24-6354

ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SHELBEN TERRELL CURTIS

PETITIONER

VS.

RON NEAL,WARDEN AT THE INDIANA STATE PRISON (ISP)

RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTH CIRCUIT COURT OF APPEALS

CORRECTED PETITION FOR A WRIT OF CERTIORARI

SHELBEN TERRELL CURTIS
DOC# 248420
LOC: ICH-324(A)
INDIANA STATE PRISON
1 PARK ROW
MICHIGAN CITY, IN 46360
PHONE NUMBER: N/A

PRO-SE

QUESTION(S) PRESENTED

QUESTION I:

Whether the lower courts unreasonably applied *Brantley* retroactively when it decided that the petitioner was not denied his Sixth Amendment right to effective assistance of counsel because counsel could not anticipate a change in law, in that, it was unclear if sudden heat was a mitigator or element of voluntary manslaughter when charged as a standalone offense.

QUESTION II:

Whether the petitioner was denied his Sixth Amendment right to effective assistance of counsel when trial counsel failed to object to the aggravated battery jury instruction, which listed an uncharged element in the aggravated battery jury instruction.

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Bane v. State, 587 N.E.2d 97, (Ind. S. Ct. 1992)

Brantley v. State, 71 N.E.3d 397, (Ind. Ct. App. 2017)

Brantley v. State, 91 N.E.3d 566, (Ind. S. Ct. 2018)

Eichelberger v. State, 852 N.E.2d 631, (Ind. Ct. App. 2006)

Fuller v. State, 639 N.E.2d 344, (Ind. Ct. App. 1994)

Gilmore v. Taylor, 508 U.S. 333, 113 S. Ct. 2112, 124 L. Ed. 2d 306 (1993)

In re Winship, 397 US 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068,(1970)

Isom v. State, 651 N.E.2d 1151, (Ind. S. Ct. 1995)

Mullaney v. Wilbur, 421 U. S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881, (1975)

Palmer v. State, 573 N.E.2d 880, (Ind. S. Ct. 1991)

Ross v. State, 877 N.E.2d 829, (Ind. Ct. App. 2007)

Sanders v. Cotton, 398 F.3d 572, (7th Cir. 2005)

Wilcoxen v. State, 705 N.E.2d 198, (Ind. Ct. App. 1999)

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States Court for the Seventh Circuit Court of Appeals appears at **Appendix– K** to the petition and is

☒ reported at *Curtis v. Neal*, 2024 U.S. App. Lexis 11187, 7th Cir. Ind. April 16, 2024;

☒ is unpublished.

The opinion of the United States District Court of the Northern District of Indiana appears at **Appendix–J** to the petition and is

☒ reported at *Curtis v. Warden*, 2023 U.S. Dist. Lexis 64905, (N.D. Ind. April 12, 2023)

☒ For cases from **state courts**:

The opinion of the highest state court (Indiana Supreme Court) to review the merits appears at **Appendix- I** to the petition and is

☒ reported at *Curtis v. State*, 2022 Ind. Lexis 332| 188 N.E.3d 855| 2022 WL 2092812

☒ is unpublished.

The opinion of the Indiana Court of Appeals appears at **Appendix H** to the petition and is

☒ reported at Curtis v. State, 2022 Ind. App. Unpub. Lexis 296| 186 N.E.3d 619| 2022| 2022 WL 829180, (March 21, 2022); or,

☒ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court for the Seventh Circuit Court of Appeals decided my case was April 16, 2024. A copy of that decision appears at **Appendix-K**.

The date on which the United States District Court of the Northern District of Indiana decided my case was April 13, 2023. A copy of that decision appears at **Appendix-J**.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1)(2), which states:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: **(1)** By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; **(2)** By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

☒ For cases from **state courts**:

The date on which the highest state court (Indiana Supreme Court) decided my case was June 1, 2024. A copy of that decision appears at **Appendix-I**.

The date on which the Indiana Court of Appeals decided my case was March 21, 2022. A copy of that decision appears at **Appendix- H**.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

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 defence.

United States Constitution, Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On March 29, 2012, a grand jury returned a true bill against Shelben Terrell Curtis, (hereinafter the Petitioner). The indictment charged the petitioner with Voluntary Manslaughter, a Class A felony, pursuant to I. C. § 35-42-1-3 P. L. 261 § 4, (1997) and Aggravated Battery, a Class B felony, pursuant to I. C. § 35-42-2-1.5(2), P. L. 261 § 6, (1997).

The State alleged in the indictment for **COUNT I [Appendix-A]** that:

> Shelben Terrell Curtis did knowingly or intentionally kill Theodore J. Roe while acting under sudden heat and by means of a deadly weapon, contrary to I. C. § 35-42-1-3 and against the peace and dignity of the State of Indiana.

The State alleged in the indictment for Count II **[Appendix B]** that:

> Shelben Terrell Curtis did knowingly or intentionally inflict injury on Cameron Jimerson that caused protracted loss of impairment of the function of a bodily member or organ, contrary to I. C. § 35-42-1.5, and against the peace and dignity of the State of Indiana.

On June 30, 2014, a jury found the petitioner guilty of Voluntary Manslaughter and Aggravated Battery.

On August 1, 2014, the trial court sentenced the petitioner to 35 years on Count I, and 15 years on Count II. The court also ordered Count II, to run consecutive to Count I, for an aggravated sentence of 50 years to be executed in the Indiana Department of Correction.

On September 2, 2014, Scott King, defense counsel, filed a *Motion to Correct Error*, requesting the trial court to enter judgment of acquittal and grant a new trial, which the court denied on September 16, 2014, and a timely Notice of Appeal was filed.

On June 9, 2015, the Court of Appeals affirmed the petitioner's conviction and sentence, on the same day; defense counsel filed a *Petition for Rehearing*, which the Indiana Court of Appeals denied on August 19, 2015.

On September 18, 2015, defense counsel filed a *Petition for Transfer*, which the Indiana Supreme Court denied on November 25, 2015.

On April 29, 2016, the petitioner filed a *Verified Petition for Post-Conviction Relief* designated as Cause No. 45G04-1604-PC-00001.

On September 9, 2017, the petitioner filed a *Motion to Withdraw Verified Petition for Post-Conviction Relief* without prejudice, which was granted by the trial court on September 13, 2017.

On August 15, 2019, the petitioner reactivated his *Verified Petition for Post-Conviction Relief.*

On May 18, 2020, R. Brain Woodward entered his appearance as private counsel.

On February 19, 2021, an evidentiary hearing was held on the *Verified Petition for Post-Conviction Relief.*

On June 30, 2021, the trial court issued its *Findings of Fact and Conclusion of Law* denying the petitioner's *Verified Petition for Post-Conviction Relief* and a timely notice of appeal was filed **[Appendix–G].**

On March 21, 2022, the Court of Appeals affirmed the post-conviction court **[Appendix–H]** and the Indiana Supreme Court denied transfer on June 1, 2022. **[Appendix–I].**

On July 1, 2022, the petitioner filed a petition for Habeas Corpus Relief.

On April 12, 2023, the Northern District Court of Indiana denied the petitioner's Amended Habeas Corpus and denied certificate of appealability. **[Appendix–J].**

On May 3, 2023, the petitioner filed a timely Notice of Appeal.

On February 12, 2024, the petitioner's Motion for Issuance of Certificate of Appealability was submitted to the United States Court of Appeals for the Seventh Circuit for review.

On April 16, 2024, the United States Court of Appeals for the Seventh Circuit denied the petitioner's application for certificate of appealability **[Appendix–K].**

REASONS FOR GRANTING THE PETITION

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons, pursuant to the United States Supreme Court Rule 10(b)(c).The following, although neither controlling nor fully measuring the Courts discretion, indicate the character of the reasons that this Court should Grant writ of certiorari. The petitioner's contends that the lower courts have decided an important question of law, a case of first impression, that has not been, but should be, settled by this Court, or has decided an important federal question in a way, that conflicts with relevant decisions of this Court that is conflict with the Due Process Clause of the Fourteenth Amendment of the United States Constitution which this High Court addressed in *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068, (1970), and *Mullaney v. Wilbur*, 421 U. S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881, (1975).

The Indiana court is applying a rule similar to the Maine state rule that require the defendant to prove by the preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce the homicide from murder to manslaughter. *Mullaney v. Wilbur*, 421 U. S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881, (1975). The Indiana rule require the State to prove that the defendant acted in sudden heat when the State allege sudden heat as an element of voluntary manslaughter when the state charge voluntary manslaughter as a standalone offense, which is product of the *Brantley v. State*, 91 N.E.3d 566, (Ind. S. Ct. 2018) also *Brantley v. State,* 71 N.E.3d 397, (Ind. Ct. App. 2017).

The reason for granting this petition, is that, the United State Supreme Court should resolve the conflict on whether the retroactive decision in *Brantley v. State*, 91 N.E.3d 566, (Ind. S. Ct. 2018) also *Brantley v. State,* 71 N.E.3d 397, (Ind. Ct. App. 2017), should or should not be

applied to the petitioner's ineffective assistance of counsel claim under the pretext that the *Brantley* decision is a new rule. Another reason for granting this petition, is that, the lower court held under *Brantley*, that cousel's failure to object to the erroneous voluntary manslaughter indictment and erroneous voluntary manslaughter jury instruction was not warranted because defense counsel could not anticapate a change in the law **Appendix–H and Appendix–I**; Also see *Brantley v. State*, 91 N.E.3d 566, (Ind. S. Ct. 2018) and *Brantley v. State,* 71 N.E.3d 397, (Ind. Ct. App. 2017).

The instant case involves voluntary manslaughter as a standalone offense. However, at the time, the petitioner committed his offenses in 2011, the 2014 trial, conviction, sentence, and direct appeal, sudden heat was considered a mitigating factor. In 2017; however, the lower courts determined it was not entirely clear whether sudden heat was a mitigator or an element when the State brought a freestanding charge of voluntary manslaughter against the petitioner.

The *Brantley* court explicitly noted the uniqueness of the factual situation before it and that a search of the lower courts library turned up few precedents on which to resolve this question of law and referred to the situation before the court as a novel case. The courts further held that the petitioner's defense counsel could not be held ineffective for failing to object to the voluntary manslaughter indictment, which alleged sudden heat as an element of voluntary manslaughter. The court also determined that counsel could not be held ineffective for failing to object to the voluntary manslauhter jury instruction which also alleged sudden heat as an element of voluntary manslaughter, because counsel could not anticpate or effectuate a change in the law. Other circuits have opinion on this issue that defense attorneys cannot predict future develops in the law and therefore, their representative must be examined by the law in effect at that time. See *Boston v. Mooney*, 2015 U.S. Dist. LEXIS 148106, (E.D. of PA) also see, *Commonwealth v.*

Pizzo, 529 Pa. 155, 602 A. 2d 823, (Pa. 1992). The petitioner argued that there were no legislative changes in the law regarding the treatment of voluntary manslaughter when charged as a standalone offense. The Indiana Supreme Court aknowledged in *Brantley* that there are few precedents cases, but did not cite the precedent cases regarding voluntary manslughter as a standalone offense. The court also recognized that voluntary manslaughter has its own criminal code. The lower courts failed to follow the United States Supreme Court standard for addressing a question of law. There are four requirements that courts must consider when deciding a question of law.

The first statutory requirement is that there must be an abstract or pure question of law suitable for resolution by the court of appeals, i.e., an issue an appeals court could decide cleanly without having to scour the district court record hunting for material fact issues.

The second statutory requirement is that the question of law be controlling. A question of law is controlling if it "is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enter. Corp., v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 7th Cir. 1996); s*ee also Johnson v. Burken*, 930 F.2d 1202, (7th Cir. 1991).

The third statutory requirement is that the question of law be contestable, i.e., that there is substantial ground for a difference of opinion on the courts reason. An issue is contestable if there is a "difficult central question of law which is not settled by controlling authority," and a "substantial likelihood" exists that the district court's ruling will be reversed on appeal. *In re Brand Name Prescription Drugs Antitrust Litigation*, 878 F. Supp. 1078, (N.D. Ill. 1995).

The fourth statutory requirement is that resolution of the question of law "may materially advance the ultimate termination of the litigation. The requirement that resolution of the question of law would speed up the litigation means, "resolution of a controlling legal question would

serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, (11th Cir. 2004). In the case at hand, the lower court was presented with a question of law by their own admission regarding voluntary manslaughter as a standalone offense that presented itself four years after the petitioner's direct appeal became final, of which, there is no controlling lower court or Seventh Circuit precedent as to the treatment of voluntary manslaughter when charged as a standalone offense.

The Seventh Circuit Court of Appeals stated, "It is not fair to change the rules so substantially when it is too late for the affected parties to change course." *Elliott v. Bd. of Sch. Trs. of Madison Consol. Sch.*, 876 F.3d 926, (7th Cir. 2017) ; *see also Woody's Grp., Inc. v. City of Newport Beach*, 233 Cal. App. 4th 1012, 183 Cal. Rptr. 3d 318, (Cal. Ct. App. 2015).[C]hanging the rules in the middle of the game does not accord with fundamentally fair process. Id. The controlling precedent at the time the petitioner committed his offense is that sudden heat is a mitigator and the burden to disprove sudden heat rest with the State. There are multitudes of Indiana cases that will concede to this material fact because it is well settled in Indiana that sudden heat is not an element of voluntary manslaughter. *Isom v. State*, 651 N.E.2d 1151, (Ind. S. Ct. 1995); *Bane v. State*, 587 N.E.2d 97, (Ind. S. Ct. 1992); *Palmer v. State*, 573 N.E.2d 880, (Ind. S. Ct. 1991); *Wilcoxen v. State*, 705 N.E.2d 198, (Ind. Ct. App. 1999); also see *Mullaney v. Wilbur*, 421 U. S. 684, 44 L. Ed. 2d 508, 95 S.Ct.1881, (1975).

The petitioner acknowledges that the Court in *Elliott* was dealing with a teacher's contractual rights as they applied to a change in the laws of tenure. However, the same reasoning applies here because the lower courts ruled against the petitioner's ineffective assistance of counsel claim on the ground that counsel could not anticipate a change in the law the lower courts changed the rules substantially concerning voluntary manslaughter when charged as a

standalone offense. The lower courts reasoned that the State now has to prove instead of disprove sudden heat beyond a reasonable doubt when voluntary manslaughter is charged as a standalone offense claiming that the burden is much higher. **Appendix–H;** also see **Appendix–J.**

The lower courts are applying a standard that is conflict with United States Supreme Court ruling in *Mullaney v. Wilbur*, 421 U. S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881, (1975); and *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068, (1970).

The rule in Maine's state court require defendants charged with murder to prove by a preponderance of the evidence that he acted in the heat of passion on sudden provocation, in order to reduce murder to manslaughter. The United States Supreme determined that the Maine state rule violates the due process requirement that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged. The due process clause of the Fourteenth Amendment requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case. The lower courts changed the rules substantially because failing to object to an erroneous jury instructions alleging sudden heat as an element of voluntary manslaughter is an incorrect statement of law and require reversal when defense counsels do not object to an erroneous jury instruction alleging sudden heat as an element of voluntary manslaughter. *Eichelberger v. State,* 852 N.E.2d 631, (Ind. Ct. App. 2006).

Because the petitioner was not indicted for murder the lower courts concluded that the State no longer has to negate sudden heat when voluntary manslaughter is charged as a stand-alone offense, establishing a new substantive rule in Indiana. According to Indiana law, it is the State's burden to disprove sudden heat once it becomes an issue. Under Indiana law, the presence of sudden heat is a question of fact to be determined by the trier of fact not to be proved by the

State. *Roberson v. State*, 982 N.E.2d 452, (Ind. Ct. App. 2013). Sudden heat became an issue when the State presented the grand jury with an indictment alleging that the petitioner committed voluntary manslaughter while acting in sudden heat. **Appendix–A and Appendix–C.** Because the grand jury indictment did not inform the jurist that sudden heat is a mitigator it invited confusion that this High Court must now address. This confusion has resulted in the State being relieved of its burden to disprove sudden heat. According to the lower court, because voluntary manslaughter was charged as a standalone offense, the State was not required to meet its burden to disprove that the defendant acted in sudden heat, in fact, the State now has to meet a much higher burden of proof, proving beyond a reasonable doubt that the defendant acted in sudden head, which is a clear violation of the Due Process Clause of the Fourteenth Amendment **Appendix–H and Appendix–I.**

The due process requirement that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged renders invalid a state's rule requiring that the defendant in a murder prosecution must prove by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter. Notwithstanding that as a formal matter, under state law the absence of the heat of passion on sudden provocation is not a fact necessary to constitute the crime of felonious homicide, but comes into play only in determining punishment after the jury has determined that the defendant is guilty since, (1), the criminal law is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability; (2) the safeguards of due process are not rendered unavailable simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty, and (3) if the due process requirement were limited to those facts that constituted a crime

as defined by state law, a state, by redefining the elements of different crimes to characterize them as factors bearing solely on the extent of punishment, could undermine many of the interests which that requirement seeks to protect without effecting any substantive change in its law. *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068, (1970).

The lower courts concluded that the law in Indiana was unclear at the time of the petitioner's trial which was four years before the ruling in *Brantley* whether sudden heat was a mitigating factor or an element when the State charged voluntary manslaughter as a standalone offese, therfore, defense counsel could not have anticipated a change in the law, concluding, that counsel was not ineffective for failing to object the voluntary manslaughter jury instruction, which alleged sudden heat as element in the voluntary manslaughter instruction, or the grand jury indictment for voluntary manslaughter, which also alleged sudden heat as an element of voluntary manslaughter. The petitioner insists that the case at hand is a case of first impression and *Brantley* is not the case to determine the petitioner's ineffective assistance of counsel claims. The United States Supreme Court should resolve this issue because the lower court is applying the *Brantley* decision retroactively as a new rule and applying it to the petitioner's ineffective assistance of counsel claims. The *Brantley* decision is not the standard for evaluating an ineffective assistance of counsel claim, nor, is the *Brantley* decision the standard for addressing retroactivity, or a substantial change in the law regarding voluntary manslaughter when charged as a standalone offense.

Under the retroactivity doctrine developed by the United States Supreme Court beginning with *Teague v Lane,* 489 US 288, 103 L Ed 2d 334, 109 S. Ct. 1060, (1989) as a general matter, new constitutional rules of criminal procedure will not be applicable to those cases, which have become final before the new rules are announced. *Teague* and its progeny recognize two

categories of decisions that fall outside this general bar on retroactivity for procedural rules. First, new substantive rules generally apply retroactively. Second, new watershed rules of criminal procedure, which are procedural rules implicating the fundamental fairness and accuracy of the criminal proceeding, will also have retroactive effect.

A case announces a new rule, if, the result was not dictated by precedent existing at the time the defendant's conviction became final. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the state's power to punish. Procedural rules, by contrast, regulate only the manner of determining the defendant's culpability. Such rules alter the range of permissible methods for determining whether a defendant's conduct is punishable. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.

After the petitioner was unsuccessful in a state post-conviction proceeding and post-conviction appeal, the accused sought habeas corpus relief in the United States District Court for the Northern District of Indiana. The petitioner argued (1), Trial counsel was ineffective because counsel failed to file a motion to dismiss the grand jury indictment which alleged sudden heat as an element of voluntary manslaughter **Appendix–A**; (2) Trial counsel was ineffective because counsel failed to object to the voluntary manslaughter jury instructions that alleged sudden heat as an element of voluntary manslaughter **Appendix–D**; and (3) Trial counsel was ineffective because counsel failed to object to the erroneous aggravated battery jury instruction, which listed an uncharged element in the aggravated battery jury instruction, even though, not charged in the aggravated battery indictment **Appendix–B and Appendix E**.

The rulings in the lower courts affirmatively misstated applicable state law and mislead the jury, and the most that could be said of the jury instructions in the case at hand was that they created a risk that the jury failed to consider sudden heat as a mitigating factor instead of treating sudden heat as an element as instructed. This failure to instruct the jury as to the significance of sudden heat as a mitigator could have compromised the petitioner's affirmative defense of self-defense. On the other hand, some jurors may have convicted the petitioner of protracted loss of impairment, which was charged in the aggravated battery indictment, while other fact finders may have convicted the petitioner of the uncharged element of serious permanent disfigurement, which could have created a non-unanimous jury verdict. The petition for writ of certiorari should be granted.

ARGUMENT I

> Whether the lower courts unreasonably applied *Brantley* retroactively when it decided the petitioner was not denied his Sixth Amendment right to effective assistance of counsel because counsel could not anticipate a change in law, and that, it was unclear if sudden heat was a mitigator or element of voluntary manslaughter when charged as a standalone offense.

The petitioner argues that the indictment returned by the grand jury was defective because the indictment alleged sudden heat as an element of voluntary manslaughter. If counsel would have objected to the defective indictment, the indictment would have to be resubmitted to the grand jury, which found the indictment, or another grand jury; or the prosecuting attorney would have the option to file a proper affidavit against the petitioner. The State would not have had the option to amend the indictment to murder, because the grand jury returned a true bill on voluntary manslaughter. *Walker v. State*, 251 Ind. 432, (Ind. S. Ct. 1968).

A voluntary manslaughter charge alleging sudden heat as an element constitutes an invalid charge and is statutorily incorrect as matter of law, pursuant to Indiana Code § 35-34-1-6.

The Indiana courts have held that without the proper instructions, the jury "may have believed that the defendants had to prove he acted in sudden heat," rather than "the State having to negate its existence." *Sanders v. Cotton*, 398 F.3d 572, (7th Cir. 2005). To allege sudden heat in the indictment, the state is clearly establishing that the petitioner had to negate its existence rather than the State proving the absence of sudden heat. In contrast, to Maine's state rule, the petitioner's indictment and voluntary manslaughter instruction does not comport with the requirement of the Due Process Clause of the Fourteenth Amendment that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged, *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068, (1970). To satisfy that requirement the prosecution in a homicide cases must prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented.

Indiana Code § 35-34-1-2(4), P. L. 2 § 119, (2005), states in pertinent part: "[t]he indictment shall be in writing and allege the commission of an offense by: setting forth the nature and elements of the offense charged in plain and concise language." Had the grand jury received a correct indictment, the State would have to prove beyond a reasonable doubt that the defendant (Shelben T. Curtis)

1. knowingly or intentionally
2. killed a human being (Theodore Roe)
3. by means of a deadly weapon

Because the grand jury indictment was defective, the State informed the jury in order to convict the petitioner of voluntary manslaughter the State must prove each of the following elements beyond a reasonable doubt:

1. The defendant
2. knowingly or intentionally

3. killed
4. another human being, to wit: Theodore J. Roe
5. by means of a deadly weapon, to wit a handgun
6. and acted under sudden heat

The petitioner's voluntary manslaughter instruction is similar to the voluntary manslaughter instruction in *Eichelberger v. State,* 852 N.E.2d 631, (Ind. Ct. App. 2006). The *Eichelberger* voluntary manslaughter instruction reads as follows: To convict the defendant, *Jason Eichelberger*, the State must have proved each of the following elements. The defendant:

1. knowingly or intentionally
2. killed James Beasley
3. while acting under sudden heat

The Indiana Court of Appeals reversed and remanded *Eichelberger* on the ground that sudden heat is not an element of voluntary manslaughter finding that counsel was ineffective for tendering an incorrect jury instruction alleging sudden heat as an element of voluntary manslaughter. The Indiana Court of Appeals and the Indiana Supreme Court have both held steadfastly that sudden heat is a mitigator *only* in the sense that it can be used to "mitigate." *Sylvester v. State*, 698 N.E.2d 1126, (Ind. S. Ct., 1998). Sudden heat is an evidentiary predicate that allows mitigation *Dearman v. State*, 743 N.E.2d 757, (Ind. S. Ct. 2007). "When determining a statute's meaning, a court starts with the plain language of the statute, giving its words their ordinary meaning and considering the structure of the statute as a whole." *Town of Brownburg v. Annexaltion*, 124 N.E. 3d 597, (Ind. S. Ct. 2019).

The post-conviction court concluded that because the petitioner was charge with voluntary manslaughter as a standalone offense it was a novel issue and counsel was not ineffective for not objecting to the indictment alleging sudden heat as an element of voluntary

manslaughter. The petitioner argued that the lower courts are attempting to argue that *Brantley* is a new rule when the State charge voluntary manslaughter as a standalone offense, and that, the law in Indiana was not clear as to whether sudden heat is a mitigator or an element when voluntary manslaughter is charged as a standalone offense; therefore, counsel was not ineffective because counsel could not anticipate a change in the law. The *Ex Post Facto* Clause of U.S. Const. art. I, § 9, cl. 3, forbids the application of any new punitive measure to a crime already consummated. *United States v. Shorty*, 159 F.3d 312, (7th Cir. 1998).

The petitioner committed his offense on July 29, 2011. The petitioner was indicted on April 29, 2012. On June 30, 2014, the jury found the petitioner guilty of voluntary manslaughter and aggravated battery. The petitioner was sentenced on August 1, 2014. The Court of Appeals affirmed the trial court on June 9, 2015. The Indiana Supreme Court denied transfer on November 25, 2015.

Brantley committed his offense on July 14, 2014. On November 13, 2016, *Brantley* was convicted of voluntary manslaughter. On February 24, 2017, the Indiana Court of Appeals reversed *Brantley*'s voluntary manslaughter. On February 16, 2018, the State filed transfer, which the Indiana Supreme Court granted, reversing the Indiana Court of Appeals. The *Brantley* decision was decided four years after the Indiana Supreme Court denied petitioner's petition for transfer. The lower courts cannot rely on *Brantley* as a *new rule* to up seat the petitioner's Sixth Amendment claim that trial counsel was ineffective. The confusion sowed by *Brantley* has create a dilemma in the context of an ineffective assistance of counsel claim as presented by the petitioner. The *Brantley* decision has brought into question the Due Process Clause of the Fourteenth Amendment, when the State charge voluntary manslaughter as a standalone offense which require the State to now prove sudden heat beyond a reasonable doubt.

The lower courts issued a decision contrary to clearly established United States Supreme Court law and a blatant violation of the Fourteenth Amendment of the United Constitution. The petitioner cannot obtain relief unless application of a correct interpretation of that U.S. Supreme Court decision leads to the conclusion that his rights were violated. The United States Court of Appeals for the Second Circuit has held that a state court determination is reviewable under the Antiterrorism and Effective Death Penalty Act if the state decision unreasonably failed to extend a clearly established, U.S. Supreme Court defined, legal principle to situations which that principle should have, in reason, governed. *Stenson v. Health*, U.S. Dist. Lexis 29828, 2012. Counsel's failure to object to the defective indictment was prejudicial because the charging instrument misled the jury and the petitioner of the statutory elements of voluntary manslaughter. "Minor variances from the language of the statute do not make an information defective, as long as, the defendant is not misled" *Shui v. State*, 966 N.E.2d 619, (Ind. Ct. App. 2012).

The Sixth Amendment requires that a defendant be informed of the nature and the cause of the accusation. The State's offered indictment to the grand jury is counterintuitive with the language in I. C. § 35-42-1-3, P. L. 261 § 4, (1997).

It is well settled in Indiana that the State has the burden of proving all the elements of a charged crime beyond a reasonable doubt. The State misled the petitioner in the indictment and the voluntary manslaughter jury instruction when it alleged sudden heat as an element of voluntary manslaughter "A defendant is deprived of his constitutional protection, that is, due process, if he is convicted of a statutory offense that has one or more *additional element or elements*, which differ from those of the alleged statutory offense. *Moon v. State*, 823 N.E.2d 710, (Ind. Ct. App. 2005). In such cases, the judgment of conviction is contrary to law and cannot be permitted to stand." *Salary v. State*, 523 N.E.2d 764, (Ind. Ct. App. 1988).

The State alleged a brummagem element in its indictment and voluntary manslaughter jury instruction to convict the petitioner of voluntary manslaughter by including sudden heat as an element of voluntary manslaughter. The post-conviction court misapplied its reasoning when the court concluded that "even when voluntary manslaughter is the lead charge, the State must prove the elements of murder: the knowing or intentional killing of another human being and while this is a true statement of law, the petitioner was not indicted for murder, which carries a higher culpability than voluntary manslaughter. In fact, sudden heat lessens culpability *Ross v. State*, 877 N.E.2d 829, (Ind. Ct. App. 2007). To convict the petitioner of voluntary manslaughter the State must prove not only the knowing or intentional element, the State must also prove the statutory element of a deadly weapon, and prove the absence of sudden heat.

The use of a deadly weapon is not an element of murder, which distinguishes voluntary manslaughter from murder. *Ross v. State*, 877 N.E.2d 829, (Ind. Ct. App. 2007). "However, the offense is a Class A felony if it is committed by means of a deadly weapon." I. C. § 35-42-1-3(a) as amended by P. L. 321 § 1, (1987). Class A Felony for voluntary manslaughter requires the State to prove an element--use of a deadly weapon--not found in the murder statute pursuant to a clear application of *Wright v. State*, 658 N.E.2d 563, (Ind. S. Ct. 1995), in that, voluntary manslaughter cannot be considered an inherently lesser-included offense of murder. Class A Felony voluntary manslaughter can be a factually lesser-included offense of murder, **if the charging information for murder** alleges the use of a deadly weapon to commit the crime. Again, the petitioner was not indicted under I. C. § 35-42-1-1, which is the murder statute in Indiana. The state through its drafting can foreclose to the defendant, the tactical opportunity to seek a conviction for a lesser offense, which is clearly demonstrated when the State interjected sudden heat in its indictment that notifies the defendant that sudden heat is a mitigator. The point

is that absolute discretion rests with the State to determine the crime(s) with which a defendant will be charged. When the State seeks only to charge the greater offense, injecting a lesser offense would allow the jury to return a compromise verdict. *Sills v. State*, 463 N.E.2d 228, (Ind. S. Ct. 1984), quoted its decision in *Jones v. State*, Ind. 438 N.E.2d 972, (Ind. S. Ct. 1982).

A defendant charge with voluntary manslaughter can be convicted without the presence of sudden heat. However, if the State interjects sudden heat in its charging instrument or indictment that informs the defendant that sudden heat is a mitigator then the defendant can propose or tender a lesser-included offense(s) instruction to mitigate the voluntary manslaughter. However, if the defendant interjects evidence of sudden heat, then the State must prove the absence of sudden heat beyond a reasonable doubt in order to prevent the defendant from tendering or proposing a lesser-included offense for voluntary manslaughter. In *Ford v. State*, 439 N.E.2d 648, (Ind. Ct. App. 1982), the Court of Appeals concluded it is possible for reckless homicide and involuntary manslaughter to be lesser included offenses of voluntary manslaughter, just as sudden heat, is used to lessen the culpability and severity of murder. The element, which distinguishes voluntary manslaughter from the lesser-included offenses of involuntary manslaughter and reckless homicide is the requirement of the specific intent of knowingly, or intentionally killing another human being. Id.

When the State alleged sudden heat in the indictment, the State was disclosing only two possibilities. The State was informing the defendant of the possibility of a lesser-included offense for voluntary manslaughter. The other possibility is that the State was disclosing to the petitioner that sudden heat is an element of voluntary manslaughter. However, the problem with both possibilities is that, the State made no distinction in its intent. The petitioner argues that sudden heat, as a mitigator, is a kind of culpability that would lessen the severity of the offense

of voluntary manslaughter when charged under its own criminal code. *Smith v. State*, 459 N.E.2d 355, (Ind. S. Ct. 1984). The lower courts agree that sudden heat is a mitigator, but the question for this High Court is the legal analysis that should be applied when the State charged voluntary manslaughter as a stand-alone offense. If the defendant or the State interjects sudden heat in a murder charge, it is to lessen culpability. The same should hold true if the State, or the defendant interjects sudden heat when voluntary manslaughter is charged under its own criminal code without the presence of murder. This principle or legal analysis regarding sudden heat does not change because the State decides to charge a defendant with voluntary manslaughter as a standalone offense, because in both instances, sudden heat, still *lessen in severity or burden of the criminal offense*. This is the intent of legislature.

In Indiana, the State has the burden of negating the existence of sudden heat beyond a reasonable doubt. *Boesch v. State,* 778 N.E.2d 1276, (Ind. S. Ct. 2002). Because the State alleged sudden heat in the indictment, the State's case was not to negate the existence of sudden heat, but to prove to the jury that sudden heat is an element of voluntary manslaughter. Therefore, counsel was duty bound to object to the indictment because the State added an additional element in the indictment and voluntary manslaughter instruction. To establish a Sixth Amendment violation a defendant must establish (1) that his counsel's performance fell short of prevailing professional norms and (2) that counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, (1984).

Strickland established that prejudice from substandard performance of counsel requires a showing that there was a "reasonable probability" of a different result if counsel had met professional norms. We sometimes express the standard for prejudice from the failure to object as requiring a reasonable probability that the objection would have been sustained, *Timberlake v.*

State, 690 N. E.2d 243, (Ind. S. Ct. 1997). The standard is more precisely stated as prejudicial failure to raise an objection that the trial court would have been required to sustain. Otherwise stated, if the trial court overruled the objection, it would have committed error, and the error would have had a prejudicial effect. *Spinks v. McBride*, 858 F. Supp. 865, (N.D. Ind. 1994).

To establish ineffective assistance of counsel for failure to object it must be shown that the trial court would have been required to sustain the objection had an objection been made. *Hill v. State*, 442 N.E.2d 1049, (Ind. S. Ct. 1982). The Court in *Kimble v. State*, 451 N.E.2d 302, (Ind. S. Ct. 1983), held "trial counsel's failure to enter an objection may be regarded as ineffective representation. The *Kimble* court further held that the petitioner must show that had a proper objection been made the trial court would have had no choice but to sustain the objection. In most cases, there is no practical difference between these two formulations" *Stephenson v. State*, 864 N.E.2d 1022, (Ind. S. Ct. 2007).

There is a reasonable probability that had counsel objected to the defective indictment alleging sudden heat as an element of voluntary manslaughter the trial court would have sustained the objection and that outcome of the trial would have been different *Walker v. State*, 251 Ind. 432, (Ind. S. Ct. 1968). The State gave no notice to the petitioner that sudden heat is a mitigator in the State's indictment. The Court of Appeals held in *Mcfarland v. State*, 179 Ind. App. 143, (Ind. Ct. App. 1979) that the United States Constitution provide that an accused shall be informed of the charges against him. The Defendant is deprived of this constitutional protection if he is convicted of a statutory offense that has one or more additional element or elements, which differ from those of the alleged statutory offense. In such cases, the judgment of conviction is contrary to law and cannot be permitted to stand. The petitioner's conviction for voluntary manslaughter must be vacated.

It is clear from the grand jury indictment and the voluntary manslaughter jury instruction that the State is alleging that sudden heat is an element of voluntary manslaughter because the State makes no distinction that sudden heat is a mitigator. The State did not make a distinction in the grand jury indictment, or voluntary manslaughter jury instruction informing the petitioner, or the fact finders, that sudden heat is a mitigator. In *Teague v Lane* 489 US 288, 103 L. Ed 2d 334, 109 S. Ct. 1060, (1989), the United States Supreme Court prohibit federal courts from retroactively applying a new criminal procedure rule in a case on collateral review unless the rule (a) placed certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe, or (b) was a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding, and (3) granted habeas corpus relief to the accused on the basis of the rule announced by the Court of Appeals.

The lower courts are attempting to apply *Brantley* retroactively to deny the petitioner's ineffective assistance of counsel's claim because counsel could not anticipate a change in the law. However, *Brantley* is not the precedent case or the standard of review for deciding an ineffective assistance of counsel claim or the standard of review for determining a changed in the law regarding voluntary manslaughter when charged as a standalone offense and require retroactive application. Generally, questions of law are reviewed *de novo* and questions of fact, for clear error, while the appropriate standard of appellate review for a mixed question depends on whether answering it entails primarily legal or factual work. See *Monasky v. Taglieri*, 140 S. Ct. 719, 728, 206 L. Ed. 2d 9, (2020).

In *Bane v. State*, 587 N.E.2d 97, (Ind. S. Ct. 1992), the jury instruction, at one point, suggested to the jury that sudden heat was an element of voluntary manslaughter. At another point, it cited the voluntary manslaughter statute and informed the jury that sudden heat was a

mitigating factor. The Indiana Supreme Court held in *Bane* that "although inartfully drafted and, in fact, technically erroneous, the instruction does not constitute fundamental error because it did not deprive the defendant of his due process rights. The reason the Indiana Supreme Court determined that it was not a fundamental error in *Bane* was because the jury was expressly instructed that sudden heat, *acts as a mitigator* for reducing what would otherwise be murder to voluntary manslaughter. In *Bane*, the State explained and instructed the jury that the existence of sudden heat is a mitigating factor that reduces what would otherwise be murder to voluntary manslaughter. In the petitioner's case, the State failed to instruct the jury or inform the petitioner that sudden heat is a mitigator in any context.

The lower courts are attempting to undermine the petitioner's ineffective assistance of counsel claims by concluding that because *Brantley* established a new rule regarding voluntary manslaughter as a standalone offense, counsel was not ineffective for not objecting to the defective indictment, or ineffective for not objecting to the voluntary manslaughter jury instruction alleging sudden heat as an element of voluntary manslaughter. The lower courts furthered determined that counsel was not ineffective because counsel could not have anticipate a change in the law because of the novelty of the State charging voluntary manslaughter as a standalone offense. The *Ex Post Facto Clause of U.S. Const. art. I, § 9, cl. 3*, which forbids the application of any new punitive measure to a crime already consummated. By including this prohibition in the Constitution, the founding fathers aimed at preventing laws that retroactively alter the definition of crimes or increase the punishment for criminal acts. For a law to run a-foul of the *Ex Post Facto Clause* it must (1) be retrospective, that is, it must apply to events occurring before its enactment and (2) alter the definition of criminal conduct" *United States v. Shorty*, 159 F.3d 312, (7th Cir. 1998). In the case at hand, when the State charged voluntary manslaughter as

a standalone offense the court has taken the position that the State must prove that the defendant acted in sudden heat. This is a misapplication of Indiana law regarding sudden heat and is in conflict with the United States Supreme Court decision in *Mullaney* and *In re Winship*; also see *Sanders v.* Cotton, 398 F.3d 572, (7th Cir. 2005).

Voluntary manslaughter can be charged as a standalone criminal offense in Indiana. However, this "anomaly" to do so does not somehow transform sudden heat into an element where the state must now prove, or for that matter, relieve the State of its "burden" to prove the absence of sudden heat beyond a reasonable doubt. This High Court addressed this same issue in *Mullaney* and *In Winship*. The Court held in *Holland v. State*, 454 N.E.2d 409, (Ind. S. Ct. 1983), "[s]udden heat is not an element the State must prove to support a voluntary manslaughter conviction." Usually, either, a defendant raises voluntary manslaughter in an attempt to mitigate a murder charge or the State charges voluntary manslaughter as a lesser-included offense to a murder charge. This is Indiana law. This symbiotic relationship between murder and voluntary manslaughter are often viewed as relational; however, these offenses can exist without the other.

The Indiana Supreme Court held, because voluntary manslaughter appears in the criminal code as its own crime, the State may charge it as a stand-alone offense. The Indiana Supreme Court further held "[t]he authority to define crimes and establish penalties belongs to the legislature. A court cannot amend a statute or establish public policy within its judicial authority to confine legislative products to constitutional limits. However, a court in reading a statute for constitutional testing, may give it a narrowing construction to save it from nullification, where such construction does not establish a new or different policy basis and is consistent with legislative intent." *State v. Downey,* 476 N.E.2d 121, (Ind. S. Ct. 1985). The lower courts are attempting, to do just that, establish a new rule or different policy as it relates to voluntary

manslaughter when charge as a standalone offense. The Indiana Supreme Court determined in *Brantley,* "we perceive no substantive difference between the State's authority to charge voluntary manslaughter together with another charge, such as murder, or by itself." *Brantley v. State*, 91 N.E.3d 566, (Ind. S. Ct., 2018); also see *Brantley v. State,* 71 N.E.3d 397, (Ind. Ct. App. 2017). If the State elects to charge voluntary manslaughter as a standalone offense then what rules would apply when raising an ineffective assistance of counsel claim or the standard to be applied regarding sudden heat as an element of voluntary manslaughter when the State charge voluntary manslaughter as a standalone offense.

The Indiana Court of Appeals likewise warned that simply because the State may charge voluntary manslaughter as a standalone, it "does not mean the State selected a wise course." *Brantley v. State*, 71 N.E.3d 397, (Ind. Ct. App. 2017). Murder and voluntary manslaughter both require a *knowing* killing, however, whether culpability is mitigated by sudden heat is best left to the factfinders to determine, and avoids the thicket we must cut through today. Id. The factfinders in the petitioner's case was not given the opportunity to determine the petitioner's level of culpability as it relates to sudden heat as a mitigator because the factfinders where instructed that sudden heat is an element of voluntary manslaughter. *Brantley v. State*, 71 N.E.3d 397, (Ind. Ct., App. 2017). The jury was not instructed in *Brantley* that sudden heat was an element of voluntary manslaughter, nor did the State allege sudden heat as an element in the charging information, or the voluntary manslaughter jury instruction.

In *Brantley*, the court properly instructed the jury that sudden heat is a mitigator, which is a correct statement of law. Id. The *Brantley* case is about "novelty," in that, the State elected to charge voluntary manslaughter as a standalone offense and the State could not concede sudden heat, which is the extent of the *Brantley* court. The Indiana Supreme Court reversed *Brantley,*

because the Court determined that the State could not concede sudden heat. An instruction assigning to the State the burden of affirmatively proving sudden heat is an element of voluntary manslaughter is erroneous as a matter of law and violates the Due Process Clause of the Fourteenth Amendment. This Court must decide this issue under, *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S Ct 1068, (1970) and *Mullaney v. Wilbur*, 421 U. S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881, (1975).

The petitioner's case is analogous to *Eichelberger v. State,* 852 N.E.2d 631, (Ind. Ct. App. 2006), and *Sanders v.* Cotton, 398 F.3d 572, (7th Cir. 2005). *Eichelberger* and *Sanders* both argued that trial counsel was ineffective for not objecting to an erroneous jury instruction, which instructed the jury that sudden heat was an element of voluntary manslaughter. *Eichelberger* argued that his trial counsel was ineffective because his counsel "tendered a flawed instruction on voluntary manslaughter, because the instruction informed the jury that sudden heat is an element of voluntary manslaughter." *Eichelberger's* attorney tendered the following jury instruction: To convict the defendant, *Eichelberger*, the State must prove each of the following elements:

> The defendant
>
> 1 knowingly or intentionally;
> 2 killed James Beasley;
> 3 while acting under sudden heat.

The Indiana Court of Appeals reversed and remanded *Eichelberger's* voluntary manslaughter. The Court held "*Eichelberger's* trial counsel failed to ensure that the jury was properly instructed that the absence of sudden heat is not an element of voluntary manslaughter on which the State bears the burden of proof." The court determined in *Eichelberger* this failure to instruct the jury was a due process violation that required a new trial. As a result, *Eichelberger* proved

both deficient performance and prejudice on the part of his trial counsel. The petitioner was prejudiced because the jury was erroneously informed that sudden heat was an element of voluntary manslaughter and like *Eichelberger*, "[i]t is highly improbable that the jury in the petitioner's case was misled as to an accurate legal understanding of sudden heat and its significance, because the jury was not instructed that sudden heat was a mitigator." *Eichelberger v. State,* 852 N.E.2d 631, (Ind. Ct. App. 2006).

The right at issue here is one premised upon the notion that jurors faithfully follow what they understand to be their instructions. This premise clearly operates in the capital and noncapital contexts alike. See *Richardson v. Marsh*, 481 US 200, 95 L Ed 2d 176, 107 S. Ct. 1702, (1987). The jury in petitioner's case was never informed by any means that sudden heat is a mitigator. The only conclusion for the jury to follow in the voluntary manslaughter instruction tendered by the State is that, sudden heat is an element of voluntary manslaughter. The jurors followed their instructions and thereby convicted the petitioner of voluntary manslaughter because they are ignorant of the fact, that sudden heat is a mitigator instead of an element as the State instructed.

The *Eichelberger* court argued that his trial counsel was ineffective for failing to ensure that the jury was properly instructed as to the burden of proof for voluntary manslaughter. The Indiana Supreme Court determined that *Eichelberger* proved both deficient performance and prejudice on the part of trial counsel, ruling that the post-conviction court erred in denying *Eichelberger's* petition for post-conviction relief. Id. The lower courts are treating the petitioner's ineffective assistance of counsel differently because the petitioner was charged with voluntary manslaughter as a standalone offense.

In *Sanders v. State*, 764 N.E.2d 705, (Ind. Ct. App. 2002), the Indiana Court of Appeals affirmed *Sanders* convictions and sentences. *Sanders* then filed a petition for post-conviction relief, because his voluntary manslaughter instructions were erroneous and that his appellate counsel was ineffective for failing to challenge those instructions. The Court of Appeals affirmed the denial of *Sander's* petition for post-conviction relief on appeal.

> Specifically stating we found that the trial court's instructions on voluntary manslaughter were erroneous because they indicated that sudden heat was an element of the offense. We noted that a jury instruction that incorrectly includes sudden heat as an element of voluntary manslaughter is not fundamental error when the instruction also explains that sudden heat is a mitigating factor that reduces murder to voluntary manslaughter. Id.

The Indiana Court of Appeals held that the error was not fundamental which erroneously included sudden heat as an element of the offenses because the jury was informed that sudden heat is a mitigating factor. The Indiana Court of Appeals denied the petitioner's post-conviction relief on the same premise as it did in *Sanders*, arguing, "[i]f a jury instruction is not fundamentally erroneous, then counsel is not ineffective for failing to object at trial, or failing to raise the issue on appeal" *Sanders v. Cotton,* 398 F.3d 572, (Seventh Cir. 2005). *Sanders* argued in the Seventh Circuit that the Indiana State courts unreasonably determined that his appellate counsel was not ineffective for failing to challenge the trial court's instruction making sudden heat an element of voluntary manslaughter requiring the State to prove its presence beyond a reasonable doubt. *Sanders* argued that Indiana case law would have required reversal and a new trial had these issues been raised on direct appeal.

The United States Supreme Court held 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," *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068, (1970), and "requires the prosecution to prove beyond a reasonable doubt the

absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case," *Mullaney v. Wilbur*, 421 U. S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881, (1975). The State is attempting to have it both ways. When the State charge murder and the defendant interject sudden heat, Indiana law requires the State to disprove or negate sudden heat. When voluntary manslaughter is charged as a standalone offense the State is required to prove the existence of sudden heat. In petitioner's case, the State could not prove beyond a reasonable doubt the absence of sudden because the state charged sudden heat as an element of voluntary manslaughter. The voluntary manslaughter instruction erroneously required the State to prove the presence of sudden heat as an element of voluntary manslaughter, which is a misstatement of Indiana law and clearly in violation of the Due Process Clause of the Fourteenth Amendment. The petition for writ of certiorari should be granted.

ARGUMENT II

> Whether the petitioner was denied his Sixth Amendment right to effective assistance of counsel when trial counsel failed to object to the aggravated battery jury instruction, which listed an uncharged element in the aggravated battery jury instruction.

The State charged the petitioner with aggravated battery by alleging that:

> Shelben Terrell Curtis did knowingly or intentionally inflict injury on Cameron Jimerson that caused protracted loss of impairment of the function of a bodily member or organ, contrary to I. C. § 35-42-1.5, and against the peace and dignity of the State of Indiana.

Fair notice to the defendant of the crime charged is a basic tenet of our criminal justice system. The Indiana Constitution guarantees the right "to demand the nature and cause of the accusation." Indiana Constitution Article I Section XIII. Notice enables the accused "to prepare his defense, to protect him in the event of double jeopardy, and to define the issues so that the court will be able to determine what evidence is admissible and to pronounce judgment." *Manna v. State*, 440 N.E.2d 473, (Ind. S. Ct. 1982). Therefore, it is error for a court to instruct the jury in

terms broader than the charging document. This mistake has necessitated new trials in a number of our decisions. *Evans v. State*, 571 N.E.2d 1231, (Ind. S. Ct. 1991); *Kelly v. State*, 535 N.E.2d 140, (Ind. S. Ct. 1989). The aggravated battery instruction given in the petitioner's case improperly instructed the jury that the petitioner could be convicted of an element with which the State had not charged. The aggravated battery jury instruction as given could have resulted in the jury finding the petitioner guilty under 1.5(1) instead of 1.5(2). *Potter v. State*, 666 N.E.2d 93, (Ind. Ct. App. 1996).

Serious permanent disfigurement and protracted loss or impairment of the function of a bodily member or organ requires a different burden of proof that the State must prove in order to convict a defendant of a certain aggravated battery. " Penal statutes must be construed strictly against the State and may not be enlarged beyond the fair meaning of the language used to include offenses other than those clearly defined." *Tucker v. State*, 646 N.E.2d 972, (Ind. Ct. App. 1995). The State charged the petitioner under the statutory provision of I. C. § 35-42-2-1.5(2), P. L. 261 § 6, (1997), with protracted loss or impairment of the function of a bodily member or organ. The 1997 statute reads as follows:

A person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death or causes:

(1) serious permanent disfigurement;
(2) protracted loss or impairment of the function of a bodily member or organ; or
(3) the loss of a fetus;

In *Allison v. State*, 157 Ind. App. 277, 299 N.E.2d 618, (Ind. Ct. App. 1973), the Court of Appeals held that great bodily harm or disfigurement was an element of the offense of aggravated assault and battery, which had to be alleged in the charging information. In *Gutowski v. State*, 170 Ind. App. 615, 354 N.E.2d 293, (Ind. Ct. App. 1976), the court held that a

conviction for aggravated assault and battery was fundamental error unless great bodily harm or disfigurement was alleged in the charging instrument.

The Court held, in *Golladay v. State*, 875 N.E.2d 389, (Ind. Ct. App. 2007), even [t]hough similar, an offense under I. C. § 35-43-6-12(a)(3), P.L. 251 § 4, (1987), was not inherently included in an offense under I. C. § 35-43-6-12(a)(4), (1987) as the former required an additional element of the use of deception to induce a customer into signing a home improvement contract. Furthermore, an offense under I. C. § 35-43-6-12(a)(4), P. L. 251 § 4, (1987) was not factually stated in defendant's charging instrument, which did not contain the element that the customer was induced to sign the contract due to a deception.

According to the grand jury indictment the petitioner was charged with aggravated battery pursuant to I. C. § 35-42-2-1.5(2), P. L. 261 § 6, (1997) . **[Appendix–B and Appendix–E].** However, the aggravated battery jury instruction alleged that the jury could also find the petitioner guilty of serious permanent disfigurement under I. C. § 35-42-2-1.5(1), P. L. 261 § 6, (1997) **[Appendix–F].** The State informed the jury in order to convict the defendant (Curtis) the State must prove each of the following elements beyond a reasonable doubt:

1) the defendant
2) knowingly or intentionally
3) inflicted injury on Cameron
4) that caused serious permanent disfigurement or protracted loss or impairment of the function of a bodily member.

Serious permanent disfigurement is a separate offense under the aggravated battery statute. The serious permanent disfigurement element was not factually or inherently included in the grand jury indictment. *Golladay v. State*, 875 N.E.2d 389, (Ind. Ct. App. 2007).

In *Fuller v. State*, 639 N.E.2d 344, (Ind. Ct. App. 1994), the State alleged that *Fuller*:

did knowingly confine Malcolm J. Randolph without the consent of Malcolm J. Randolph and while said Larry Tyrone Fuller was armed with a deadly weapon, to-wit: a loaded firearm.

The factual basis underlying the confinement charge does not allege that *Fuller* employed any force other than that necessary to effectuate the robbery. However, the State contends a separate act of confinement occurred when *Fuller* forced the clerk at gunpoint to move from behind the counter to the back of the liquor store. It is true that the facts of this case establish that *Fuller* compelled the clerk by threat of force to move from the front of the store to the back of the store, and that such facts constitute an offense under I. C. § 35-42-3-3, (Supp. 1992), which reads:

A person commits criminal confinement when he:

1 Knowingly or intentionally:

2 Confines another person without the other person's consent; or

3 Removes another person, by fraud, enticement, force, or threat of force, from one place to another.

Indiana Code § 35-42-3-3, (Supp. 1992), contains two distinct types of criminal confinement: confinement by non-consensual restraint in place and confinement by removal. Also see *Ryle v. State*, 549 N.E.2d 81, (Ind. Ct. App. 1990) . *Fuller* was not charged with a confinement by removal under I. C. § 35-42-3-3(3), (Supp. 1992) . In *Fuller*, the language of the charging instrument alleges a non-consensual confinement without making any distinction between the factual basis for that confinement and the facts necessary to prove the force element of the robbery. The Court vacated *Fuller's* conviction and sentence for confinement. The fatal flaw in the petitioner's conviction for aggravated battery is a due process violation. There is a fatal variance between the aggravated battery indictment and the aggravated battery jury instruction.

The test for a fatal variance in an information is:

(1) was the defendant misled by the variance in the evidence from allegations and specifications in the charge in the preparation and maintenance of his defense, and was he harmed or prejudiced thereby?;

(2) will the defendant be protected in the future criminal proceeding covering the same event, facts, and evidence against double jeopardy?

See *Harrison v. State*, 507 N.E.2d 565, (Ind. S. Ct. 1987).

The petitioner was convicted under I. C. § 35-42-2-1.5(1), which was an uncharged offense of aggravated battery causing serious permanent disfigurement. To put it plainly, the jury convicted the petitioner of an uncharged element contained in the aggravated battery instruction. In *Townsend's*, the court held that, *Townsend's* due process rights were violated in Count II of the charging information, because the State failed to specifically state that *Townsend* was being charged under section 4.6(a)(4). *Townsend v. State*, 673 N.E.2d 503, (Ind. Ct. App. 1996). In the petitioner's case, the State also had the discretion to charge the petitioner with 1.5(1) or 1.5(2), or the State could have elected to indict the petitioner with both provisions, but failed to do so. The State instead elected to charge the petitioner with the latter 1.5(2), which requires a different type of burden of proof that the State must prove under 1.5(1). In fact, the grand jury returned a true bill on 1.5(2). Therefore, the State's decision to seek an indictment against the petitioner allowed the grand jury to decide what charge the petitioner would face. In other words, the State was locked into 1.5(2). The indictment/information plays a crucial role in guaranteeing due process rights, under the United States Constitution, which provide that an accused shall be informed of the charges against him and due process requires that defendants be notified of the charges against them. The purpose behind an information is to give the defendant notice of the crime for which the defendant is charged, so that he or she is able to prepare a defense.

> The purpose of written pleadings is to inform the opposite party, in a definite and certain manner, of what he is to meet. The opposite party is called upon to meet only what is charged against him. He cannot be charged in a pleading with one wrong or offense and

> be convicted upon the evidence of a different wrong or offence. Nor can he be charged with a single wrong or offence, and be convicted upon the evidence of additional wrongs and offences, although of the same sort and grade *Lebkovitz v. State*, 113 Ind. 28, (Ind. S. Ct. 1887).

Thus, conviction of an offense neither charged nor included within the criminal conduct alleged constitutes a denial of due process. *Salary v. State,* 523 N.E.2d 764, (Ind. Ct. App. 1988). It is well-settled that, "[w]here the defendant is convicted of an offense not within the charge, the conviction may not stand for the reason the defendant is entitled to limit his defense to those matters with which he stands accused. Thus, the information must charge in direct and unmistakable terms the offense with which the defendant is accused, and if there is a reasonable doubt as to what offense(s) are set forth in the charging instrument, that doubt should be resolved in favor of the defendant. *Stevens v. State*, 422 N.E.2d 1297, (Ind. Ct. App. 1981), citing *Belcher v. State*, 162 Ind. App. 411, 319 N.E.2d 658, (Ind. Ct. App. 1974). There is no way for us to know if the jury convicted the petitioner of protracted loss of impairment of the function of a bodily member or organ as charged, or whether the jury found the petitioner guilty of serious permanent disfigurement, which was not alleged in the aggravated battery indictment but alleged in the aggravated battery jury instruction. Therefore, the aggravated battery should be vacated.

CONCLUSION

The petitioner's trial counsel was ineffective when counsel failed to object to the defective voluntary manslaughter indictment alleging sudden heat as an element of voluntary manslaughter, and ineffective for failing to object to the voluntary manslaughter jury that also alleged sudden heat as an element of voluntary manslaughter, just as; counsel was ineffective for not objecting to the uncharged element in the aggravated battery jury instruction. The lower court concluded that trial counsel was not ineffective, because *Brantley* established a new rule and counsel could not anticipate a change in the law.

The lower courts erred when it denied petitioners' certificate of appealabilty after the petitioner made a substantial showing that the petitioner was denied his Sixth Amendment right to effective assistance of counsel guaranteed by the United States Constitution. The U.S. Supreme Court may review the denial of a certificate of appealability (COA) by lower courts. When lower courts deny a COA and the United Supreme Court concludes that their reason for doing so was flawed, the court may reverse and remand so that the correct legal standard may be applied.

For the foregoing reason, and because of the importance of the issue presented, the petitioner respectfully requests this high Court to issue a writ of certiorari to review the judgment of the lower courts.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/_____
Shelben Terrell Curtis-***pro se***

Date: **December 30, 2024**