No. _____

In the Supreme Court of the United States

LANDON HANK BLACK, PETITIONER

v.

STATE OF TENNESSEE, RESPONDENT

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

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

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QUESTIONS PRESENTED

1. The defendant was convicted of second-degree murder after he shot a man who approached him aggressively in a parking lot. This factual situation presented a question of whether the defendant was instead guilty only of the lesser-included offense of voluntary manslaughter as having acted in a state of passion produced by adequate provocation. The jury instructions allowed a verdict of voluntary manslaughter instead of murder only if it was proven, beyond a reasonable doubt, that he had acted in a state of passion.

   The first question presented is:

   Did these instructions, which imposed on the defendant a burden of proving his innocence of second-degree murder beyond a reasonable doubt, violate due process under *In re Winship*, 397 U.S. 358 (1970), *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197, 214 (1977)? In particular, these instructions shift the burden of proof from the prosecution to the defendant on an issue which the State has been historically required to prove, and imposes a beyond-a-reasonable-doubt standard. Does this reversal of burdens cross the "constitutional limits beyond which the States may not go" mentioned, but left undefined, in *Patterson*?

2. The trial court instructed the jury that second degree murder had two elements, and that voluntary manslaughter had those same two elements plus an additional element (state of passion). It instructed the jury that voluntary manslaughter was a lesser offense of second-degree murder. It also instructed the jury that it could consider a lesser-included offense only if it unanimously acquitted on the greater offense. Together, these instructions if followed meant that the jury could never correctly return a verdict of voluntary manslaughter; if it found the first two elements it would return a murder verdict and if it did not find them it could not convict on manslaughter either.

   The second question presented is:

   Did these instructions, which if followed exactly ruled out any possibility of a conviction for voluntary manslaughter, violate the defendant's right to a fair trial and right to present a defense?

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PETITION FOR WRIT OF CERTIORARI

Landon Hank Black petitions for a writ of certiorari to the Tennessee Court of Criminal Appeals.

OPINIONS BELOW

The opinion from the Tennessee Court of Criminal Appeals is unpublished, and appears below as Appendix A. *State v. Landon Hank Black*, No. E2022-01741-CCA-R3-CD, 2024 WL 2320284 (Tenn. Crim. App. May 22, 2024), App.2a. The Court of Criminal Appeals denied rehearing in an order dated June 4, 2024. That order appears below as Appendix B. App.47a. The Tennessee Supreme Court denied Mr. Black's application for discretionary review on November 14, 2024. That order appears below as Appendix C. App.49a.

JURISDICTION

The Tennessee Supreme Court denied discretionary review on November 14, 2024. The jurisdiction of this Court is pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution reads as follows:

> 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 offense 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.

The Sixth Amendment to the United States Constitution reads as follows:

> 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.

The Fourteenth Amendment to the United States Constitution reads in part as follows:

> 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.

Tenn. Code Ann. § 39-13-202 states in pertinent part: "First degree murder is (1) A premeditated and intentional killing of another…."

Tenn. Code Ann.§ 39-13-210 provides in part: "Second degree murder is (1) A knowing killing of another...."

Tenn. Code Ann.§ 39-13-211 states in part: "Voluntary manslaughter is 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."

STATEMENT OF THE CASE

I. Factual Overview.

Landon Black was convicted of second-degree murder after shooting the decedent in the parking lot of a bar. Earlier that evening, there were multiple skirmishes and arguments between different groups of people inside the bar. Mr. Black then went to his car to leave. When he drove around the parking lot towards the exit, he stopped next to the decedent. The decedent approached the window of the car aggressively, yelling at Mr. Black and raising his arms. Mr. Black shot him once and then drove away. The defense argued that the decedent may have had a weapon; the State contended that the shooting arose out of the earlier confrontations inside the bar and that Mr. Black had acted violently after having been disrespected by the decedent or another individual. Mr. Black was charged with first-degree (premeditated) murder, but was convicted by the jury only of second-degree (knowing) murder. In so finding, the jury rejected the claim that Mr. Black had acted in self-defense (which would have been a complete defense). For the reasons described below, the jury may never have assessed the question of whether he acted in a state of passion produced by adequate provocation, which could have resulted in a voluntary manslaughter verdict. Mr. Black received a total sentence of twenty-five years in prison.

II. Legal Framework of Murder and Manslaughter in Tennessee.

A. Introduction.

A live issue at trial, and the basis for the issues raised in this petition, related to the definitions of second-degree murder and voluntary manslaughter, and the instructions given to the jury regarding consideration of those crimes. As explained in further detail below, Tennessee law as interpreted and applied in this case sets up an unusual regime for homicide crimes. Second-degree murder is defined as having two elements, and the lesser-included offense of voluntary manslaughter is defined as having those same two elements plus an additional one (state of passion). Thus the lesser offense includes all of the elements of the greater offense. Also, what is generally thought of as a defense to murder (state of passion) is technically characterized as an affirmative element of the lesser-included offense of voluntary manslaughter.

This structure causes at least two logical and legal problems. First, it imposes as a practical matter the burden of proving state of passion on the defendant and on a beyond-a-reasonable-doubt standard. The defendant must prove his innocence of second-degree murder beyond a reasonable doubt, which is a reversal of the constitutionally-required burden of proof for a criminal case. Second, when combined with the ordinary sequential instruction requiring that the jury acquit on a greater offense before considering any lesser-included offense, it sets up a procedure whereby the jury can logically never return a voluntary manslaughter verdict, as it will either convict on second-degree murder or convict on neither. Both of these problems were raised on appeal but rejected by the Tennessee Court of Criminal Appeals.

B. Instructions.

The trial court's instructions were approved by the Court of Criminal Appeals as an accurate statement of Tennessee law. App.40a-45a. Here, the trial court instructed as to second-degree murder:

> For you to find the defendant guilty of this offense, the state must have proven, beyond a reasonable doubt, the existence of the following essential elements:
> (1) that the defendant unlawfully killed Brandon Lee; and
> (2) that the defendant acted knowingly.
> …
> The distinction between voluntary manslaughter, a lesser-included offense, and second-degree murder is that voluntary manslaughter requires that the killing result from a state of passion produced by adequate provocation from the alleged victim sufficient to lead a reasonable person to act in an irrational manner.

Vol. 21/1456. The trial court then turned to voluntary manslaughter, making it clear that it could consider voluntary manslaughter only if it first acquitted of second-degree murder:

> If you have a reasonable doubt as to the defendant's guilt of second-degree murder, a lesser-included offense, then your verdict must be not guilty as to this offense and then you shall proceed to determine his guilt or innocence of voluntary manslaughter, a lesser-included offense.

Vol. 21/1456. It then defined the elements of voluntary manslaughter:

> Any person who commits voluntary manslaughter is guilty of a crime.
> For you to find the defendant guilty of this offense, the state must have proven, beyond a reasonable doubt, the existence of the following essential elements:
> (1) that the defendant unlawfully killed Brandon Lee; and
> (2) that the defendant acted intentionally or knowingly; and
> (3) that the killing resulted from a state of passion produced by adequate provocation from the alleged victim sufficient to lead a reasonable person to act in an irrational manner.

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The trial court also provided separate instructions to the jury regarding the sequential order in which it was required to consider offenses. It specifically indicated that the jury could considered a lesser-included offense only if it had already unanimously resolved the greater offense:

> In reaching your verdict, you shall, first, consider the offense charged in the Presentment. If you unanimously find a defendant guilty of that offense beyond a reasonable doubt, you shall return a verdict of guilty for that offense. If you unanimously find the defendant not guilty of that offense or have a reasonable doubt of the defendant's guilt of that offense, you shall then proceed to consider whether or not the defendant is guilty of the next lesser-included offense in order from greatest to least within that Count of the Presentment. You shall not proceed to consider any lesser-included offense until you have first made a unanimous determination that the defendant is not guilty of the immediately-preceding greater offense or you unanimously have a reasonable doubt of the defendant's guilt of that offense.
>
> If you have a reasonable doubt of the guilt of the defendant as to all offenses charged and included in that Count of the Presentment, you shall return a verdict of not guilty.

Vol. 21/1459-1460.

C. Constitutional Claim Raised on Appeal.

On appeal, in addition to a variety of state law claims, Mr. Black also raised federal constitutional claims relating to the jury instructions. He contended that the imposition of the burden of proof as to state of passion on the defendant, to a beyond-a-reasonable-doubt standard, constituted a violation of due process based on the Court's decisions in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977). The Court of Criminal Appeals rejected this claim. It wrote:

> [W]e are bound to follow published case law by our supreme court. Our supreme court stated in [*State v. Williams*, 38 S.W.3d 352 (Tenn. 2001)] that "state of passion produced by adequate provocation" is an essential element of voluntary manslaughter…. [W]e conclude that the trial court properly instructed the jury that "state of passion" is an element of voluntary manslaughter. As such, it was the State's burden to establish state of passion beyond a reasonable doubt.

App.45a.

Mr. Black also argued that the trial court's sequential-consideration instructions, which allowed for jury consideration of a lesser-included offense only if the jury unanimously found that the State had not proven one of the elements of the greater offense, violated his constitutional rights by precluding any possibility of a voluntary manslaughter verdict. The Court of Criminal Appeals disagreed: "[D]espite those concerns, this court has repeatedly rejected claims that sequential jury instructions precluded the jury from finding the defendant guilty of voluntary manslaughter." App.43a.[1]

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[1] Both claims were included in the application for discretionary review to the Tennessee Supreme Court.

REASONS FOR GRANTING THE PETITION

I. The State Has Effectively Redefined the Traditional Crime of Second-Degree Murder So as to Impose a Burden on the Defendant of Disproving His Guilt of that Crime Beyond a Reasonable Doubt. This Case Thus Presents the Issue Left Open Since *Mullaney* and *Patterson* as to the Due Process Limits on Imposition of Improper Burdens of Proof on a Defendant by Means of Creative Recharacterization of the Traditional Elements of An Offense.

A. Introduction.

This Court has not addressed lingering issues left open for several decades as to the extent to which the State can redefine fundamental elements of a crime as instead being issues that have to be negated by the defendant. Here, the State of Tennessee has taken what was traditionally something to be proven as part of establishing the crime of murder (the absence of a state of passion produced by provocation) and placed a practical burden on the defense to prove it (that he acted in such a state of passion) in order to be found not guilty of second-degree murder. Significantly, and even going beyond any precedent supporting affirmative defenses, the state of passion that distinguishes the lesser offense of manslaughter from murder must be proven beyond a reasonable doubt. The ordinary, and constitutionally-required, burdens of proof are therefore entirely reversed, and a defendant will be convicted of the greater offense unless he convinced the jury beyond a reasonable doubt that is he guilty only of a lesser offense. This is contrary to the Constitution.

B. Overview of Tennessee Homicide Statute as Interpreted and Approved in this Case.

The structure of the Tennessee homicide statutes, as interpreted and approved by the Court of Criminal Appeals in this case, is as follows: First-degree murder is an intentional, premeditated killing. Second-degree murder requires proof beyond a reasonable doubt that there was an unlawful killing that was knowing. Voluntary manslaughter, like second-degree murder, requires proof beyond a reasonable doubt that there was an unlawful killing that was knowing. Voluntary manslaughter also requires proof beyond a reasonable doubt that the killing was committed in a state of passion produced by adequate provocation. Thus, under this structure, if a defendant pursues a voluntary manslaughter defense for a knowing killing, but the jury does not find state of passion beyond a reasonable doubt, he will be found guilty of second-degree murder.

C. Contrast with Other Jurisdictions.

This regime stands as a significant contrast with other jurisdictions, which apply different burdens to these same concepts. The more traditional treatment of state of passion is through the concept of "malice." Historically, murder is considered as homicide with "malice aforethought." Malice, in turn, is defined as including the absence of reasonable provocation or certain other mitigating circumstances. State of passion based on reasonable provocation (or its equivalent) thus negates malice. Consequently, to establish murder, under this approach, the prosecution has to disprove state of passion under the reasonable doubt standard, at least if it has been

raised by the defense. This traditional approach appears to still be followed in at least twenty-eight states.[2]

The other widely-adopted approach is to treat state of passion or provocation as an affirmative defense. In jurisdictions following this "modern" approach, the burden falls on the defendant to prove provocation or state of passion, usually by a preponderance of the evidence, in order to reduce a charge to a lesser-included offense. (Crucially, this burden on a defendant is never on a beyond-a-reasonable-doubt standard.) This approach is followed in at least twelve states.[3]

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[2] *See Varnado v. State*, 352 So.3d 777, 780 (Ala. Ct. App. 2021); *Howell v. State*, 917 P.2d 1202, 1207 (Alaska Ct. App. 1996); *State v. Raimonde*, 2014 WL 7277784 at *3 (Ariz. Ct. App. 2014); *People v. Rios*, 2 P.3d 1066, 1074 (Cal. 2000); *People v. Garcia*, 28 P.3d 340, 345 (Colo. 2001); Florida Standard Jury Instructions in Criminal Cases 7-4; *Shields v. State*, 285 Ga. 372, 376 & n.3 (2009); *Bradford v. State*, 675 N.E.2d 296, 300 (Ind. 1996); *Commonwealth v. Acevedo*, 427 Mass. 714, 715-716 (1998); *Baze v. Commonwealth*, 965 S.W.2d 817, 822-823 (Ky. 1997); *Sims v. State*, 573 A.2d 1317, 1323 (Md. 1990); *People v. Mendoza*, 664 N.W.2d 685 (Mich. 2003); *State v. Quick*, 659 N.W.2d 701, 711 (Minn. 2003); *State v. Boyd*, 913 S.W.2d 838 (Mo. Ct. App. 1995); *Jones v. State*, 2014 WL 1679566, at *2 (Nev. Apr. 25, 2014); *State v. Soto*, 34 A.3d 738, 744 (N.H. 2011); *State v. Heslop*, 639 A.2d 1100, 1104 (N.J. 1994); *State v. Patterson*, 254 S.E.2d 604, 610 (N.C. 1979); *Hogan v. State*, 139 P.3d 907, 924 (Okla. Crim. App. 2006); *Barrett v. Commonwealth*, 341 S.E.2d 190, 192 (Va. 1986); *State v. Bolaski*, 95 A.3d 460, 466 (Vt. 2014); *State v. McGuire*, 490 S.E.2d 912, 924 (W. Va. 1997); *State v. Lee*, 321 N.W.2d 108, 109 (Wis. 1982); *Lane v. State*, 12 P.3d 1057, 1062 (Wyo. 2000).

[3] *See State v. Ruben T.*, 104 Conn.App. 780, 784 (2007); *State v. Gattis*, 2011 WL 1458484, at *9 (Del. Super. Mar. 22, 2011); *State v. Adviento*, 319 P.3d 1131, 1162 (Hawaii 2014); *People v. Garcia*, 651 N.E.2d 100, 112 (Ill. 1995); *State v. Johnson*, 370 So.3d 91, 97 (La. Ct. App. 2023); *State v. Hanaman*, 38 A.3d 1278, 1283 (Me. 2012); *People v. Sepe*, 111 A.D.3d 75, 85-86, 972 N.Y.S.2d 273 (2013); *State v. Rhodes*, 590 N.E.2d 261, 264 (Ohio 1992); *State v. Lyon*, 672 P.2d 1358, 1360 (Or. App. 1983); *Cornett v. State*, 405 S.W.3d 752, 757 (Tex. Ct. App. 2013); *State v. Flynn*, 515 P. 3d 492, 498 (Utah Ct. App. 2022).

In adopting a regime that follows neither of these two approaches, but instead treats state of passion as a supposed element of manslaughter to be proven beyond a reasonable doubt, Tennessee stands alone.[4] Even those jurisdictions that temporarily did have such an approach have specifically rejected it after identifying the problems involved. In *People v. Reddick*, 526 N.E.2d 141 (Ill. 1988), for example, the court rejected the facile argument (identical to that offered by the State here) that because provocation can be characterized as an "element" of manslaughter, the Constitution requires that it be proven beyond a reasonable doubt by the prosecution. It instead imposed a burden on the State to disprove state of passion beyond a reasonable doubt in order to obtain a murder conviction. *Id.* at 146. Similarly, in Colorado, the Supreme Court rejected use of instructions that treated provocation as an affirmative element of the lesser offense, concluding that the State must disprove provocation to sustain the greater charge. *People v. Garcia*, 28 P.3d 340, 346 (Colo. 2001).

D. *Mullaney*, *Patterson*, and the Constitutional Limits on Re-Allocation of Burdens of Proof in Criminal Cases.

It seems obvious that a system that requires a defendant to prove his innocence of a given charge beyond a reasonable doubt is contrary to the Constitution. Yet this area is one in which the Court has spoken only infrequently and with a lack of clarity. The two primary precedents are *Mullaney* and *Patterson*. In *Mullaney*, the Court dealt with a Maine statutory scheme which required the defendant to prove that he

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[4] Some jurisdictions have not directly addressed this issue or do not have an equivalent to state of passion manslaughter.

acted "in the heat of passion on sudden provocation" in order to reduce a homicide to manslaughter. The trial court had instructed the jury that if it found the killing to be intentional and unlawful, malice was presumed unless the defendant established by a preponderance that he acted in the heat of passion. In this Court, the issue was "whether the Maine rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process." *Id.* at 692.

The state argued that absence of heat of passion was not, as a "formal matter," a fact necessary to establish felonious homicide, and thus the beyond-a-reasonable-doubt requirements of *In re Winship*, 397 U.S. 358 (1970), did not apply. The Court rejected this argument. It reasoned:

> [I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

Id. at 698. It noted that shifting the burden to the defendant would "increase further the likelihood of an erroneous murder conviction." *Id.* at 701. It concluded:

> Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence. This is an intolerable result in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter. *In re Winship*, 397 U.S., at 372, 90 S.Ct., at 1076 (concurring opinion). We therefore hold that the Due Process Clause 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.

Id. at 703-704.

Two years later, the Court provided a narrower view of the issue, limiting the scope of *Mullaney*. In *Patterson*, the Court addressed the New York statutory scheme, which treated extreme emotional disturbance as an affirmative defense upon which the defendant bore the burden of proof on a preponderance standard. The defendant argued that *Mullaney* prohibited a state from permitting guilt or punishment "to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt." The Court rejected that interpretation. Although it acknowledged that *Mullaney* requires a state to prove "every ingredient of an offense beyond a reasonable doubt" and prohibits a state from "shift[ing] the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense," the Court declared it "unnecessary" to have gone further in *Mullaney*. *Id.* at 215, 97 S.Ct. 2319. *Patterson* approved of the New York scheme, and thus limited *Mullaney* to situations where a fact is presumed or implied against a defendant. *See id.* at 216, 97 S.Ct. 2319.

The Court in *Patterson* did present one significant caveat to this holding, however, limiting the power of the state to completely alter traditional burdens of proof. It stated:

> This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously

> constitutional limits beyond which the States may not go in this regard. "(I)t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."

Id. at 2327. *See also Jones v. United States*, 526 U.S. 227, 241 (1999) ("The caveat was a stated recognition of some limit upon state authority to reallocate the traditional burden of proof").

After *Mullaney* and *Patterson*, there has been uncertainty as to what exactly are those limits on imposition of burdens on a defendant.[5] The *Patterson* caveat has been repeatedly acknowledged but never clarified or applied. As the Court later stated:

> [W]e have never attempted to define precisely the constitutional limits noted in *Patterson*, i.e., the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases.

McMillan v. Pennsylvania, 477 U.S. 79, 86 (1986). Similarly, Justice Powell wrote:

> Even *Patterson*, from which I dissented, recognized that "there are obviously constitutional limits beyond which the States may not go [in labeling elements of a crime as an affirmative defense]."... Today, however, the Court simply asserts that Ohio law properly allocates the burdens, without giving any indication of where those limits lie.

Martin v. Ohio, 480 U.S. 228, 241 (1987) (Powell, J., dissenting); *see also Moran v. Ohio*, 469 U.S. 948, 953 (1984) (Brennan, J., dissenting from denial of certiorari) ("This case presents the opportunity for us to define those limits").

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[5] *See generally* Wayne R. LaFave, 1 *Substantive Criminal Law* § 1.8 (2d ed.); Luis E. Chiesa, "When an Offense Is Not an Offense: Rethinking the Supreme Court's Reasonable Doubt Jurisprudence," 44 Creighton L. Rev. 647 (2011).

Indeed, to the extent the Court has addressed related issues since *Patterson* and *Martin*, in the line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), it has taken a somewhat different approach. In those cases, it has imposed a jury requirement, on a beyond a reasonable doubt standard, on any fact that increases the penalty for a crime beyond a statutory maximum or which increases a statutory minimum. *Id.* at 491; *see also id.* at 525 (O'Connor, J., dissenting) (citing *Patterson*'s indication that there are "obviously constitutional limits" on redefining elements of crimes); *Alleyne v. United States*, 570 U.S. 99, 103 (2013). Such an approach would seem to encompass the disputed issue here -- whether or not Mr. Black acted in a state of passion -- that distinguishes manslaughter from murder. *See Apprendi*, 530 U.S. at 494 ("the relevant inquiry is one not of form, but of effect"). Coming from a slightly different direction, then, the *Apprendi* line of cases serves to confirm that there remain limits to the State's ability to impose burdens of proof as to non-guilt on a defendant.

E. This Court Should Hold that the Due Process Clause Does Not Allow a State to Require the Defendant to Prove His Own Innocence By Shifting the Burden of Proving the Existence or Non-Existence of a Fact From the State (Beyond a Reasonable Doubt) to the Defendant (Beyond a Reasonable Doubt).

This case provides an ideal vehicle to consider the scope of the due process protections against shifting the burdens of proof to a defendant, and in particular the meaning of *Patterson*'s "obvious[] constitutional limits" on redefinition of crimes. The Tennessee statutory scheme as interpreted in this case does not treat state of passion as something that must be disproved beyond a reasonable doubt as part of proving second-degree murder, nor as an affirmative defense to second-degree murder that

must be proven by a preponderance of the evidence by the defendant. Rather, state of passion is something that must be proven beyond a reasonable doubt in order to reduce a murder verdict to manslaughter. Given that only the defendant is arguing that state of passion is present, and that the State is disputing state of passion, the defendant's only hope of voluntary manslaughter is for him to prove state of passion beyond a reasonable doubt. In effect, for all practical purposes, the burden of proof on this issue is on the defendant. This extreme allocation of the burdens of proof, which goes beyond even the ordinary preponderance burden of an affirmative defense, and which amounts to nothing less than a defendant being required to prove his innocence of second-degree murder beyond a reasonable doubt, is surely barred by the Constitution. What was historically inconsistent with malice, and thus something that had to be disproven by the prosecution in order to sustain a murder conviction, is now something that must be proven beyond a reasonable doubt by a defendant. If this complete reversal does not go beyond the limits alluded to in *Patterson*, then those limits simply do not exist.

The defendant in this case stands convicted, on these instructions, because he failed to prove beyond a reasonable doubt that he was innocent of second-degree murder and guilty only of voluntary manslaughter, a result anathema to this Court's due process jurisprudence from *In re Winship* to the present. This Court should grant the petition for writ of certiorari to provide clarity in this area and give content for the first time to the key language in *Patterson*. In the alternative, the Court should

grant, vacate, and remand for reconsideration in light of *Mullaney*, *Patterson*, and *Apprendi*.

II. The Sequential, Acquittal-First Instructions in this Case Precluded Consideration of a Viable Theory of the Case in Violation of Due Process and the Constitutional Right to Present a Defense.

A. Introduction.

A separate issue is presented by the combination of (a) the unusual definitions of murder and manslaughter, with voluntary manslaughter having all the elements of second-degree murder plus one more, with (b) the instructions requiring the jury to consider the greater offenses first and not progress to the lesser unless there is a unanimous finding of not guilty on the greater. Construed together, as a logical matter, these instructions make a voluntary manslaughter verdict impossible. This 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 a fair trial and right to present a defense.[6]

B. Presentation of the Issue in *Gilmore*.

In *Gilmore*, the Court confronted a defendant convicted of murder in Illinois despite a claim of heat of passion. Similar to the regime here, the instructions given at trial provided that murder was proven by two affirmative elements, and that

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[6] The problem here is not that the trial court declined to give an instruction on a lesser-included offense. Rather, it is that the trial court did provide an instruction on the lesser-included offense, but also gave additional instructions that made it impossible for the jury to ever return a verdict on that lesser-included offense.

voluntary manslaughter was proven by those two elements plus heat of passion. The trial court informed the jury that it could convict the defendant of only one, and not both, such offenses, but gave no other guidelines as to how the jury was supposed to decide between the two offenses. *Id.* at 337-338.

On habeas review, the Court of Appeals for the Seventh Circuit ruled in the petitioner's favor. In doing so, it relied upon an earlier decision, *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), which had held that these jury instructions -- because they allowed the jury to convict of murder without considering whether he was entitled instead to a voluntary manslaughter verdict -- violated due process. The Seventh Circuit explained: "[T]he instructions could have allowed the jury to find that the prosecution proved both elements of murder, and to conclude that a murder verdict was appropriate, without ever reaching the issue of whether the defendant possessed a mitigating mental state." *Taylor v. Gilmore*, 954 F.2d 441, 450 (7th Cir. 1992). In reviewing that decision, however, this Court reversed, finding that the decision in *Falconer* constituted a "new rule" for retroactivity purposes under *Teague v. Lane*, 489 U.S. 288 (1989), and thus could not form the basis for habeas relief. 508 U.S. at 345.

In doing so, at least four justices noted the existence of a substantial underlying constitutional question. Justice O'Connor, joined by Justice White, noted the tension between *In re Winship* and *Patterson* / *Martin*, before concluding: "[O]ur cases do not resolve conclusively the question whether it violates due process to give an instruction that is reasonably likely to prevent the jury from considering an

affirmative defense, or a hybrid defense such as the State of Illinois permits." 508 U.S. at 351 (O'Connor, J., concurring). Justice Blackmun, joined by Justice Stevens, went further, and found that there was a constitutional violation and that consideration was not barred by *Teague*. *Inter alia*, he found a due process violation and a violation of the Sixth Amendment when the defendant's testimony, which was offered to prove heat of passion, was transformed through the instructions into effectively a plea of guilty to murder. He concluded:

> Kevin Taylor … has asked that he be convicted of voluntary manslaughter if he is guilty of voluntary manslaughter, that he be spared a sentence for murder if he is innocent of murder, and that his judge not effectively instruct the jury to disregard the exculpatory part of his testimony and attend only to that which would ensure a conviction for murder. If he is denied what he asks, he is denied a fair trial.

Id. at 364-365 (Blackmun, J., concurring).

C. The Defendant in this Case Was Denied a Fair Trial and His Right to Present a Defense Where the Jury Instructions Precluded the Jury from Returning a Verdict of Voluntary Manslaughter.

The instant case presents a similar situation to that of *Gilmore*, as the Tennessee statutory structure is similar to that in Illinois.[7] Procedurally, however,

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[7] Prior to the decision in *Gilmore*, the Illinois courts had already the rejected long-standing pattern instructions as used in that case and construed state of passion not as an element of voluntary manslaughter but rather something that had to be disproven by the state to establish murder. *See People v. Reddick*, 123 Ill. 2d 184 (1988). The instructions at issue in *Gilmore* were thus wrong, as a matter of state law, at the time they were given, unlike the instructions here which have been held to be accurate under Tennessee law. The federal constitutional issues, however, are the same.

the case is different, as this is a direct appeal rather than habeas review. The Court is thus directly presented with the due process argument that it did not need to decide in *Gilmore*. Indeed, in a way the violation here is even greater. In *Gilmore*, the instructions gave no explanation for how the jury should decide between murder and manslaughter.[8] Here, the instructions actually precluded a verdict of manslaughter. Here, if the jury found that this was a knowing and unlawful killing, it was *required* to return a verdict of second-degree murder. Under the terms of the sequential-consideration instruction, it could not go on to consider voluntary manslaughter

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[8] It is noteworthy that the logical problem presented by the jury instructions here is not inevitable. The other jurisdictions that have confronted this problem (or even a lesser version of it) have uniformly provided sensible solutions. In the wake of *Gilmore*, the Illinois pattern instructions were first changed and then the Illinois legislature enacted a new statutory structure eliminating this problem by treating these mitigating factors as an affirmative defense under a preponderance standard. *See Falconer*, 905 F.2d at 1133 n.4. Similarly, the Arkansas Supreme Court confronted this "impossible scenario" where the jury was "instructed not to consider the offense of manslaughter unless it had reasonable doubt as to murder, but it was also instructed not to find guilt on manslaughter unless [the defendant] had committed a murder." *Fincham v. State*, 427 S.W.3d 643, 648 (Ark. 2013). The court consequently directed that the pattern instructions be revised, and they now impose a burden on the prosecution to disprove extreme emotional disturbance beyond a reasonable doubt. *See Douglas v. State*, 567 S.W.3d 483, 491 (Ark. 2019). Colorado and New Jersey have also rejected an interpretation that would present this issue. *See Garcia*, 28 P.3d at 346 (Colorado Supreme Court found error where "the jury instructions could have prevented the jury from considering provocation after having determined that Defendant was guilty of second-degree murder"); *State v. Coyle*, 574 A.2d 951, 965 (N.J. 1990) (rejecting instruction which "had the potential to foreclose jury consideration of whether passion/provocation should reduce an otherwise purposeful killing from murder to manslaughter"). In Tennessee, though, the pattern instructions (and a string of appellate cases approving of them) remain unchanged, even a decade after this flaw was first highlighted. *See State v. Khaliq Ra-El*, No. W2013-01130-CCA-R3CD, 2014 WL 3511038 (Tenn. Crim. App. July 11, 2014).

(which it could only do if it unanimously acquitted on second-degree murder, which it could not do having found the two elements of that crime to have been proven). On the other hand, if it found that it was not a knowing and unlawful killing, and thus not second-degree murder, then it could not convict for voluntary manslaughter either (as such requires those same two elements of a knowing and unlawful killing). In short, a jury conscientiously following these instructions could never return a verdict of voluntary manslaughter. This Court should grant certiorari and hold, consistent with the position of Justice Blackmun, that the Constitution is violated when the jury is given instructions that allow, and even mandate, a return of a verdict on second-degree murder without consideration of the possibility that the defendant might not be guilty of second-degree murder but only of voluntary manslaughter. Ruling that a voluntary manslaughter conviction is permissible on the facts presented, but issuing jury instructions that make it impossible for a jury to return a voluntary manslaughter verdict without ignoring those instruction, violates due process and the right to present a defense.

Conclusion

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

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