This Court recognizes that "[a] state legislature certainly has the authority to identify the elements of the offenses it wishes to punish, but . . . a defendant [also] has the right to insist that the State prove beyond a reasonable doubt every element of an offense charged." *Montana v. Egelhoff,* 518 U.S. 37, 64 (1996). "[A]pplicability of the reasonable-doubt standard, however, has always been dependent on how a State defines the offense that is charged." *Patterson v. New York,* 432 U.S. 197, 211 n.12 (1977).

Tennessee's homicide offense definitions, which were accurately instructed here, comply with established constitutional mandates about the burden of proof and its assignment in criminal cases. The pattern jury instructions given here allowed a conviction for either second-degree murder or voluntary manslaughter only if the State proved all elements of either offense beyond a reasonable doubt. (Resp. App., 004-06, 011-12, 019-20.) And the instructions repeatedly emphasized that the petitioner is entitled to the presumption of innocence. (Resp. App., 019-20.) Thus, contrary to the petitioner's suggestion, this case offers no potential to examine the scope of constitutional "limits[] on redefinition of crimes" because Tennessee's homicide definitions in no way test this Court's holdings in *In re Winship*, 397 U.S. 358 (1970), *Mullaney v. Wilbur*, 421 U.S. 684 (1975), or *Patterson*, 432 U.S. 197.

The petitioner wrongly insists that her conviction is "a result anathema to this Court's due process jurisprudence from *In re Winship*." (Pet., 15.) *In re Winship* concerned a state court's juvenile delinquency adjudication on proof by a preponderance rather than by proof beyond a reasonable doubt. 397 U.S. at 360. This Court surveyed the longstanding rule that a criminal charge must be established by the government's proof beyond a reasonable doubt and held that this standard should also apply to delinquency adjudications. *Id*. at 361-62. The petitioner's jury instructions here clearly followed that longstanding rule by ensuring that the jury deliberated on all charged offense elements under the appropriate burden of proof—beyond a reasonable doubt. And the instructions placed that burden unequivocally on the State. (Resp. App., 004-06, 011-12, 019-20.) The petitioner was not convicted of second-degree murder because she failed to prove her innocence of that offense. Rather, she was convicted of second-degree murder because the State proved beyond a reasonable doubt both elements of that offense—(1) she killed the victim and (2) did so knowingly. Nothing about that conviction offends the holding in *In re Winship*.

The petitioner's reliance on *Mullaney v. Wilbur*, 421 U.S. 684 (1975), is similarly inapposite because the state statutes and precedent addressed in that opinion differ significantly from the Tennessee statutes and precedent on second-degree murder and voluntary manslaughter. *Mullaney* addressed a state murder statute that included "malice aforethought [as] an essential and indispensable element" of that offense "without which the homicide would be manslaughter." *Id*. at 685-86, 688. But the trial court nonetheless instructed the jury that "malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation." *Id*. at 686. The state appellate court upheld the murder conviction, noting that "for more than a century it repeatedly had held that the prosecution could rest on a presumption of implied malice aforethought and require the defendant to prove that he had acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter." *Id*. at 688. This Court unsurprisingly held that relieving the prosecution of proving the essential element of malice violated the right to due process. *Id*.

In contrast with the state laws addressed in *Mullaney*, Tennessee's homicide offense definitions did not allow the State to rest on any presumption about an essential element of the conviction offense. They required the jury to decide whether the State had proven the two statutory elements of second-degree murder beyond a reasonable doubt. (Resp. App., 004-05.) And the second-degree murder instructions also explained the provocation element unique to voluntary manslaughter, thereby inviting the jury to consider whether the evidence established voluntary manslaughter rather than second-degree murder during their sequential consideration of second-degree murder. (Resp. App., 005.)

Finally, *Patterson v. New York* supports denying certiorari rather than granting it. In that case, the Court rejected a constitutional attack on a state murder statute that assigned the defendant

the burden to prove the affirmative defense of extreme emotional disturbance. 432 U.S. 197, 198 (1977). Focusing on the elements of the conviction offense—"death, the intent to kill, and causation"—the Court emphasized, "No further facts are either presumed or inferred in order to constitute the crime." *Id*. at 205-06. Similarly, the jury instructions here did not allow the jury to presume or infer any facts or essential elements of second-degree murder. It may have been the petitioner's strategy to prove provocation in the hope of limiting conviction to the lesser manslaughter offense, but the burden of proving the provocation element of the manslaughter charge never shifted to the petitioner. That burden was the State's burden and remained with the State throughout. (Resp. App., 005-06.) The propriety of that burden and its assignment to the State is not called into doubt by *In re Winship*, *Mullaney*, or *Patterson*.

Patterson succinctly describes the limited occasion for federal intervention in the administration of justice by the States:

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *Leland v. Oregon*, 343 U.S. 790, 798 (1952); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

Patterson, 432 U.S. at 201-02. The petitioner's jury instructions accurately defined the statutory elements of all pertinent offenses, and they conditioned any guilty verdict on the State's proof of all offense elements beyond a reasonable doubt. Thus, the instructions did not offend any fundamental principle of justice such that there is a pressing need to intrude on the State of Tennessee's prevention of crime.

II. Any Issue About the Petitioner's Right to Present a Defense Is Waived, and the Instruction on Sequential Consideration of Offenses Did Not Preclude a Fair Trial.

This case is no vehicle to consider whether the petitioner's jury instructions violated her right to present a defense because the petitioner did not present that issue and the state court did not decide that issue on direct appeal. *Hamilton*, 2022 WL 4494108, at *16-22. Because the issue is waived it is not properly before this Court.

"This Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision [it] ha[s] been asked to review." *Hemphill v. New York*, 595 U.S. 140 (2022) (cleaned up). The petitioner argues that her case "presents an extreme form of the substantive issue considered by the Court in *Gilmore v. Taylor*, 508 U.S. 333 (1993), as to whether illogical or incomplete jury instructions can deny the right to . . . present a defense." (Pet., 15-16.) But the petitioner did not raise that issue or cite *Gilmore* in any of her direct appeal briefs. (Resp. App., 083-119, 125-32.)

In any event, the petitioner does not present a close or important federal question with her complaint that the pattern instruction on sequential consideration of offenses prevented a verdict on voluntary manslaughter. (Pet., 15-16.) Viewed holistically, the instructions fairly invited the jury to consider the distinguishing element between second-degree murder and voluntary manslaughter. (Resp. App., 003, 004-06.) And this is demonstrated by the fact that Tennessee juries routinely return verdicts for voluntary manslaughter as a lesser offense of second-degree murder based on the same or similar instructions. The petitioner's reliance on precedent addressing statutes and jury instructions from other States is inapposite given that Tennessee's pattern instructions are unique and distinguishable. Because the instructions did not remove any

defense theory or lesser-included offense from the jury's consideration, they created no constitutional violation requiring federal intervention.

A. Tennessee's pattern instructions did not remove any defense theory or lesser-included offense from the jury's consideration.

The petitioner's contention that the jury instructions made "a voluntary manslaughter verdict impossible" finds no support in the instructions themselves. (Pet., 15.) The trial court began the charge by telling the jury to consider all instructions together in harmony and cautioned against singling out any to the exclusion of others. (Resp. App., 003.) The instruction for second-degree murder specifically invited the jury to consider voluntary manslaughter by explaining in detail the distinguishing element of that offense—that the killing resulted from a state of passion produced by adequate provocation. (Resp. App., 004-05.) And that explanation preceded any instruction on the sequential consideration of offenses, which itself directed the jury to consider voluntary manslaughter if it had a reasonable doubt about the petitioner's guilt of second-degree murder. (Resp. App., 004-05, 011-12.) The petitioner relies on a hyper-technical read of the sequential-consideration instruction to emphasize an alleged "logical and legal problem[]." (Pet., 5.) But a plain interpretation of the trial court's opening instruction to consider all instructions in harmony belies her claim that a voluntary manslaughter verdict was impossible. (Pet., 5.)

Several recent decisions by the Tennessee Court of Criminal Appeals further belie the petitioner's claim that a manslaughter verdict was logically impossible. *See State v. Jones*, No. E2022-01287-CCA-R3-CD, 2023 WL 4797734, at *3 (Tenn. Crim. App. July 27, 2023) (conviction for manslaughter instructed as a lesser of first-degree murder)[1]; *State v. Simpson*, No.

[1] Second-degree murder is always a lesser-included offense of first-degree murder in Tennessee. So it is no basis to distinguish a voluntary manslaughter conviction as a lesser-included offense of first-degree murder because such cases also include second-degree murder as a charge preceding voluntary manslaughter.

M2021-01031-CCA-R3-CD, 2022 WL 1654456, at *1 (Tenn. Crim. App. Oct. 31, 2022) (same); *State v. Banks*, No. W2021-01038-CCA-R3-CD, 2022 WL2903265, at *1 (Tenn. Crim. App. July 22, 2022) (conviction for manslaughter instructed as a lesser of second-degree murder); *State v. Howard*, No. W2020-00207-CCA-R3-CD, 2022 WL 144235, at *1 (Tenn. Crim. App. Jan. 15, 2021) (same); *State v. Rivers*, No. E2019-01541-CCA-R3-CD, 2020 WL 6441262, at *1 (Tenn. Crim. App. Nov. 3, 2020) (same); *State v. Wright*, No. M2018-00574-CCA-R3-CD, 2020 WL 464631, at *1 (Tenn. Crim. App. Sept. 17, 2019) (conviction for manslaughter instructed as a lesser of first-degree murder); *State v. Owens*, No. W2017-02188-CCA-R3-CD, 2019 WL 851465, at *4 (Tenn. Crim. App. Oct. 17, 2013) (same). These cases demonstrate that Tennessee juries routinely return voluntary manslaughter verdicts when, as here, it is charged as a lesser offense of second-degree murder.

B. Decisions on instructions from other jurisdictions are not instructive.

The petitioner cites *Gilmore v. Taylor*, 508 U.S. 333 (1993), and its discussion of *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), to argue that the jury instructions violated her rights to a fair trial and to present a defense. (Pet., 16-18.) But the unique state laws and jury instructions in those cases have no bearing on the constitutionality of the instructions in this case. And the four Justices joining the plurality opinion in *Gilmore* rejected the argument that a state court's instructional errors implicate the right to present a defense.

1. The state law and jury instructions in *Falconer* differ significantly from Tennessee law and the instructions in this case.

In *Falconer*, the defendant obtained federal habeas relief because the issued instructions left the jury "with the false impression that it could convict [her] of murder even if she possessed one of the mitigating states of mind described in the voluntary manslaughter instruction." 905 F.2d at 1136. The district court's decision in *Falconer* discussed an earlier decision from the

Supreme Court of Illinois, *People v. Reddick*, 526 N.E.2d 141, 146 (Ill. 1988), which deemed the above instruction reversible error for two reasons. *Falconer v. Lane*, 720 F. Supp. 631, 642 (N.D. Ill. 1989). First, the Court in *Reddick* noted that the murder instruction made no mention of the mitigating mental conditions that could turn a conviction for murder into one for voluntary manslaughter. *Reddick*, 526 N.E.2d at 145. Second, the Court in *Reddick* found that the instructions improperly failed to require the State to disprove the existence of the mitigating mental conditions for voluntary manslaughter because such circumstances were a "partial affirmative defense" under Illinois law. *Id*. at 146-47. In accord with *Reddick*, the Seventh Circuit Court of Appeals ultimately concluded on habeas review that the identical pattern instructions in Falconer's case violated due process. *Falconer*, 905 F.2d at 1137.

But unlike Illinois, Tennessee courts have concluded that voluntary manslaughter, and more specifically the mitigating mental circumstance of provocation, is not an affirmative defense to murder. *Hamilton*, 2022 WL 4494108, at *19; *State v. Moore*, No. E2015-00585-CCA-R3-CD, 2016 WL 2865759, at *10 (Tenn. Crim. App. May 16, 2016), *perm. app. denied* (Tenn. Sept. 22, 2016), *cert. denied* 581 U.S. 920 (2017). That conclusion about a matter of Tennessee law is binding on this Court. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005).

Moreover, the pattern instructions in this case differ significantly from the instructions in *Falconer* and *Reddick*. Again, the trial court told the jury to consider all instructions together in harmony and cautioned against singling out any to the exclusion of others. (Resp. App., 003.) The instruction for second-degree murder required the jury to consider not just the next lesser offense of voluntary manslaughter, but specifically the distinguishing element of provocation. (Resp. App., 004-05.) And that explanation preceded the sequential-consideration instruction. (Resp. App., 004-05, 011-12.) Unlike the jury in *Falconer*, the jury here was not "left with the false

impression that it could convict the petitioner of [second-degree] murder even if she possessed . . . the mitigating state[] of mind described in the voluntary manslaughter instruction." 905 F.2d at 1136.

To be sure, the jury instruction for second-degree murder did not describe provocation as a fact requiring proof beyond a reasonable doubt. (Resp. App., 004-05.) But that burden was explained as part of the voluntary manslaughter instruction. (Resp. App., 005-06.) And the instruction for second-degree murder did not preclude the jury from forming reasonable doubt about the petitioner's guilt of that offense based on proof of provocation. (Resp. App., 004-05.) Indeed, the instruction on sequential consideration of offenses directed the jury to consider voluntary manslaughter if it had a reasonable doubt about the petitioner's guilt of second-degree murder. (Resp. App., 005.) Thus, the petitioner never had any burden of proving provocation, as a defense theory, equivalent to the State's burden of proving it as an essential element of voluntary manslaughter.

2. Four Justices in *Gilmore* rejected the argument that state instructional errors implicate the right to present a defense.

Gilmore and *Falconer* both originated from Illinois and concerned the same pattern jury instructions. *Gilmore*, 508 U.S. at 339. The Seventh Circuit Court of Appeals granted habeas relief in *Gilmore* based on its prior decision in *Falconer*. *Taylor v. Gilmore*, 954 F.2d 441, 443 (7th Cir. Ill. 1992). But this Court reversed after finding that *Falconer* announced a new rule for retroactive application purposes and, therefore, could not form the basis for federal habeas relief. *Gilmore*, 508 U.S. at 344. In doing so, however, the four Justices joining the plurality opinion rejected the argument that "the jury instructions . . . interfered with [the defendant's] fundamental right to present a defense." *Id.* at 343. They explained that the Court's existing precedent on the right to present a defense involved the exclusion of defense evidence or testimony and not

instructional errors or restrictions on an accused's ability to present an affirmative defense provided under state law. *Id*. at 343-44.

The petitioner correctly notes that other concurring and dissenting Justices in *Gilmore* recognized the potential for jury instructions on lesser offenses to implicate the right to present a defense. *Id*. at 351, 364-65. But Tennessee's distinguishable instructions in this case offer a poor vehicle for exploring that question because, unlike the instructions in both *Falconer* and *Gilmore*, Tennessee's instructions created no "false impression [on the jury] that it could convict the petitioner of [second-degree] murder even if she possessed . . . the mitigating state[] of mind described in the voluntary manslaughter instruction." *Falconer*, 905 F.2d at 1136. The evidence of provocation was simply underwhelming here given the petitioner's extremely disproportionate reaction to a momentary scuffle with the victim that had clearly ended when the petitioner rushed the victim from across the room and stabbed him in the neck before he could even raise his hands.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by first class mail to counsel for the petitioner: Jonathan Harwell at 1101 Liberty Street, Knoxville, Tennessee 37919, on the 6th day of November, 2023. I further certify that all parties required to be served have been served.

Katherine Redding

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