No. 24-6586

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

REPLY BRIEF FOR PETITIONER

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I. The State's Positions Are Inconsistent With the Actual Jury Instructions Given in This Case.

In his petition, Mr. Black raised two related but discrete issues regarding the jury instructions given in his case, which (1) imposed on him a burden of proving that he was guilty only of voluntary manslaughter rather than second-degree murder, on a reasonable doubt standard, and (2) also, if followed, logically precluded any possibility of a voluntary manslaughter verdict. In its *Brief in Opposition*, the State tries to dispute the premise of these arguments. In the State's view, there was no burden placed on the defendant and no legal impediment to a voluntary manslaughter conviction. The jury instructions, however, speak for themselves, and contradict the State's position.

A. The Jury Instructions Required the Mitigating Element of State of Passion to Be Proved Beyond a Reasonable Doubt. This Placed a Burden on the Defendant, As Only a Defendant Would Try to Prove that Mitigating Element in a Case Charged as Murder.

In challenging the petitioner's first issue, the State repeatedly asserts that the only burden of proof as to state of passion was placed on the State. *BIO* at 13-16. That is what the instructions technically indicate. Yet in the context of a charge of second-degree murder, state of passion serves to mitigate or lessen the crime, and thus is something that only a defendant, not the State, would ever seek to prove. In such a case, far from trying to prove it, the State *disputes* the existence of state of passion. It makes no more sense to treat state of passion as something to be proven by the State than it would, say, to set up a system where self-defense is ostensibly a fact to be proven by the State (but which the State then never tries to prove).

The State's only answer here is to offer a differentiation between the "defense *strategy* … to prove a lesser offense" (which the State apparently agrees falls on a defendant) and the "burden of doing so." *BIO* at 13 (*italics in original*). In doing so, it concedes the point. Denominating it a "strategy" instead of a "burden" does not erase the constitutional problem -- Mr. Black could be convicted of voluntary manslaughter, and not second-degree murder, if and only if he could convince the jury beyond a reasonable doubt that he acted in a state of passion produced by adequate provocation. Whatever one calls it, this is contrary to the Constitution. Indeed, this Court in *Patterson v. New York* identified the dangers that would arise if "the purpose or **effect** [of new statutory approaches] were to unhinge the procedural presumption of innocence which historically and constitutionally shields one charged with crime."

432 U.S. 197, 211 n.13 (1977) (*emphasis added*). *Patterson*'s focus on the "effect" is inconsistent with the State's effort here to draw a formulistic distinction between the "strategy" and the "burden" imposed by the statute. *See also Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975) ("*Winship* is concerned with substance rather than … formalism"); *see also Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) ("the relevant inquiry is one not of form, but of effect"). The Constitution cannot be evaded so easily. Even if the courts of Tennessee refuse to denominate it a "defense" or "affirmative defense," state of passion clearly has that *function* in such prosecutions. It serves to reduce the severity of the offense and limit the possible punishment. And the burden of proving it here, on a beyond-a-reasonable-doubt standard, falls on the defendant. That is unconstitutional.

B. The Jury Instructions Did Not Inform the Jury that State of Passion Could Produce a Reasonable Doubt as to Second-Degree Murder.

As to the petitioner's second issue -- that the instructions, if followed conscientiously, precluded a jury from ever returning a verdict of guilty of voluntary manslaughter -- it would be trivially easy for the State to point the Court to the instruction that informed the jury that it could proceed past second-degree murder on to voluntary manslaughter even if it found both elements of murder (a (1) unlawful killing (2) done knowingly) to be proven -- if such an instruction existed. There was no such instruction. Consequently, the best the State can argue is that perhaps a "holistic" consideration of the instructions would have allowed such a verdict and that the instructions did not rule it out directly. *BIO* at i. But even this position is wrong. The instructions explained reasonable doubt *only* in terms of the elements of the

offense under consideration ("the State must have proven beyond a reasonable doubt the existence of the following essential elements…," *Respondent's Appendix* at 004). Further, the State explicitly concedes that there were only two elements necessary to support a conviction for second-degree murder: "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." *BIO* at 15. Any implication that the jury could have found a reasonable doubt as to second-degree murder based on something that did not pertain to either of the two elements of second-degree murder is thus inconsistent with the actual instructions given.[1] There was simply no way, without disregarding these instructions, for a jury that believed this was an unlawful and knowing killing to find Mr. Black not guilty of second-degree murder and thus to even begin deliberations on the lesser-included offense of voluntary manslaughter.

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[1] In order to return a voluntary manslaughter verdict, the jury would have had to disregard the instruction that it could only consider and return a manslaughter verdict if it first had a reasonable doubt as to one of the two elements of second-degree murder. *See Respondent's Appendix* at 009 ("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."). On the other hand, the jury would not have violated any specific portion of the jury instructions if it returned a second-degree murder verdict, even if it believed that he had acted in a state of passion.

C. The Existence of Voluntary Manslaughter Convictions Merely Shows that A Jury Will Sometimes Ignore Its Instructions. It Does Not Justify Unconstitutional Instructions.

The State notes, correctly, that these pattern instructions have not eliminated all practical possibility of a voluntary manslaughter conviction, pointing to specific cases in which manslaughter verdicts were returned. *See BIO* at 19 & n.1. But the point here is that those verdicts could only be returned by a jury that disregarded its instructions or portions thereof. Those convictions -- which may arise from either jury confusion or a form of jury nullification -- say nothing about the legal validity of the instructions, particularly in light of the long-standing and "crucial assumption underlying that system … that juries will follow the instructions given them by the trial judge." *Parker v. Randolph*, 442 U.S. 62, 73 (1979). To approve jury instructions merely because a jury might ignore them is to abdicate any pretense of legality.

II. This Case Presents Two Issues Deserving of Review.

As outlined above, Mr. Black pointed to two separate areas of the law calling out for intervention by this Court: the proper understanding of due process limitations on definition of elements and assignment of burdens, pursuant to *Mullaney*, *Patterson*, and *Apprendi*; and the constitutional consequences of jury instructions that limit consideration of defense evidence or precludes an ostensibly-available lesser verdict sought by the defense, after *Gilmore v. Taylor*, 508 U.S. 333 (1993). In response, the State suggests, as to both issues, that there is no need for resolution because there is no uncertainty or even any tension in the Court's precedents. *BIO* at 7. This position is hard to take seriously.

This Court and individual Justices have repeatedly acknowledged that *Mullaney* and *Patterson* have left open questions. *See*, *e.g.*, *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986); *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"); *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986) ("we 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, and do not do so today"). The emergence of the *Apprendi* line of cases has only complicated these questions.[2]

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[2] Just to give two recent examples of lower courts wrestling with similar issues in different statutory contexts: In *Hawes v. Pacheco*, 7 F.4th 1252 (10th Cir. 2021), a habeas petitioner challenged the application of a Wyoming kidnapping statute that imposed on him the practical burden of proving a "safe release" of the victim in order to receive a lesser sentence than otherwise. He argued that placing this burden on him (rather than requiring the State to prove the absence of release beyond a reasonable doubt in order to impose the higher sentence) violated his Sixth and Fourteenth Amendment rights, citing *Mullaney* and *Apprendi*. Over a dissent, the Tenth Circuit rejected his arguments on the basis of AEDPA deference even while noting that they had "some force" and "may be correct."

Similarly, in *Bieganski v. Shinn*, No. CV-21-01684-PHX-DWL, 2023 WL 4862681 (D. Ariz. July 31, 2023), the Arizona child molestation statute at issue included an "affirmative defense," to be proven by the defendant on a preponderance standard, of lack of sexual motivation -- even though sexual interest had traditionally been an element of the crime. The District Court rejected arguments under *Mullaney* and *Patterson*, but granted the certificate of appealability, noting that "a member of this Court, a member of a Ninth Circuit panel, members of the Arizona Supreme Court, as well as members of the Arizona Court of Appeals—have all called into question the constitutionality of Arizona's burden-shifting scheme." *Id.* at *11. That case is now pending decision by the Ninth Circuit.

Similarly, with respect to the fact that the instructions prevented any jury actually following those instructions from returning a verdict of voluntary manslaughter, Justices of this Court have acknowledged the uncertainty in the area. As Justice O'Connor (joined by Justice White) stated in her concurring opinion in *Gilmore*, in addressing the issue of whether constitutional error arises when a state provides an affirmative defense but then jury instructions prevent the jury from actually considering it: "Our cases do not provide a clear answer to that question." She further advised that she would "reserve that question until we address it on direct review." 508 U.S. at 352 (O'Connor, J., concurring). This case presents exactly that opportunity. As a case on direct review, it presents the perfect vehicle. Indeed, under *Gilmore*, it may be impossible to ever address the merits of the issue on habeas.

To be sure, the precise situation presented here does not occur all across the country. That is largely because, as set out in the petition, those jurisdictions that have examined these questions with respect to murder and manslaughter have recognized the fundamental illogic of the position taken by the State here, and have rejected it.[3] Indeed, given that jurisdictions define crimes in distinct ways, it is unlikely that any single specific instance of the larger issues at play will ever generate a split involving most of the states or the circuits. Yet that is no reason to ignore forever these larger recurring issues. This Court should grant the petition in order

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[3] The State asserts that there was no federal constitutional issue in the Illinois resolution of this issue in *People v. Reddick*, 526 N.E.2d 141 (Ill. 1988). *See BIO* at 8. In *Falconer v. Lane*, 905 F.2d 1129, 1137 (7th Cir. 1990), though, the Seventh Circuit found that those Illinois instructions did violate the federal due process clause.

to adjudicate the rights of Mr. Black (and the numerous individuals convicted of second-degree murder in Tennessee under this nonsensical regime) and to provide guidance both to courts and legislatures on these important constitutional questions regarding the allocation of burdens through definitions of crimes and the scope of the right to have a lesser-included offense actually considered by a jury.

III. The Issues are Preserved and Ripe for Review.

Finally, the State contends that Mr. Black has waived these challenges by not presenting any federal claims to the state court. *See BIO* at 10-12. This is flatly wrong.

As required under Tennessee law to preserve an issue for appeal, Mr. Black presented these issues in his post-trial motion for new trial. As to the issue of the burden of proving or disproving state of passion, he argued that it was error to require him to prove state of passion (rather than the State disproving it), on a beyond-a-reasonable-doubt standard. He contended that "These instructions therefore violated … his constitutional rights to a fair trial, to a trial by jury, to proof beyond a reasonable doubt, and to a lawful jury verdict, and were contrary to the Fifth, Sixth, Eighth, and Fourteenth Amendments." On appeal, he repeated this claim, arguing:

> [I]mposing a burden on the defense to prove state of passion beyond a reasonable doubt, produces a statutory scheme contrary to the due process rulings of the Supreme Court in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977).

Respondent's Appendix at 120. In other words, the argument and even the supporting precedent from this Court which forms the basis of the instant petition was presented to the state court below.[4] No more was necessary.[5]

The same is true of Mr. Black's second argument. The issue was identified in the motion for new trial. There, he identified the predicate, writing:

> [T[hese jury instructions erroneously required the jury to return a verdict of guilty of second-degree murder if it found those two elements to have been proven. The jury would therefore never consider the offense of voluntary manslaughter, even if it would have found those two elements as well as state of passion to have been established.

This caused a legal problem, he contended, as it violated his "constitutional rights to a fair trial, to a trial by jury, to a lawful jury verdict, and to jury consideration of all appropriate offenses, and were contrary to the Fifth, Sixth, Eighth, and Fourteenth Amendments." *Id.* at 583-584. He cited two federal cases in support of these propositions. On appeal, in his brief-in-chief, the defendant spelled out this issue in detail, arguing both that it violated state law and also that it violated the federal constitution, and citing to federal precedent about the due process implications of an unfair jury instruction. *See Respondent's Appendix* at 118.

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[4] Indeed, in its own brief, the State responded by addressing *Mullaney* and *Patterson*. *State's Brief* at 66.

[5] This Court recently explained, in dealing with 28 U.S.C. § 1257(a):

> [A] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief ... by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'

Howell v. Mississippi, 543 U.S. 440, 444 (2005).

In sum, the issues raised here were fully preserved and presented in the courts of Tennessee. To the extent the State's complaint is that the Tennessee Court of Criminal Appeals did not explicitly address the federal constitutional nature of the claims here, that failure provides no reason for this Court to deny the petition for writ of *certiorari*.[6] In any event, the Court could (as requested by the petitioner as an alternative remedy) grant, vacate, and remand for reconsideration in light of *Mullaney*, *Patterson*, *Apprendi*, and related authorities.

IV. Conclusion.

This Court should grant the petition for writ of *certiorari* on both issues.

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[6] The State suggests that the Court of Criminal Appeals may have concluded that one or more of the federal constitutional claims was waived. *See BIO* at 11. This suggestion is invented out of whole cloth. Tellingly, the State does not even offer any supporting citation to the actual opinion of the Court of Criminal Appeals for this claim. The Court of Criminal Appeals did not so hold.