No. 24-6586

In the Supreme Court of the United States

LANDON HANK BLACK,
PETITIONER

v.

STATE OF TENNESSEE,
RESPONDENT

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did Tennessee's pattern jury instructions on two lesser-included homicide offenses place a burden on Black to prove his innocence in violation of his right to due process when those instructions allowed a conviction only if the State proved all the statutory elements of either offense beyond a reasonable doubt?

2. Did the jury instructions on two lesser-included homicide offenses violate Black's rights to a fair trial and to present a defense when they accurately stated the elements of those offenses, explained the sole distinguishing element between the two, and required holistic consideration of all instructions without singling out any one to the exclusion of others or placing significance on the order of instructions?

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INTRODUCTION

Petitioner Landon Hank Black shot and killed Brandon Lee outside a bar. A jury convicted Black of second-degree murder. In doing so, the jury rejected Black's suggestion that he committed the killing in a state of passion produced by sufficient provocation—the element that distinguishes second-degree murder from voluntary manslaughter under Tennessee law.

The petition claims the jury instructions erroneously shifted the burden for proving that distinguishing element to Black and even prevented the jury from considering that element at all. Neither is true. But more relevantly, neither issue merits this Court's attention. Although Black tries to conjure up a split of authority on these issues, he fails to identify any actual disagreement between circuits, among any state courts of last resort, or within this Court's own precedent. The purported tension he conjures in this Court's cases, for example, has failed to produce any lower-court confusion. And his emphasis on the uniqueness of Tennessee's law gets him nowhere. A difference in state substantive law is not a conflict of authority.

On top of that, Black's case presents serious vehicle problems. Most fatal, Black failed to fairly present any of the federal questions he raises here in the state court below. And he entirely waived his claim that jury instruction error violated his right to present a defense. Both oversights leave this Court without jurisdiction to consider these issues in the first instance.

In any case, the Tennessee Court of Criminal Appeals correctly affirmed Black's conviction. This Court should deny the petition.

STATEMENT

A. Legal Background

Tennessee law defines first-degree premeditated murder as a "premeditated and intentional killing of another." Tenn. Code Ann. § 39-13-202(a)(1). It defines second-degree murder as "[a] knowing killing of another." *Id.* § 39-13-210(a)(1). And it defines voluntary manslaughter as "the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." *Id.* § 39-13-211(a).

Consistent with federal law, Tennessee requires the State to prove all the statutory elements of a criminal offense beyond a reasonable doubt to sustain a guilty verdict. *Id.* § 39-11-201(a). Short of such proof, a defendant retains a presumption of innocence. *Id.* § 39-11-201(b). The defendant never faces any burden to prove his own innocence. *Id.* § 39-11-201(c).

The Tennessee pattern jury instructions accurately restate and define all the essential statutory elements of the homicide offenses. T.P.I. Criminal 7.01, 7.05(a), and 7.06. And when voluntary manslaughter is charged as a lesser offense of second-degree murder, the second-degree instruction distinguishes voluntary manslaughter by its additional element that the killing must result from a state of passion produced by adequate provocation. T.P.I. Criminal 7.05(a).

Consistent with Tenn. Code Ann. § 39-11-201 and federal law, the pattern instructions also explain both the State's unshifting burden of proof and a defendant's presumption of innocence. T.P.I. Criminal 2.02. The pattern instructions also tell the jury that "the order in which [the] instructions are given is no indication of their

relative importance." T.P.I. Criminal 1.02. And they direct the jury to "not single out any one or more [instructions] to the exclusion of another or others but [to] consider each one in light of and in harmony with the others." *Id.*

B. Factual Background

In late December 2020, Landon Black shot and killed Brandon Lee outside a bar in Knoxville, Tennessee, before fleeing to California. *State v. Black*, No. E2022-01741-CCA-R3-CD, 2024 WL 2320284, at *1 (Tenn. Crim. App. May 22, 2024). Both men visited the bar that night. *Id.* Black was there with his cousin, Taylor Hodge, and his cousin's girlfriend, Carrie Phillips. *Id.* Lee was there with two friends and Jackson's girlfriend. *Id.* Eventually, Hodge's ex-girlfriend, Kelsey Murrell, and her sister joined Lee's group at the bar. *Id.*

After midnight, two overlapping conflicts erupted. *Id.* at *2. First, Black confronted Murrell for engaging in "intimate contact" with Lee in view of Hodge, and this escalated into a scuffle between Black and Murrell. *Id.* Second, a nearby patron, Alan Ford, intervened in the conflict between Murrell and Black, which led to Ford and Black fighting until a barkeeper separated them. *Id.*

Ford then left the bar through the front door, followed shortly by Jackson, Hayes, and Lee. *Id.* Black left through an emergency exit. *Id.* Ford and some other patrons stopped in the parking lot, while Lee and his group continued toward Lee's truck. *Id.* at *3. Black, having armed himself after the confrontation with Ford, drove his cousin's car through the parking lot and saw Ford, who had already become involved in another fight. *Id.* at *25. Black sped up, rounded a corner, and almost

struck Lee with the car. *Id.* Lee responded by walking toward the driver's side of the vehicle, holding his hands out, and cursing. *Id.* Instead of simply driving away, Black shot Lee, whose hands were at his sides, through the heart. *Id.* at *3, 25. Lee fell to the ground, and Black drove back toward the bar. *Id.* at *3.

Black then pulled up to Hodge, who was standing outside the bar. *Id.* at *7. Black appeared distraught and scared, and he told Hodge to get in the car. *Id.* Hodge said he was going home with Phillips, and Black drove away. *Id.* Later, Hodge retrieved his car from Black, who admitted that he had shot Lee, and Black urged his cousin to repaint this car and remove any stickers. *Id.* Black claimed that he shot Lee because he was holding a knife, but Hodge later told investigators that he thought Black may not have been honest on this point. *Id.*

Indeed, when Lee's companions approached him right after the shooting, they found no weapons on or near him, and authorities also found no weapon at the scene. *Id.* at *3-*4. Lee had a bullet wound to his chest, and he died before emergency medical assistance could arrive. *Id.* at *3, 8.

An arrest warrant issued for Black in early January 2021. *Id.* at *8. Investigators soon discovered that Black's cell phone was no longer active. *Id.* Law enforcement arrested Black in Los Angeles three weeks later, and recovered his cell phone, which had not connected to a cell tower since January 6th. *Id.* at *3, 8.

C. Procedural Background

A Knox County grand jury indicted Black for first-degree murder and unlawful possession of a firearm after being convicted of a violent felony. *Id.* at *1. The case

proceeded to a jury trial on the murder charge alone. *Id.* After the close of proof, the trial court read the jury Tennessee's pattern instructions. These included instructions on the order of considering offenses, the offense elements, the State's unshifting burden of proof, and Black's presumption of innocence. (Resp. App., 2-6, 8-9.)

The trial court first told the jury to consider all instructions "in harmony" and to not "single out one or more of them to the exclusion of others." (Resp. App., 2.) The court accurately instructed the jury sequentially on the elements of first-degree murder, second-degree murder, and voluntary manslaughter. (Resp. App., 2-6.) After defining the two elements of second-degree murder, the court gave the pattern instruction distinguishing voluntary manslaughter from second-degree murder by the element of provocation. (Resp. App., 4-5.) The next instruction on voluntary manslaughter reiterated that distinguishing element. (Resp. App., 5-6.) And the trial court told the jury to consider the lesser offense of voluntary manslaughter if it had any reasonable doubt as to Black's guilt of second-degree murder. (Resp. App., 5.)

Before reading the elements of each homicide offense, the trial court reiterated that the State had the burden to prove all the elements of each offense beyond a reasonable doubt. (Resp. App., 1-6.) The court also stated that Black's presumption of innocence remained with him through every stage of trial. (Resp. App., 17.) And the court repeated that the State bore the burden of proof, that this burden never shifts, and that Black was not required to prove his innocence. (Resp. App., 17.)

After hearing these pattern instructions, the jury found Black guilty of second-degree murder. *Black*, 2024 WL 2320284, at *9.

On appeal, Black argued that the trial court erred by denying his request for special jury instructions on second-degree murder and voluntary manslaughter. The crux of his argument was that the pattern instruction for voluntary manslaughter should have defined "state of passion" as a defense to second-degree murder instead of as an element of voluntary manslaughter and that the sequential nature of the instructions prevented them from accurately conveying the law to the jury. In passing—and without citation to any federal constitutional provision—Black stated that the jury instructions for second-degree murder, voluntary manslaughter, and sequential consideration of offenses violated his rights to due process and to a fair trial, citing only *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977). *Black*, 2024 WL 2320284, at *26-29.

The Tennessee Court of Criminal Appeals affirmed Black's conviction, holding that the trial court accurately instructed the jury on the elements of voluntary manslaughter and that the jury instruction for second-degree murder was "clear and unambiguous" in distinguishing that offense from voluntary manslaughter. *Id.* at *40, 43. In doing so, the court did not address Black's barely hinted federal questions and instead simply confirmed that "state of passion produced by adequate provocation" is an element of voluntary manslaughter that the State had to prove beyond a reasonable doubt, rather than a partial defense to second-degree murder. *Id.* at *28. The court also approved the instruction on sequential consideration of

offenses because, immediately after the instruction on the elements of second-degree murder, the instructions defined provocation as the element that distinguished the lesser-included offense of voluntary manslaughter, thereby requiring the jury to pass on that element when it considered second-degree murder. *Id.* at *28.

The Tennessee Supreme Court denied Black's application for permission to appeal. (Pet. App. C.)

REASONS FOR DENYING THE WRIT

The Court should deny the petition. Black identifies no split. The questions presented are oft and recently denied. And this case has serious vehicle problems. On top of that, the Tennessee Court of Criminal Appeals' decision was correct.

I. There is No Split of Authority Warranting Review.

Black identifies no split on any of the federal due process questions he now raises—relating to burden shifting, a defendant's right to a fair trial, and the right to present a defense. He asserts (at 15) that this Court's precedent creates "uncertainty" about burden shifting to defendants. And he gestures at supposed "tension" among this Court's cases as to whether a jury instruction may violate due process or deprive a defendant of his right to a defense. (Pet., 19.) But lower courts are not confused—they're applying the law consistently. Black cites no circuit cases struggling to apply precedent, no widespread confusion, and no division of authority.

Black's numerous attempts to manufacture a split go nowhere. First, Black identifies a "contrast" (at 10-12) between Tennessee law and other States' on the allocation of the burden to prove a state of passion or provocation—the key element

distinguishing second-degree murder and manslaughter under Tennessee law. But a difference in state substantive law is not a split of legal authority. "[N]ovelty itself is not a vice." *Chandler v. Miller*, 520 U.S. 305, 324 (1997) (Rehnquist, C.J., dissenting). It is a virtue of our federal system.

And Black wrongly suggests (at 12) that Tennessee's conflicts specifically with *People v. Reddick*, 526 N.E.2d 141 (Ill. 1988), and *People v. Garcia*, 28 P.3d 340 (Colo. 2001). Neither *Garcia* nor *Reddick* address any federal question. Indeed, *Reddick* barely addressed the issue at all. The court simply found that the Illinois General Assembly intended state of passion to be an affirmative defense to murder that the State must disprove. *Reddick*, 526 N.E.2d at 146. And the court in *Garcia* found held the jury instructions in that case were erroneous because they "contravened the intent of the legislature" to treat provocation as a "mitigator to second-degree murder" rather than as an element of a "separate offense." 28 P.3d at 345. These cases do not reflect a split among the States on any common federal question; they simply show the States taking different approaches to defining criminal offenses.

Next, Black suggests (at 15-16) that *Mullaney* and *Patterson* created "uncertainty" about the limits of imposing evidentiary burdens on defendants—uncertainty that this case could resolve. But if that's so, lower court decisions do not show it. Black identifies no lower-court opinion displaying the uncertainty he alleges.

Black also observes (at 19) that the concurring opinion in *Gilmore v. Taylor*, 508 U.S. 333 (1993), notes tension between *In re Winship*, 397 U.S. 358 (1970), and two other cases—*Patterson*, 432 U.S. 197, and *Martin v. Ohio*, 480 U.S. 228 (1987).

But again, lower courts do not seem to be struggling with any such tension; at least, Black does not identify any. And that is because no tension exists. As the *Gilmore* concurrence explains, *Winship* stands for the "straightforward proposition" that due process requires the State to prove every element of a criminal offense beyond a reasonable doubt. *See Gilmore*, 508 U.S. at 350 (O'Connor, J., concurring). *Martin* and *Patterson* merely clarify that due process does not require the State to prove the absence of an affirmative defense beyond a reasonable doubt. *Id.* These wholly compatible decisions are not in tension. And consistent with *Winship*, Tennessee places an unshifting burden squarely on the State to prove all the elements of a homicide offense.

With no split between any circuits, among any state courts of last resort, or within this Court's own precedent, there is no compelling reason for review.

II. The Questions Presented Are Oft and Recently Denied.

Black contends that this case presents constitutional questions in need of an answer. But the Court twice denied review of these precise questions in the last decade, and Black introduces nothing new to warrant a different result now.

In *Hamilton v. Tennessee*, the petition for writ of certiorari presented questions identical to those presented here: (1) whether Tennessee's pattern jury instructions on second-degree murder and voluntary manslaughter violated due process protections by shifting the burden of proof to the petitioner; and (2) whether the jury instructions on second-degree murder and voluntary manslaughter violated the

petitioner's right to a fair trial and to present a defense. 144 S.Ct. 502 (2023) (Pet. App., at ii). The Court denied certiorari.

In *Moore v. Tennessee*, the petition presented the same questions. 581 U.S. 920 (2017) (Pet. App., at ii). Again, as with *Hamilton*, the Court denied certiorari. The Court has twice denied review of these same issues in the last eight years. Yet Black does not explain why this petition should yield a different result.

III. This Case Has Vehicle Problems.

Various vehicle defects afflict Black's petition. First up, jurisdiction: This Court's jurisdiction under 28 U.S.C. § 1257(a) hinges on the proper presentation of a federal question in the state court below. That proposition stems from an early interpretation of Section 25 of the Judiciary Act of 1789, the lineal ancestor of 1257(a). *See Crowell v. Randell*, 35 U.S. 368 (1836). And since then, this Court "has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court." *Hemphill v. New York*, 595 U.S. 140, 148 (2022).

Indeed, this Court routinely dismisses cases for want of jurisdiction when petitioners fail to fairly present a federal question in state court. Mere references to the "Constitution of the United States" or the "laws of the United States," for example, do not fairly raise a federal question. *Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935); *Oxley Stave Co. v. Butler Cty.*, 166 U.S. 648, 656 (1897). Nor do cursory allusions to "due process of law," *Bowe v. Scott*, 233 U.S. 658, 665 (1914). Black's petition suffers similar jurisdictional defects due to his failure to fairly present any federal question to the Tennessee Court of Criminal Appeals.

In his opening brief in that court, Black failed to fairly raise any of the due-process, fair-trial, or right-to-present-a-defense issues raised here (at 16-18, 20-22). (Resp. App., 115-21.) He cited no constitutional provisions (state or federal) and offered only three passing references to "due process," a single reference to a "fair trial," and solitary cites—with no discussion—to three federal court opinions involving the alleged instructional errors that his petition now recasts as implicating federal constitutional rights. The Court of Criminal Appeals did not perceive or address any federal question because that court treats "[i]ssues . . . not supported by argument or citation to authorities . . . as waived." Tenn. R. Ct. Crim. App. Rule 10(b). And Black's failure to properly raise any federal issues in state court means this Court should not consider them either. *See Hemphill*, 595 U.S. at 148.

Even worse, Black entirely waived his claim that Tennessee's pattern jury instructions violated his right to present a defense by failing to raise it in his opening brief in the Court of Criminal Appeals. His tactical mention of the issue for the first time in his reply brief waived the issue under state law. (Resp. App., 145.); *see Hughes v. Tenn. Bd. of Prob. & Parole*, 514 S.W.3d 707, 724 (Tenn. 2017) ("Issues raised for the first time in a reply brief are waived."). Predictably, the Court of Criminal Appeals did not address the issue. *Black*, 2024 WL 2320284, at *26-29. And this Court should also pass for want of jurisdiction.

Jurisdictional defects aside, this case is no vehicle to provide nationwide clarity on rights to due process, to a fair trial, or to present a defense. Black casts Tennessee's regime as an outlier, claiming that Tennessee "stands alone" in treating

passion or provocation as an element that the State must prove beyond a reasonable doubt. (Pet., 12.) But assuming that's true does not aid Black's cause. Rather, Tennessee's unique definition of voluntary manslaughter only shows that his petition presents a single-state issue—one that offers small opportunity to give nationwide guidance about the broad constitutional rights Black's petition belatedly invokes.

IV. The Decision Below is Correct.

Regardless, the Court of Criminal Appeals properly affirmed Black's conviction. Black insists that the pattern jury instructions given in his case violated his right to due process, to a fair trial, and to present a defense in two reasons. He alleges the instructions (1) required him to prove his innocence of second-degree murder, and (2) precluded a verdict on the lesser offense of voluntary manslaughter—the target of his defense theory. He is wrong on both counts.

First, Black fails to show that Tennessee's definitions of second-degree murder and voluntary manslaughter fall outside constitutional limits on the States' broad authority to determine the elements of offenses they intend to punish. And the pattern instructions given at Black's trial placed no burden on him to prove his innocence. To the contrary, they repeatedly emphasized Black's presumption of innocence. (Resp. App., 2-9, 17.) And they placed the burden of proving all offense elements beyond a reasonable doubt on the State. (Resp. App., 2-9, 17.) They also stated expressly that Black was not required to prove his innocence. (Resp. App., 17.)

Second, Black's jury instructions did not preclude a verdict on the lesser offense of voluntary manslaughter. The instruction for second-degree murder invited the jury to consider Black's alternative guilt of voluntary manslaughter by explaining

in detail the distinguishing element of voluntary manslaughter—that the killing resulted from a state of passion produced by adequate provocation. (Resp. App., 5-6.) That explanation preceded the instruction on sequential consideration of offenses, which directed the jury to consider voluntary manslaughter if it had any reasonable doubt about Black's guilt of second-degree murder. (Resp. App., 5.)

Considered in this context, the instruction on sequential consideration of offenses did not preclude a verdict on voluntary manslaughter. Rather, the jury simply rejected Black's theory of provocation given that he shot an unarmed victim after nearly running him over with a car.

A. The challenged definitions fall well within established constitutional limits on state authority to craft offense elements.

Black is correct that, in Tennessee, second-degree murder requires proof of a knowing killing, while voluntary manslaughter also requires the same proof plus provocation producing a state of passion in the defendant. Tenn. Code Ann. §§ 39-13-210, -211. But he strays with the claim that these offense elements, when instructed together, "impose a burden on defendant of disproving his guilt" of second-degree murder." (Pet., 9.) Just because Black's defense *strategy* was to prove a lesser offense to the exclusion of the greater offense does not mean he bore the burden of doing so. (Pet., 9-17.) And the jury instructions make clear that was not the case.

This Court recognizes that "[a] state legislature certainly has the authority to identify the elements of the offenses it wishes to punish," while "a defendant has the right to insist that the State prove beyond a reasonable doubt every element of an offense charged." *Montana v. Egelhoff*, 518 U.S. 37, 64 (1996). "[A]pplicability of the

reasonable-doubt standard, however, has always been dependent on how a State defines the offense that is charged." *Patterson*, 432 U.S. at 211 n.12.

Tennessee's homicide offense definitions, which the trial court accurately instructed here, comply with established constitutional mandates about the burden of proof and its assignment in criminal cases. The pattern jury instructions allow a conviction for either second-degree murder or voluntary manslaughter only if the State proves all elements of either offense beyond a reasonable doubt. (Resp. App., 2-9, 17.) And the instructions repeatedly emphasize that the defendant is entitled to the presumption of innocence. (Resp. App., 2-9, 17.) Contrary to Black's suggestion, this case offers no potential to examine the scope of constitutional "limits[] on redefinition of crimes" or improper burden shifting to the defendant because Tennessee's homicide definitions in no way test this Court's holdings in *In re Winship*, 397 U.S. 358, *Mullaney*, 421 U.S. 684, or *Patterson*, 432 U.S. 197.

Black wrongly insists (at 17) that his conviction is "a result anathema to this Court's due process jurisprudence from *In re Winship*." *In re Winship* concerned a state court juvenile delinquency adjudication that involved proof by a preponderance rather than proof beyond a reasonable doubt. 397 U.S. at 360. This Court surveyed the longstanding rule that a criminal charge must be established by the government's proof beyond a reasonable doubt and held that this standard should also apply to delinquency adjudications. *Id.* at 361-62. Black's jury instructions here clearly followed that longstanding rule by ensuring that the jury deliberated on all charged offense elements under the appropriate burden of proof—beyond a reasonable doubt.

And the instructions clearly placed that burden on the State. (Resp. App., 2-9, 17.) Black was not convicted of second-degree murder because he failed to prove his innocence of that offense. Rather, he was convicted of second-degree murder because the State proved beyond a reasonable doubt both elements of that offense—(1) he killed the victim and (2) did so knowingly. Nothing about Black's conviction offends the holding of *In re Winship*.

Black's reliance on *Mullaney* (at 12-13.) is similarly inapposite because the state statutes and precedent addressed in that opinion differ significantly from Tennessee's. *Mullaney* addressed a state murder statute that included "malice aforethought [as] an essential and indispensable element" of that offense "without which the homicide would be manslaughter." 421 U.S. at 685-86, 688. But the trial court nonetheless instructed the jury that "malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation." *Id.* at 686. The state appellate court upheld the murder conviction, noting that "for more than a century it repeatedly had held that the prosecution could rest on a presumption of implied malice aforethought and require the defendant to prove that he had acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter." *Id.* at 688. This Court unsurprisingly held that relieving the prosecution of proving the essential element of malice violated due process. *Id.*

By contrast to the state laws addressed in *Mullaney*, Tennessee's homicide offense definitions did not allow the State to rest on any presumption about an

essential element of Black's conviction offense. They required the jury to decide whether the State had proven the two statutory elements of second-degree murder beyond a reasonable doubt. (Resp. App., 3-5.) And the second-degree murder instructions also explained the provocation element unique to voluntary manslaughter. They thereby invited the jury to consider whether the evidence established voluntary manslaughter rather than second-degree murder during the jury's sequential consideration of second-degree murder. (Resp. App., 3-5.)

Finally, *contra* Black (at 14-15), *Patterson* supports denying certiorari rather than granting it. In that case, the Court rejected a constitutional attack on a state murder statute that assigned the defendant the burden to prove the affirmative defense of extreme emotional disturbance. 432 U.S. at 198. Focusing on the elements of the conviction offense—"death, the intent to kill, and causation"—the Court emphasized that "[n]o further facts [were] either presumed or inferred in order to constitute the crime." *Id.* at 205-06. Similarly, the jury instructions here did not allow the jury to presume or infer any facts or essential elements of second-degree murder. It may have been Black's strategy to prove provocation in the hope of limiting conviction to the lesser manslaughter offense, but the burden of proving the provocation element of the manslaughter charge never shifted to Black. That burden belonged to and remained with the State throughout. (Resp. App., 1-4, 15, 20.) *In re Winship*, *Mullaney*, or *Patterson* do not call into doubt the propriety of that burden or its assignment to the State.

To the contrary, *Patterson* underscores the limited occasion for federal intervention in the administration of justice by the States:

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

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

B. Tennessee's pattern instruction on sequential consideration of offenses did not preclude a complete defense or a fair trial.

Black does not present a close or important federal question with his claim that the pattern instruction on sequential consideration of offenses prevented a verdict on voluntary manslaughter. (Pet., 18-20.) Viewed together, the pattern instructions fairly invited the jury to consider the distinguishing element between second-degree murder and voluntary manslaughter. (Resp. App., 2-9.) And this is demonstrated by the fact that Tennessee juries routinely return verdicts for voluntary manslaughter as a lesser offense of second-degree murder based on the same or similar instructions.

No binding precedent from this Court prohibits the type of jury instructions used by Tennessee, and Black's reliance on precedent addressing statutes and jury instructions from other States is inapposite given that Tennessee's pattern instructions are unique and distinguishable. Because the instructions did not remove any defense theory or lesser-included offense from the jury's consideration, they created no constitutional violation requiring federal intervention.

1. The pattern instructions did not remove any defense theory or lesser offense from jury consideration.

Black's contention (at 18) that the jury instructions made "a voluntary manslaughter verdict impossible" finds no support in the instructions themselves. The trial court began the charge by telling the jury to consider all instructions together in harmony and cautioned against singling out any to the exclusion of others. (Resp. App., 2-3.) The instruction for second-degree murder specifically invited the jury to consider voluntary manslaughter by explaining in detail the distinguishing element of that offense—that the killing resulted from a state of passion produced by adequate provocation. (Resp. App., 5.) And that explanation preceded any instruction on the sequential consideration of offenses, which itself directed the jury to consider voluntary manslaughter if it had a reasonable doubt about Black's guilt of second-degree murder. (Resp. App., 2-9, 17.) Black relies on a hyper-technical reading of the sequential-consideration instruction to emphasize an alleged "logical and legal problem[]." (Pet., 5.) But a plain interpretation of the trial court's opening instruction to consider all instructions in harmony belies his claim that a voluntary manslaughter verdict was impossible. (Pet., 5.)

Several recent Tennessee decisions further undermine Black's claim that a manslaughter verdict was a logical impossibility. In each case, a defendant charged with first- or second-degree murder was convicted for the lesser offense of manslaughter. *See, e.g.*, *State v. Banks*, No. W2021-01038-CCA-R3-CD, 2022 WL2903265, at *1 (Tenn. Crim. App. July 22, 2022) (conviction for manslaughter as lesser of second-degree murder charge).[1] Second-degree murder is always a lesser-included offense of first-degree murder in Tennessee, so the jury in all of these cases would have heard both the pattern second-degree murder instruction and the pattern manslaughter instruction—just as in this case. *See Strader v. State*, 362 S.W.2d 224, 227 (Tenn. 1962). And just as in this case, they would have also heard the standard instruction on the sequential consideration of offenses. *See, e.g.*, *State v. Raines*, 882 S.W.2d 376, 381-82 (Tenn. Crim. App. 1994). As these cases make clear, Tennessee juries routinely return voluntary manslaughter verdicts based on the pattern instructions Black wrongly claims make such a verdict impossible.

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[1] *State v. Howard*, No. W2020-00207-CCA-R3-CD, 2022 WL 144235, at *1 (Tenn. Crim. App. Jan. 15, 2021) (conviction for manslaughter as lesser of second-degree murder charge); *State v. Rivers*, No. E2019-01541-CCA-R3-CD, 2020 WL 6441262, at *1 (Tenn. Crim. App. Nov. 3, 2020) (same); *State v. Turner*, No. W2022-01389-CCA-R3-CD, 2024 WL 808713, at *1 (Tenn. Crim. App. Feb. 27, 2024) (conviction for manslaughter as lesser of first-degree murder); *State v. Jones*, No. E2022-01287-CCA-R3-CD, 2023 WL 4797734, at *3 (Tenn. Crim. App. July 27, 2023) (same); *State v. Simpson*, No. M2021-01031-CCA-R3-CD, 2022 WL 1654456, at *1 (Tenn. Crim. App. Oct. 31, 2022) (same); *State v. Wright*, No. M2018-00574-CCA-R3-CD, 2020 WL 464631, at *1 (Tenn. Crim. App. Sept. 17, 2019) (same); *State v. Owens*, No. W2017-02188-CCA-R3-CD, 2019 WL 851465, at *4 (Tenn. Crim. App. Oct. 17, 2013) (same).

2. No precedent from this Court prohibits the type of instructional regime employed by Tennessee.

Black cites *Gilmore*, 508 U.S. 333, and its discussion of *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990), to argue that the jury instructions violated his rights to a fair trial and to present a defense. (Pet., 18-20.) But the unique state laws and jury instructions in those cases have no bearing on the constitutionality of the instructions here. And *Gilmore* rejected the argument that a state court's instructional errors implicate the right to present a defense.

a. This Court has not held that jury instructions like those challenged here violate due process.

Black makes much of Justice Blackmun's dissenting conclusion in *Gilmore* that the jury instructions there deprived the defendant of his right to a fair trial, as well as Justice O'Connor's concurring opinion that the Court's cases did not conclusively resolve that question. (Pet., 19-20.) Justice Blackmun agreed with the Seventh Circuit's holding in *Falconer* that Illinois's pattern instructions permitted a jury to find a defendant guilty of murder, even when the elements of voluntary manslaughter were satisfied, thus violating due process. *See Gilmore*, 508 U.S. at 355-57 (Blackmon, J., dissenting). But Justice Blackmun's opinion, joined by Justice Stevens, is not controlling. And the *Gilmore* majority reversed after finding that *Falconer* announced a new rule for retroactive application purposes and, therefore, could not form the basis for federal habeas relief. *Id.* at 344. In doing so, moreover, the majority rejected the argument that "the jury instructions . . . interfered with [the defendant's] fundamental right to present a defense." *Id.* at 343. The majority

explained that the Court's existing precedent recognizing a defendant's right to present a defense involved the exclusion of defense evidence or testimony—not instructional errors or other "restrictions . . . on a defendant's ability to present an affirmative defense" provided under state law. *Id.* at 343-44. So *Gilmore* does not establish Black suffered a constitutional violation.

b. *Falconer* is distinguishable.

Even if *Gilmore*—and by way of that case, *Falconer*—governed here, the relevant state law and jury instructions differ significantly from Tennessee's. In *Falconer*, the defendant obtained federal habeas relief because the issued instructions left the jury "with the false impression that it could convict [her] of murder even if she possessed one of the mitigating states of mind described in the voluntary manslaughter instruction." 905 F.2d at 1136. The district court's decision in *Falconer* discussed an earlier decision from the Supreme Court of Illinois, *Reddick*, 526 N.E.2d at 145-47. *Reddick* reversed a murder conviction because the murder instruction made no mention of the mitigating mental conditions that could allow for a manslaughter conviction, instead of murder, and because the instructions failed to require the State to disprove these mitigating mental conditions, which he had presented as a "partial affirmative defense." 526 N.E.2d at 147. In accord with *Reddick*, the Seventh Circuit ultimately concluded on habeas review that the identical pattern instructions in Falconer's case violated due process. *Falconer*, 905 F.2d at 1137.

But unlike the Illinois Supreme Court, Tennessee courts have held that voluntary manslaughter, and more specifically the mitigating mental circumstance of provocation, is not an affirmative defense to murder. *Black*, 2024 WL 2320284, at *1; *State v. Hamilton*, No. E2021-00409-CCA-R3-CD, 2022 WL 4494108, at *19 (Tenn. Crim. App. Sep. 28, 2022), *perm. app. denied* (Tenn. Apr. 17, 2023), *cert. denied* 144 S.Ct. 502 (2023); *State v. Moore*, No. E2015-00585-CCA-R3-CD, 2016 WL 2865759, at *10 (Tenn. Crim. App. May 16, 2016), *perm. app. denied* (Tenn. Sept. 22, 2016), *cert. denied* 581 U.S. 920 (2017). That conclusion about a matter of Tennessee law is binding on this Court. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005).

Moreover, the pattern instructions in this case differ significantly from the instructions in *Falconer* and *Reddick*, which makes this case a poor vehicle to consider the question Justice O'Connor thought *Gilmore* left open—whether it "violates due process to give an instruction that is reasonably likely to prevent the jury from considering an affirmative defense." *See Gilmore*, 508 U.S. at 351 (O'Connor, J., concurring). Again, the trial court told the jury to consider all instructions together in harmony, and the instruction for second-degree murder required the jury to consider not just the next lesser offense of voluntary manslaughter but specifically the distinguishing element of provocation. (Resp. App., 4-5.) And that explanation preceded the sequential-consideration instruction. (Resp. App., 8-9.) Unlike the jury in *Falconer*, the jury here was not "left with the false impression that it could convict the petitioner of [second-degree] murder even if [he] possessed . . . the mitigating state[] of mind described in the voluntary manslaughter instruction." 905 F.2d at

1136. Also, the jury instruction for voluntary manslaughter placed the burden of proving provocation beyond a reasonable doubt on the State, and the instruction on sequential consideration of offense directed the jury to consider voluntary manslaughter if it had a reasonable doubt about Black's guilt of second-degree murder. (Resp. App. 5.) Thus, Black never had the burden of proving provocation as a defense theory anywhere equivalent to the State's burden of proving it as an essential element of voluntary manslaughter.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by first class mail to opposing counsel: Jonathan Harwell at 1101 Liberty Street, Knoxville, Tennessee 37919, on the 23rd day of April 2025. I further certify that all parties required to be served have been served.

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