ORIGINAL

No. 24-7493

FILED
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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER DAVID HARRELL,
Petitioner,

v.

STATE OF WYOMING,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE WYOMING SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Wyoming Supreme Court has consistently decided an important federal question in a way that conflicts with the decision of other state courts of last resort and, more importantly, decisions of the Supreme Court of the United States. In *Alleyne v. United States*, 570 U.S. 99, 113 (2013), the Court appeared to put to rest any confusion as to what constitutes an element of a crime by explaining, if a fact is by law essential to the penalty, it is an element of the offense and that, "the core crime and the fact[s] triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." *Id.* Despite the Courts holding, some States continue to reallocate the burden of proof with respect to its graded offenses—forcing defendants to disprove aggravating factual predicates to mitigate ones' sentence. An affirmative defense with mitigating circumstances is an aspect that was left unaddressed in *Alleyne*.

The affirmative defense – sentence mitigation issue in *Patterson v. New York*, 432 U.S. 197 (1977), was wrongly decided and deserves universal criticism because it continues to allow States to manipulate substantive elements of crimes. As Justice O'Connor wrote in her *Apprendi v. New Jersey* dissent, 530 U.S. at 544, it would require the Court to overrule, at a minimum, decisions like *Patterson* and *Walton v. Arizona*, 497 U.S. 639 (1990). Justice O'Connor's intuition was spot-on—*Walton* and a host of others have since been overruled in the wake of *Apprendi* and its progeny.

The questions presented are:

1. Whether this Court should resolve a controversial split, amongst State Courts of Last Resort, when State kidnapping statutes, having been influenced by federal law, unconstitutionally provides for an extended term of imprisonment by reallocating the burden of proof, requiring defendants to disprove aggravating predicates by a preponderance-of-the-evidence, while other States constitutionally mandate the State establish those same factual predicates beyond-a-reasonable-doubt.

2. Whether Wyoming Statute § 6-2-201 is unconstitutionally void for vagueness (due process) as written and applied, because the statutes inconsistent interpretations and contradictory applications violate the Sixth and Fourteenth Amendments and are contrary to the holdings in *Alleyne v. United States* (2013); *Apprendi v. New Jersey* (2000); and *Mullaney v. Wilbur* (1975).

3. Whether this Court's decision in *Patterson v. New York*, 432 U.S. 197 (1977), should be clarified, limited or overruled.

RELATED CASES

- *Harrell v. State*, 265 P.3d 235, Wyoming Supreme Court (S-11-035). Judgment entered September 16, 2011.

- *Harrell v. State*, Case No. 5466, Sixth Judicial District Court. Order denying Sentence Reduction. Judgment entered April 18, 2012.

- *Harrell v. State*, Case No. 5466, Sixth Judicial District Court, Judgment denying Petition for Post-Conviction Relief entered February 06, 2013

- *Harrell v. State*, No. S-13-0034, Wyoming Supreme Court, Judgment denying Petition for Writ of Review/Certiorari entered March 19, 2013

- *Harrell v. Wilson*, No. 2:13-CV-078-NDF, U.S. District Court for the District of Wyoming, Judgment denying Federal Habeas Relief entered April 10, 2014.

- *Harrell v. Wilson*, No. 14-8038, U.S. Court of Appeals for the Tenth Circuit, Judgment denying Certificate of Appealability entered August 28, 2014.

- *Harrell v. Wilson*, No. 14-7348, Supreme Court of the United States, Judgment Petition of Certiorari entered January 26, 2015.

- *Harrell v. State*, Case No. 5466, Sixth Judicial District Court, Judgment denying Post-Conviction Relief entered June 02, 2020.

- *Harrell v. State*, Wyoming Supreme Court (S-20-0151), Judgment denying Writ of Review/Certiorari entered July 28, 2020.

- *Harrell v. State*, Sixth Judicial District Court, Case No. 5466, Judgment denying Motion to Correct Illegal Sentence entered October 15, 2021.

- *Harrell v. State*, No. S-21-0276 Wyoming Supreme Court, Judgment denying Writ of Review entered July 05, 2022.

- *Harrell v. State*, No. S-21-0176, Wyoming Supreme Court, Petition for Rehearing. Clerk refused to accept/file, July 13, 2022.

- *Harrell v. State*, No. S-21-0176, Wyoming Supreme Court, Petition for Rehearing/explanation, Clerk refused to accept/file, Judgment entered July 25, 2022.

- *Harrell v. Pacheco*, No. 22-8051, U.S. Court of Appeals for the Tenth Circuit, filed as §2244, Second Successive Habeas Petition. Judgment entered September 01, 2022.

- *Harrell v. Pacheco*, No. 22-8051, U.S. Court of Appeals for the Tenth Circuit. (Petition for Rehearing filed March 27, 2023. No Response from Court yet).

- *Harrell v. Norris*, No. S-25-0059, Wyoming Supreme Court, Judgment denying Petition for Writ of Habeas Corpus entered March 25, 2025.

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STATUTORY PROVISIONS INVOLVED
WYOMING STATUTE § 6-2-201

(a) A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business or from the vicinity where he was at the time of the removal, or if he unlawfully confines another person, with the intent to:

(i) Hold for ransom or reward, or as a shield or hostage;

(ii) Facilitate the commission of a felony; or

(iii) Inflict bodily injury on or to terrorize the victim or another.

(b) A removal or confinement is unlawful if it is accomplished:

(i) By force, threat or deception; or

(ii) Without the consent of a parent, guardian or other person responsible for the general supervision of an individual who is under the age of fourteen (14) or who is adjudicated incompetent.

(c) If the defendant voluntarily releases the victim substantially unharmed and in a safe place prior to trial, kidnapping is a felony punishable by imprisonment for not more than twenty (20) years.

(d) If the defendant does not voluntarily release the victim substantially unharmed and in a safe place prior to trial, kidnapping is a felony punishable by imprisonment for not less than twenty (20) years or for life except as provided in W.S. § 6-2-101.

OPINIONS BELOW

The opinion of the Wyoming Supreme Court is not recorded but is attached hereto as Appendix A. *Harrell v. Norris*, No. S-25-0059 (March 25, 2025).

The opinion of the United States Court of Appeals for the Tenth Circuit is not reported but is attached hereto as Appendix B. *Harrell v. Pacheco*, No. 22-8051. (Sept. 01, 2022).

The opinion of the Wyoming Supreme Court is not recorded but is attached hereto as Appendix C. *Harrell v. State*, No. S-21-0176 (July 05, 2022).

The Sixth Judicial District Courts Finding of Facts and Conclusions of Law is not recorded but is attached hereto as Appendix D. (Oct. 15, 2021).

The opinion of the Wyoming Supreme Court is not recorded but is attached hereto as Appendix E. *Harrell v. State*, No. S-20-0151 (July 28, 2020).

The Sixth Judicial District Courts Finding of Facts and Conclusions of Law is not recorded but is attached hereto as Appendix F. (June 02, 2020).

The order of the Supreme Court of the United States is reported and attached hereto as Appendix G. *Harrell v. Wilson*, No. 14-7348 (Jan. 26, 2015).

The opinion of the United States Court of Appeals for the Tenth Circuit is reported and attached hereto as Appendix H. *Harrell v. Wilson*, No. 14-8038; 737 Fed. Appx. 905 (10th Cir. Aug. 28, 2014).

The opinion of the Federal District Court for the District of Wyoming is reported and attached hereto as Appendix I. *Harrell v. Wilson*, No. 2:13-cv-00078-NDF; 2019 U.S. Dist. LEXIS 234662 (Apr. 10, 2014).

The opinion of the Wyoming Supreme Court is not recorded but is attached hereto as Appendix J. *Harrell v. State*, No. S-13-034 (March 19, 2013).

The Sixth Judicial District Courts Finding of Facts and Conclusions of Law is not recorded but is attached hereto as Appendix K. (Feb. 06, 2013).

The Sixth Judicial District Courts Finding of Facts and Conclusions of Law is not recorded but is attached hereto as Appendix L. (April 18, 2012).

The opinion of the Wyoming Supreme Court is reported at and attached hereto as Appendix M. *Harrell v. State*, 265 P.3d 235 (Sept. 16, 2011).

JURISDICTION

The Wyoming Supreme Court issued its unreported opinion denying Christopher D. Harrell, habeas corpus relief on March 25, 2025, affirming his conviction and sentence under Wyoming Statute § 6-2-201 (a)(iii), (b)(i) and (d), which was originally entered by Judge Michael Deegan of the Sixth Judicial District Court. This Court has jurisdiction under 28 U.S.C. § 1257(a) and Article III, Section 2 of the United States Constitution.

STATUTORY PROVISIONS INVOLVED

Petitioner brought the underlying action under 28 U.S.C. § 1257(a), which confers jurisdiction upon the Supreme Court of the United States to review by writ of certiorari, final judgments or decrees rendered by the highest court of a State in which a decision could be had, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The pertinent constitutional provisions, Article III, Section 2, Clause 1. Subjects of jurisdiction; Article VI, Clause 2. Supremacy Clause; Amendment VI; and Amendment XIV of the United States Constitution and, statutory provision 28 U.S.C. § 1257(a) is reproduced at Appendix N, 161a-162a.

STATEMENT OF THE CASE

Overview

Wyoming state prisoner, Christopher Harrell, pursuant to 28 U.S.C. § 1257(a), appeals the dismissal of his state habeas petition challenging Wyoming Statute § 6-2-201's constitutionality so his federal claims of denial of right to trial by jury and due process of law may properly be vindicated. Harrell was convicted by a jury of aggravated kidnapping, in violation of § 6-2-201(a)(iii), (b)(i) and (d).

This petition for a writ of certiorari seeks review of interrelated issues directly affecting the constitutionality of § 6-2-201, the sentence imposed and the trial court's jurisdiction. It raises in the most direct and uncluttered form constitutional questions that have, in the past, been discussed by this Court but, left unanswered—that is, the constitutional aspects of the right to a jury determination of critical facts in a criminal case. More precisely, the case asks whether state legislatures can simply adopt a statutory scheme to reallocate burdens of proof, by labeling as an affirmative defense some elements of the crime, defined in their statute, as a function to circumvent procedural protections of the Bill of Rights and, to deprive defendants of their Sixth and Fourteenth Amendment

guarantees of governmental proof beyond-a-reasonable-doubt to a jury by making it "aggravating."

In the wake of *Alleyne v. United States*, 570 U.S. 99 (2013), *Apprendi v. New Jersey*, 530 U.S. 466, 501 (2000), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), States cannot simply shift the burden of proof onto a defendant and compel him to disprove the factual predicates that aggravate the crime by a preponderance-of-the-evidence, in order to mitigate ones punishment. If Harrell's positions are well-taken, new and corrective legislation will be prompted across the nation, safeguarding defendant's constitutional rights to trial by jury and due process of law. Harrell emphasizes the need for uniformity in the administration of Sixth and Fourteenth Amendment protections and governmental mandates.

Events at issue

In 2010, Harrell was picked up from his house by his fiancé GP and returned to her house after Harrell texted GP that he was "horny." "GP testified that she and Harrell kissed prior to entering the house, that then she and Harrell began arguing over previous domestic disputes, and the fight escalated. GP testified that Harrell began strangling her, retrieved a hammer and box cutter, and then proceeded to assault and rape her, both vaginally and anally. According to GP, the assault and rape continued throughout the night and into the morning.

That next morning, the police received an anonymous call that Harrell was at GP's residence and they arrived at the residence where Harrell was arrested for violating the protection order against him. The case proceeded to trial" where a jury

convicted Harrell of all charges based on the false testimony of a police officer. *Harrell v. State*, 2011 WY 129, ¶4-5, 11.

Proceedings in the Trial Court

Relevant to this petition, notwithstanding the jury's verdict, the court imposed a mandatory minimum sentence of not less than 20 years to life because, under the Wyoming Supreme Court's interpretation of *Loomer v. State*, 768 P.2d 1042 (Wyo. 1989), drawing on this Courts holding in *Patterson v. New York*, 432 US 197 (1977), the factual predicates in § 6-2-201(d) are mitigating circumstances, not ingredients of the aggravated crime charged.

> P14 The elements of kidnapping are described in Wyo. Stat. Ann. § 6-2-201(a) and (b). *Rathbun v. State*, 2011 WY 116, ¶ 25, 257 P.3d 29, 37-38 (Wyo. 2011). Subsection (c) and (d) do not contain elements. Subsection (c) "describes mitigating conduct subsequent to the kidnapping that may allow for a reduced sentence." Id. (citing *Loomer v. State*, 768 P.2d 1042, 1046-47 (Wyo. 1989)). Kidnapping is one crime "for which the maximum sentence is as stated in Subsection (d)." Id. ¶ 30, 257 P.3d at 39. Neither subsection (c) or (d) adds or subtracts elements to the offense of kidnapping.
>
> P15 The elements of kidnapping are: (1) the defendant unlawfully confines another person, and (2) with the intent to inflict bodily injury on or to terrorize the victim or another. Wyo. Stat. Ann. § 6-2-201(a)(iii). Unlawful confinement is accomplished by force, threat, or deception. Wyo. Stat. Ann. § 6-2-201(b)(i).

Harrell v. State, 2022 WY 76, ¶14-15.

Proceedings in the State Courts

In the filings between 6-2-20 thru 3-27-23, Harrell addressed the reasons why all 5 of his sentences should merge, which led to the Wyoming Supreme Court using

Loomer/Patterson in *Harrell v. State*, 2022 WY 76 ¶14-15 to justify the denials of his sentence merger under Rule 35(a)—illegal sentence.

Proceedings in the Wyoming Supreme Court

Pertinent to the current petition, on March 03, 2025, Harrell filed a petition for a writ of habeas corpus in the Wyoming Supreme Court. On March 25, 2025, the court granted the States 12(b)(6) motion to dismiss and denied relief. In its order, the court held *res adjudicata* bars the litigation of issues that were could have been but were not raised in prior proceedings despite the fact Wyoming's Constitution and statutory law clearly permits a writ of habeas corpus, challenging the constitutionality of a state statute and violations of Sixth and Fourteenth Amendments to the Federal Constitution.

Because Harrell pled a challenge to the district court's jurisdiction based on the unconstitutionality of Wyo. Stat. Ann. § 6-2-201, his judgment or final order is subject to collateral attack at any time and in any proceeding in another court of equal jurisdiction. *In re Estate & Guardianship of Paul K. Andrews v. U.S. Dep't of Veterans Affairs*, 39 P.3d 1021, 1027 (2002). Likewise, a denial or violation of specific constitutional guaranties, rights, privileges or immunities results in a loss of jurisdiction, also leaving the judgment open to collateral attack at any time. See *Miskimmins v. Shaver*, 8 Wyo. 392; 58 P. 411, 416 (1899).

It's been firmly established by this Court that, if the court which renders a judgment has no jurisdiction to render it, either because the proceedings, or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally and, a defendant who is

imprisoned under and by virtue of it may be discharged from custody on habeas corpus. This was so decided in the cases of *Ex parte Lange*, 85 U.S. 163, 18 Wall. 163, 21 L. Ed. 872 (1874); *In Re Snow*, 120 U.S. 274, 274-285, 30 L. Ed. 658, 658-662, 7 S. Ct. 556 (1887); and *Ex parte Siebold*, 100 U.S. 371, 376, 25 L. Ed. 717 (1880).

REASONS FOR GRANTING THE PETITION

I. THERE IS A DIVERGENCE IN RULINGS IN THE STATE COURTS OF LAST RESORT THAT HAVE BEEN INFLUENCED BY FEDERAL LAW AND THE FINAL DISPOSITION AND WORD ON THIS SUBJECT WILL HAVE TO COME FROM THE SUPREME COURT OF THE UNITED STATES.

Harrell was convicted under Wyoming Statute § 6-2-201(d), and the court imposed a statutory mandatory minimum sentence of not less than 20 years to life because Harrell failed to disprove the aggravating factual predicates by a preponderance-of-the-evidence. Wyoming contends, since subsection (d) only bears on the extent of punishment, it does not violate the constitution to shift the burden of proof onto the defendant because the Wyoming Supreme Court labeled § 6-2-201 an affirmative defense offense with mitigating circumstances.

To the contrary, Harrell maintains § 6-2-201 is unconstitutional because it required him to disprove factual predicates in the safe-release provision, which violates his Sixth Amendment right to trial by jury and the Fourteenth Amendment right to due process of law. Harrell relies on what is the prevailing understanding of the meaning of those rights, i.e., namely, that a defendant's sentence may be based only on facts that a jury has found beyond-a-reasonable-doubt. *Erlinger v. United*

States, 602 US 821 (2024) (quoting *Apprendi*, 530 U.S. at 501) ("a 'crime' includes every fact that is by law a basis for imposing or increasing punishment.").

Before addressing the divergence in the State Courts of Last Resort, we must begin with this constitutional question: is the adequacy of Wyoming's procedure constitutional—is it permissible for the State to reallocate the burden of proof and impose an enhanced mandatory minimum sentence of not less than 20 years, nor more than life, given it was above the 20 year maximum for the core crime? Harrell asks the Court to determine whether the legislature has acted properly within its broad power to define crimes and their punishments or, instead, has it fostered a way to evade the constitutional requirements associated with the characterization of a fact as an offense element.

Indeed, a state court's description of safe-release as a mitigating circumstance is not determinative of the Sixth Amendment inquiry. As this Court explained in *Apprendi* 530 U.S. at 485, 494 (2000), a state's characterization of a fact as "bear[ing] solely on the extent of punishment" is not enough to remove it from the Sixth Amendment's protections. Instead, the "essential Sixth Amendment inquiry is whether a fact is an element of the crime," *Alleyne*, 570 U.S. at 114 (2013), and *that inquiry* "is one not of form, but of effect," one for which "labels do not afford an acceptable answer," *Id*, 530 U.S. at 494.

As this Court is well aware, *Alleyne v. United States*, 570 U.S. 99 (2013) decided a monumental issue regarding mandatory minimum sentences with its extension of *Apprendi v. New Jersey*, 530 US 466 (2000), and the allocation of fact-

finding between judge and jury. The Court spent a great deal of time articulating how the mandatory minimum sentence in that case violated *Apprendi.* It also reemphasized that the Sixth Amendment applies to facts used to set the range of sentences to which a defendant is exposed. *Alleyne*, 570 U.S. at 111.

Nevertheless, the precise constitutional parameters of *Alleyne* appear to have been left unclear because it was unnecessary to resolve the question regarding affirmative defenses and sentence mitigation. The instant case raises questionable interpretations of *Patterson v. New York*, 432 US 197 (1977), of which would be sufficient to decide this case, and of which would both solidify and clarify the constitutional basis of *Alleyne*, *Apprendi* and *Mullaney*. Whichever path this Court chooses to resolve the question presented will guide many lower courts, both state and federal, in the cases which are bubbling to the surface. The final disposition and word on the subject of the Wyoming Supreme Court's (and its sister state courts of last resort) interpretation and application of § 6-2-201 and its reliance on *Patterson* will now have to come from the Supreme Court of the United States.

An issue that has surfaced with frequency in criminal cases is whether a given portion of a statute constitutes an element of an offense or, is it permissible for a state legislature or state supreme court to label as an affirmative defense the aggravating factual predicates in the sentencing provision, which then requires a defendant to disprove by a preponderance-of-the-evidence to mitigate punishment. The Courts answer will determine whether the factual determinations for which the

provision calls are to be made by the fact-finder or the defendant and, whether the reasonable doubt standard must be applied.

This petition aptly presents this question for final resolution by this Court. With no exceptions, Wyoming's kidnapping law, including attempted kidnapping, facilitates the imposition of a mandatory minimum sentencing enhancement in any case in which "the defendant does not voluntarily release the victim substantially unharmed and in a safe place prior to trial, kidnapping is a felony punishable by imprisonment for not less than twenty (20) years or for life except as provided in W.S. § 6-2-101." *Wyo. Stat. Ann. § 6-2-201(d).*

A. This Court Should Clearly Enunciate a Resolution on the Principles Regarding Affirmative Defenses and Mitigating Circumstances and the Constitutionality of Leaving Questions of Safe-Release to be Determined by the Jury, Beyond-a-Reasonable-Doubt when Statutory Mandatory Minimum Sentences are an Issue.

A split of authority exists on the question of whether a defendant has Sixth and Fourteenth Amendment protection when it comes to kidnapping statutes and their safe-release provisions. The kidnapping statutes in this controversial discussion will be divided into two camps. In Group-A, the factual predicates in the safe-release provision are treated as traditional elements of the offense—they are charged, submitted to the jury and proved beyond-a-reasonable-doubt.

- Group-A: (beyond-a-reasonable-doubt): Ariz. Rev. Stat. Ann. §13-1304; Del. Code Ann. tit. 11, § 783, 783A; Haw. Rev. Stat. Ann. § 707-720; Ky. Rev. Stat. Ann. § 509.040; Minn. Stat. Ann. § 609.25; N.H. Rev. Stat. Ann. § 633:1; N.J. Stat. Ann. § 2C:13-1; and Wis. Stat. Ann. § 940.31.

Group-B believes *Patterson* paved a constitutional avenue as a means to reallocate the burden of proof by simply labeling their kidnapping law as an

affirmative defense offense. This Group either ignores or refuses to accept the considerable landscaping that's changed the contours of the law, i.e., *Apprendi* and its progeny.

- **Group-B:** (preponderance-of-the-evidence): Ala. Code § 13A-6-43; Alaska Stat. § 11.41.300; Ark. Code Ann. § 41-1702 & A.C.A § 5-11-102; Mont. Code Ann. § 45-5-303; Neb. Rev. Stat. § 28-313; Ohio Rev. Code Ann. § 2905.01; Tenn. Code Ann. § 39-13-304; VT. Stat, Ann. tit.13 § 2405; and Wyo. Stat. Ann. § 6-2-201.

Relying on federal law and the United States Constitution, States in Group-A determined that the aggravating factual predicates in their safe-release provisions are substantive elements and are required to be submitted to the jury and proved beyond-a-reasonable-doubt. For example, before *Apprendi* was decided, in *State v. Federico*, 510 A.2d 1147 (N.J. 1986), the New Jersey Supreme Court explained that:

> "Trial court's failure to instruct the jury on the State's burden of disproving the "unharmed release" provision of second degree kidnapping, as well as its failure to instruct the jury on the difference between first and second degree kidnapping resulted in a reversal of appellant's conviction of kidnapping under N.J. Stat. Ann. § 2C:13-1."

In *Baker v. Commonwealth*, 922 S.W.2d 371 (1996), the Kentucky Supreme Court held, whether the victim was released alive was not an element of the substantive offense of kidnapping, but was used only for purposes of determining the range of punishments. The court explained that "the jury's deliberation as to whether the victim was released alive could not have begun until defendant had been found guilty of kidnapping." (*Cf. Loomer v. State*, 768 P.2d 1042, 1046 (Wyo. 1989), "[t]he crime of kidnapping is complete when subsections (a) and (b) of W.S. 6-2-201 have been accomplished").

However, in *Dixon v. Commonwealth*, 263 S.W.3d 583 (2008), the Kentucky Supreme Court reversed course and overruled *Baker*, explaining, because of the *Apprendi* rule, the factual predicates in the safe-release provision were substantive elements of the offense of kidnapping and are required to be submitted to the jury and proved beyond-a-reasonable-doubt. See also *State v. Bailey*, 319 P.3d 284 (Haw. 2013) (explaining, the State must establish beyond a reasonable doubt that a defendant did not voluntarily release the victim in a safe place).

The Kentucky Supreme Court's ruling in *Dixon* is contrary, however, to the Wyoming Supreme Court's ruling in *Rathbun v. State*, 257 P.3d 29, 39 (Wyo. 2011), wherein that court concluded "that the sentencing structure of Wyoming Statute 6-2-201(c) and (d), as previously interpreted by th[e] Court in *Loomer*, is a structure that is authorized by *Apprendi*." *Id.* Both state courts of last resort cannot be correct in their interpretation of *Apprendi*. The "safe-release" provision of these kidnapping statutes turn on the fact of whether or not the defendant voluntarily released the victim, substantially unharmed and in a safe place, prior to trial—and, this fact alone, establishes which grade and statutory penalty range applies, including, in Wyoming, whether the defendant faces a mandatory minimum and a lifetime statutory maximum. It is, as the Wyoming Supreme Court itself has described, the difference between a "kidnapping" and an "aggravated kidnapping." But, because at Harrell's trial the state never had to prove the facts underlying safe-release to establish this "aggravated" range of 20 years to life, rather, following *Loomer*, the

burden was placed on him, his trial violated the Sixth and Fourteenth Amendments as interpreted by *Alleyne*, *Apprendi*, and *Mullaney*.

In contrast, Group-B, which includes § 6-2-201, maintain that the use of the preponderance-of-the-evidence standard to impose extended terms of imprisonment does not violate the constitutional requirement that the State must prove each element of a crime beyond-a-reasonable-doubt—that due process is not violated by reallocating the burden of proof to the defendant with respect to the aggravating factual predicates in its safe-release provisions because their kidnapping statutes are interpreted as an affirmative defense with mitigating circumstances. See *Loomer*, 768 P.2d at 1047:

> "Therefore, the defendant has the burden of going forward with evidence to show that the circumstances exist. The burden of showing mitigating circumstances which are not an element of the offense may be placed on a defendant without violating due process requirements." *Patterson v. New York*, 432 U.S. 197 (1977)."

Cf. Apprendi, 530 U.S. 466, 472 (2000) ("the mere fact that a state legislature has placed a criminal component "within the sentencing provisions" of the criminal code "does not mean that [it] is not an essential element of the offense.")

> *State v. Kinney*, 762 A.2d 833; 2000 Vt. LEXIS 294 (2000) "Because the Legislature designated voluntary release as an affirmative defense, defendant has the burden of proof to establish it. In essence, the statute creates two different crimes: the crime of kidnapping with a maximum punishment of life in prison, and the crime of kidnapping with mitigating circumstances, with a maximum punishment of thirty years in prison."

State v. Davis, 683 A.2d 1 (Vt. 1996) ("conclud[ing] that the legislative allocation of the burden of proof in § 2405(b) is clearly permissible under the United States and Vermont Constitutions." (Citing *Patterson v. New York*, 432 U.S. 197 (1977).

The Ohio Supreme Court interprets R.C. 2905.01(C)(1) in the nature of an affirmative defense with mitigating circumstances. In *State v. Sanders*, 92 Ohio St.3d 245, 265 (2001), the court explained,

> "[i]f the kidnapper releases his victim unharmed in a safe place, that fact reduces the offense of kidnapping from a first-degree to a second-degree felony. R.C. 2905.01(C). It is not an element of the offense; rather, the accused must plead and prove it in the fashion of an affirmative defense."

In *State v. Becerra*, 263 Neb. 753 (2002), the court explained,

> "[b]ecause the *Apprendi* case was concerned only with cases involving an increase in penalty beyond the statutory maximum and did not apply to the mitigating factors in § 28-313, it was not improper for the district court to decide whether defendant should be sentenced to kidnapping as a Class IA felony instead of as a Class II felony based on the voluntary release of the victim."

Every statute in Group-B has grading and extended mandatory minimum terms of imprisonment, yet, they refuse to apply the new rule of constitutional law set forth in *Alleyne*. In fact, the Wyoming Supreme Court rejects the premise that §6-2-201 has gradation, *Loomer*, 768 P.2d at 1046 ("The statute defines a single crime, kidnapping, which carries a sentence of 20 years to life but provides for a reduced sentence based upon defendant's conduct subsequent to the kidnapping."), despite defining the crime as simple and aggravated kidnapping. See *Herrera v. State*, 64 P.3d 724, 725 (Wyo. 2003) (noting that plea agreement "reduce[d] the

'aggravated' kidnapping charged to 'simple' kidnapping, thereby reducing the possible sentence length"); Gould v. State, 151 P.3d 261, 264 & n.5 (2006) ("Wyo. Stat. Ann. § 6-2-201(a)(iii) and (d) (1988) set out the definition of aggravated kidnapping."); and Mcdermott v. State, 870 P.2d 339, 346-347 (Wyo. 1994):

> "The *enhancement portion* of the kidnapping statute provides: (d) If the defendant does not voluntarily release the victim substantially unharmed and in a safe place prior to trial, kidnapping is a felony punishable by imprisonment for not less than twenty (20) years or for life except as provided in W.S. 6-2-101."; *Cf. Apprendi*, 530 U.S. at 494, n.19. (Emphasis added)

Wyoming's under the misapprehension that it is well within its authority to interpret and apply § 6-2-201's sentencing enhancement provision, which provides for the most extreme punishment—a statutory mandatory minimum sentence of not less than 20 years and maximum of life—in a manner that reallocates the burden of proof, requiring the defendant to disprove the aggravating elements. But, in *Mullaney* 421 U.S. at 699, n.24 (1975), to the contrary noted, "[i]f *Winship* were limited to a State's definition of the elements of a crime, these States could define all [kidnappings] as a single offense and then require the defendant to disprove the elements of aggravation."

The Wyoming cases decided after *Loomer* reinforce what this actual *effect* of safe-release is—it is the "enhancement portion of the kidnapping statute," the sole factor in establishing which of the two radically different statutory penalties applies, including the 20-year-to-life penalty for an "aggravated" offense. If this Court interprets § 6-2-201 de novo, it will find that it leads clearly and inexorably to

the same interpretation—namely, that the question of safe-release quite plainly goes "to the length of [the] sentence." *Apprendi*, 530 U.S. 484 (citations omitted), and the factual basis set forth in § 6-2-201(d) clearly "increase[s] the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 483, 490, and, indeed, "triggers a mandatory minimum," *Alleyne*, 570 U.S. at 112.

The federal constitutional significance of that effect is plain—it means it is an element that must be submitted to the jury and proved beyond-a-reasonable-doubt. *See Alleyne*, 570 U.S. at 113-14, 116 (explaining that aggravating facts that trigger a mandatory minimum sentence and produce a higher sentencing range are "element[s] of a distinct and aggravated crime"); *Apprendi*, 530 U.S. 483-85, 494-95 & n.19 (explaining the elemental nature of facts that impact the length of sentence).

Group-B's processes forfeits significant constitutional protections for criminal defendants in the finding of material facts, including a sufficient standard of proof and jury fact-finding. These statutes effectively assume an aggravated crime was performed and then require a defendant to prove that it was not. It appears these schemes were adopted to manipulate statutory elements of graded kidnapping offenses in an effort to circumvent procedural protections and, until now, their resolve has proved successful. Under this concept, if continued, State legislatures will have effectively drafted their way around constitutional protections. This disobedience of federal law and the Constitution has a dramatic impact carrying with it serious consequences.

Patterson v. New York, 432 US 197 (1977) is not in line with *Apprendi* and its progeny. The semantic debate about whether a statutory fact is an "element of a crime" or a "sentencing factor", which has driven so much discussion in the past, is, in the end, an empty one. Wyoming's kidnapping statute establishes two levels of crime and two levels of sentencing based on the "safe-release" and "nonrelease" provisions. Because the punishment varies based on the absence or existence of those factual predicates, whatever name is given to these factors, when it deeply affects the defendant should be resolved by the jury. See *Apprendi*, 530 U.S. at 501-502, ("One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.").

The present case affords this Court the opportunity to embrace, fully as a constitutional principle, the rules it laid out in *Alleyne*, *Apprendi*, *Mullaney* and *Winship* and to demonstrate its sharp departure from *Patterson*. Whatever the precise limits of *Patterson*, the cloud which has continued to overhang affirmative defenses, mitigating circumstances and substantive elements of a crime, has yet to dissipate even in the face of *Apprendi* and *Alleyne*. As so far as this case raises the precise boundaries of *Patterson*, a resolution would promote stability and certainty in countless cases involving scores of statutes in this country. For that reason, the Court should grant the writ, and hear the merits of this case.

II. WYOMING STATUTE § 6-2-201's INCONSISTENT INTERPRETATIONS AND CONTRADICTORY APPLICATIONS ARE VAGUE, AND SO STANDARDLESS IT MUST BE STRUCK DOWN.

The Wyoming Supreme Court, the district courts and the State and county attorneys have saturated W.S. § 6-2-201 with inconsistent interpretations and contradictory applications, forming *intra-circuit* splits and dueling decisions over the past 35 years. *Silverwood v. Tokowitz*, 541 P.3d 446, 450 (Wyo. 2024) (explaining, "a statute is ambiguous if it is found to be vague or uncertain and subject to varying interpretations.").

This Courts void-for-vagueness doctrine prohibits the enforcement of vague laws because they contravene the first essential of due process of law by undermining the Constitution's separation of powers, handing responsibility for defining crimes to unaccountable prosecutors and judges. *Sessions v. Dimaya*, 584 U.S. 148, 175 (2018) (explaining, "vague laws . . . can invite the exercise of arbitrary power[,] . . . leaving [] people in the dark about what the law demands[,] and allow[] prosecutors and courts to make it up."). This is precisely what Wyoming's pulled off for three decades; they make it up as they go. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (explaining vague laws impermissibly delegates basic policy matters to judges and juries for resolution on an ad hoc and subjective basis). The requirement of clarity in regulation is essential to the protections provided by the due process clause of the Sixth Amendment. A *conviction or punishment* fails to comply with due process if the statute under which it is obtained is so standardless that it authorizes or encourages seriously discriminatory enforcement. As this Court explained, a statute is vague when it is *unclear as to what fact must be proved.* See *United States v. Williams*, 553 U.S. 285, 304-306 (2008).

A. Wyoming Statute § 6-2-201 Cannot Survive Constitutional Scrutiny of the Due Process Clauses and the Void-for Vagueness Doctrine.

Harrell contends Wyoming's kidnapping statute required him to prove an element in violation of the constitutional principles that require the state to prove each element of a crime beyond-a-reasonable-doubt. *In re Winship*, 397 U.S. 358 (1970). In the Tenth Circuit Court of Appeals, the majority acknowledged, *Hawes* made "colorable arguments" and further describes one of those arguments as having "some force." *Hawes v. Pacheco*, 7 F.4th 1252 (10th Cir. 2021). But the majority rejected *Hawes'* arguments because it found itself "constrain[ed]" by the Wyoming Supreme Court's interpretation of its kidnapping statute in *Loomer v. State*, 768 P.2d 1042 (Wyo. 1989). Indeed, as *Hawes* points out, the State's entire argument turned on the court of appeals deferring to *Loomer*. But after its 1989 decision in *Loomer*, the Wyoming Supreme Court frequently interpreted and applied its kidnapping statute inconsistently with *Loomer*. Because this Court should not blindly accept these inconsistencies, defer to all such differing interpretations, or select the interpretation it finds the most reasonable, this Court should conclude, it owes no deference to *Loomer* and interpret W.S. § 6-2-201 anew, unconstrained by any particular state-court interpretation. Under any de novo interpretation, Harrell's "colorable arguments" herein become much more: they succeed.

Quoted in full, Wyoming's kidnapping statute provides:

(a) A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business or from the vicinity where he was at the time of the removal, or if he unlawfully confines another person, with the intent to:

(i) Hold for ransom or reward, or as a shield or hostage;
(ii) Facilitate the commission of a felony; or
(iii) Inflict bodily injury on or to terrorize the victim or another.

(b) A removal or confinement is unlawful if it is accomplished:

(i) By force, threat or deception; or
(ii) Without the consent of a parent, guardian or other person responsible for the general supervision of an individual who is under the age of [14] or who is adjudicated incompetent.

(c) If the defendant voluntarily releases the victim substantially unharmed and in a safe place prior to trial, kidnapping is a felony punishable by imprisonment for not more than [20] years.

(d) If the defendant does not voluntarily release the victim substantially unharmed and in a safe place prior to trial, kidnapping is a felony punishable by imprisonment for not less than [20] years or for life except as provided in W.S. § 6-2-101.

Harrell will refer to the factual predicate in subsection (c) as "safe-release" and the mirror-image factual predicate in subsection (d) as "nonrelease." Interpreting this statute in *Loomer*, the Wyoming Supreme Court stated § 6-2-201 "defines a single crime, kidnapping, which carries a sentence of 20 years to life." 768 P.2d at 1046. In other words, according to *Loomer*, the crime of kidnapping involves subsections (a), (b), and (d). Subsection (a) describes criminal conduct, subsection (b) defines certain key terms in subsection (a), and subsection (d) provides the base sentence for the crime.

Yet, by its plain terms, subsection (d) provides more than just a base sentence, it also includes a factual predicate, stating that kidnapping is a felony subject to a 20-to-life sentence only "[*i*]*f* the defendant does not voluntarily release the victim substantially unharmed and in a safe place prior to trial." 6-2-201(d)

(emphasis added). Nevertheless, *Loomer* ignored that portion of subsection (d). *Id.* at 1046. But, the Wyoming Supreme Court did not explain in *Loomer* how the conditional clause in subsection (d) serves any function.

As a matter of statutory interpretation, *Loomer* is puzzling. In Wyoming, as in federal courts, "[e]very word in a statute must be given meaning." Keene v. State, 812 P.2d 147, 150 (Wyo. 1991); *see also* Moskal v. United States, 498 U.S. 103, 109 (1990) ("the established principle that a court should "'give effect, if possible, to every clause and word of a statute'"'). Yet *Loomer* seemingly ignored this principle in disregarding the factual predicate in subsection (d).

As for subsection (c), *Loomer* concluded that it "describes mitigating circumstances" that could "provide[] for a reduced sentence," *Id.* at 1046, of "not more than [20] years," 6-2-201(c). *Loomer* further held that the defendant bore the burden of proving these "mitigating circumstances," noting, the jury instruction at issue in that case had "incorrect[ly]" placed that burden on the state. *Id.* at 1047. Notably, the "mitigating circumstances" in subsection (c) are a mirror image of the factual predicate outlined in subsection (d): Both ask whether "the defendant voluntarily release[d] the victim substantially unharmed and in a safe place prior to trial." *Id.* at 1046. But according to *Loomer*, that mirror-image sentence has meaning in subsection (c), that is, it "describes mitigating circumstances" the defendant must prove; yet it has no meaning whatsoever in subsection (d), which describes only the base sentence of 20-years-to-life. And that base sentence actually

applies regardless of whether its factual question of "nonrelease" is answered. *Id.* at 1046-47 (noting state has no burden to prove factual conditions of nonrelease).

In any event, *Loomer* clearly held that § 6-2-201 describes a single crime of kidnapping. To prove this single crime, the state need only establish that the defendant's conduct satisfies subsections (a) and (b). If the state does so, the defendant is subject to the 20-to-life sentence provided in subsection (d); no proof of nonrelease is required, despite subsection (d)'s plain language stating otherwise. Thus, under *Loomer*, neither a crime of "aggravated kidnapping" under subsection (d) nor a crime of "simple kidnapping" under subsection (c) exists. There is only one crime, kidnapping. Relatedly, the state is never required to prove nonrelease in order to prove this single crime of kidnapping; nor is it required to prove nonrelease as an aggravating sentencing factor. Instead, safe-release is relevant only as a mitigating sentencing factor, and it must be proven by the defendant. Moreover, although the jury decides that fact, it relates only to the sentence and is not relevant to conviction itself, according to *Loomer*, *Id.* at 1046-47.

But a mere five years later, the Wyoming Supreme Court changed course in *McDermott v. State*, 870 P.2d 339 (Wyo. 1994). There, the state originally charged the defendant with "one count of kidnapping." *Id.* at 342-43. But at a later hearing, "the information was orally amended . . . to charge the kidnapping as an *aggravated* kidnapping because [the victim] had not been released by [the defendant] substantially unharmed." *Id.* at 343 (emphasis added). Charging "aggravated kidnapping" because the defendant did not safely release the victim directly

contradicts *Loomer*'s holding that kidnapping is only one crime in Wyoming and that nonrelease is not an element of that crime. Yet, the *McDermott* court affirmed the conviction, going so far as to characterize subsection (d) as "[*t*]*he enhancement portion* of the kidnapping statute," despite simultaneously reiterating *Loomer*'s statement that subsection (c) "describ[es] mitigating circumstances." *Id.* at 346-47 (emphasis added) (citing *Loomer*, 768 P.2d at 1046).

Additionally, the jury instruction at issue in *McDermott* specifically included nonrelease as one of "[t]he *necessary elements* of the crime of *aggravated* kidnapping" that the state was required to prove beyond-a-reasonable-doubt. *Id.* at 346 (emphases added). This is contrary to *Loomer*'s holding that safe-release is a mitigating circumstance to be proved by the defendant. But the *McDermott* court inexplicably approved the instruction as "legally correct." *Id.* at 347. Thus, despite giving *Loomer* lip service, the Wyoming Supreme Court in *McDermott* interpreted §6-2-201 in a manner directly contrary to that in *Loomer*.

Notably, in referring to nonrelease as both an element of aggravated kidnapping and a sentencing enhancement and in approving a jury instruction that places the burden on the state to prove nonrelease, *McDermott* appears to align with the statute as written, that is, it appears to recognize all of subsection (d) rather than only the sentencing portion of subsection (d).

And *McDermott* is not unique; many other post-*Loomer* Wyoming Supreme Court cases, none of which cite *Loomer*, involve charges of, convictions for, and pleas to aggravated kidnapping, a crime that does not exist post-*Loomer*. *See, e.g.*,

Bird v. State, 901 P.2d 1123, 1127 (Wyo. 1995) (noting that defendant pleaded guilty to "aggravated kidnapping"); *Kolb v. State*, 930 P.2d 1238, 1239-40 (Wyo. 1996) (explaining that jury convicted defendant of "aggravated kidnap[p]ing, [] 6-2-201(a)(iii)(d)"); *Gould v. State*, 151 P.3d 261, 264, n.5, 266-67 (Wyo. 2006) (explaining that subsections (a)(iii) and (d) "set out the definition of aggravated kidnapping," that defendant was convicted of "aggravated kidnapping," and it affirmed this conviction); *Moore v. State*, 80 P.3d 191, 193-94 (Wyo. 2003) (explaining, defendant "was originally charged with . . . two counts of aggravated kidnapping" but was instead convicted of "two counts of kidnapping" and sentenced within lower range of subsection (c)); *Herrera v. State*, 64 P.3d 724, 725 (Wyo. 2003) (describing plea agreement under which state agreed to "reduce the 'aggravated' kidnapping charge to 'simple' kidnapping, thereby reducing the possible sentence length"); *Winters v. State*, 446 P.3d 191, 196, 198, 219, n.20 (Wyo. 2019) (noting that state charged defendant "with aggravated kidnapping under . . . 6-2-201(a)(ii), (b)(ii), and (d)"; explaining that defendant "was actually convicted of aggravated kidnapping because the jury found [he] did not voluntarily release [victim] substantially unharmed and in a safe place prior to trial").

Similarly, the Tenth Circuit Court of Appeals described subsection (d) as "impos[ing] an enhanced punishment '[i]f the defendant does not voluntarily release the victim substantially unharmed and in a safe place prior to trial.'" *Daves v. Wilson*, 632 F. App'x 470, 474 (10th Cir. 2015) (unpublished) (quoting § 6-2-201(d)). Also, contrary to *Loomer*'s holding that kidnapping is a single crime comprising

subsections (a) and (b) and the sentence provided in subsection (d), a second set of contradictory post-*Loomer* cases involve kidnapping under subsection (c).

According to *Loomer*, subsection (c) is *only* a mitigating factor that can reduce a sentence. 768 P.2d at 1046-47. Thus, after *Loomer*, the state cannot charge or convict a defendant under subsection (c). But the state has routinely done just that, with the imprimatur of the Wyoming Supreme Court. For instance, in Dockter v. State, 396 P.3d 405, 407 (Wyo. 2017), the state charged the defendant "with kidnapping with voluntary release in violation of . . . 6-2-201." In *Hawes v. Pacheco,* 7 F.4th 1252, 1272 (10th Cir. 2021), the State asserted, *Dockter* "do[es] not make [a] distinction between" subsections (c) and (d) because it "analyz[ed] the elements of kidnapping without mentioning subsections (c) and (d)." But the State failed to explain how being charged "with kidnapping *with voluntary release*" could refer to anything other than kidnapping under subsection (c), a crime that, under *Loomer*, does not exist. *Dockter*, 369 P.3d at 407 (emphasis added).

And *Dockter* does not stand alone. Another example is Major v. State, 83 P.3d 468 (Wyo. 2004). There, the Wyoming Supreme Court explained that under the applicable plea agreement, the state had amended the charge for "kidnapping in violation of . . . 6-2-201 . . . (d)" to charge the defendant under subsection (c) in order "to reflect the fact that the victim had been released 'substantially unharmed.'" *Id.* at 470, 472 n.3. In a variety of other cases, none of which cite *Loomer*, defendants have been charged with, convicted of, or have pleaded guilty to kidnapping under subsection (c). *See, e.g.*, Eustice v. State, 871 P.2d 682, 683 (Wyo.

1994) (explaining, defendant pleaded guilty "to one count of kidnapping in violation of . . . 6-2-201(a)(ii), (b)(i), and (c)"); *Darrow v. State*, 824 P.2d 1269, 1269 (Wyo. 1992) (explaining, defendant was convicted of kidnapping under "[] 6-2-201(a)(i), (ii), (c)"); *Alcalde v. State*, 74 P.3d 1253, 1255-56 (Wyo. 2003) (stating, defendant was charged with and convicted of "kidnapping in violation of . . . 6-2-201(a)(iii), (b)(i), and (c)"); *Royball v. State*, 210 P.3d 1073, 1074 (Wyo. 2009) (explaining, state charged defendant with "kidnapping in violation of . . . 6-2-201(a)(i), (b)(i) and (c)"); *Appling v. State*, 377 P.3d 769, 769 (Wyo. 2016) (noting defendant pleaded guilty to "one count of kidnapping" and citing " 6-2-201(a)(iii) & (c)"). The Wyoming Supreme Court's multiple references to subsection (c) in these cases are at odds with *Loomer*'s designation of subsection (c) as mitigating circumstances to be proven by a defendant after that defendant is found guilty of kidnapping under subsections (a) and (b).

It is worth noting that in a subset of post-*Loomer* cases, the Wyoming Supreme Court has approved charges of, pleas to, convictions for, and sentences for kidnapping under subsection (c) when the facts, as recounted by the Wyoming Supreme Court, strongly suggests the defendant did not safely release the victim or victims. *See Volpi v. State*, 419 P.3d 884, 887-88, 892 (Wyo. 2018) (explaining, defendant repeatedly "attacked" the victim and the victim was "rescued by law enforcement," yet defendant was sentenced to eight to 16 years' imprisonment, a sentence possible only if defendant proved mitigating circumstances under subsection (c)); *Eustice*, 871 P.2d at 683 (noting guilty plea to kidnapping under

subsection (c) despite also explaining that defendant drove with victim, "continuing to beat her along the way," until law enforcement located them); *Moore*, 80 P.3d at 193-94 (explaining, jury convicted defendant of kidnapping, resulting in five to ten years' imprisonment for each count, but also noting that defendant repeatedly beat both victims until he "[e]ventually . . . tired" and "the beatings subsided"); *Major*, 83 P.3d at 470, 472 & n.3 (noting guilty plea to kidnapping under subsection (c) despite also explaining that victim was not "freed" until defendant was arrested); *Darrow*, 824 P.2d at 1269-70 (noting sentence within lower range but also explaining that victims "escaped"). Harrell acknowledges that some post-*Loomer* cases do not directly contradict its holdings. But, those cases only serve to further highlight the inconsistency of the Wyoming Supreme Court's interpretations and applications of its kidnapping statute.

In referring to "sufficient evidence," the Wyoming Supreme Court in *Doud* arguably implied contrary to *Loomer* that the burden of showing nonrelease was on the state. 845 F.3d at 408. A similar inconsistency appears in the court's statement that "[i]f the defendant fails to establish any one of the four elements contained in subsection (c), his crime *becomes punishable* by imprisonment for not less than [20] years." *Id.* at 407 (emphasis added). This statement suggests, again contrary to *Loomer*, that subsection (d) is not the base sentence.

Additionally, the State has relied on *Rathbun v. State*, 257 P.3d 29, 39 (Wyo. 2011) which references *Loomer* for the proposition that "[t]here is one crime kidnapping for which the maximum sentence is as stated in [s]ubsection (d)." *Id.*

Rathbun's reliance on *Loomer* doesn't permit the conclusion that *Loomer* is the single controlling interpretation of 6-2-201 for the simple reason that *Rathbun* dealt with an attempted kidnapping. *Id.* at 31. And, as the *Rathbun* court recognized, "where there has not been a completed kidnapping . . . the mitigating circumstances described in subsection (c) cannot occur." *Id.* at 38. *Rathbun* was sentenced to life.

- *Cf.* Silva v. State, 338 P.3d 934 (Wyo. 2014): *Rathbun* and *Silva* were both convicted of violating § 6-1-301(a)(i) and § 6-2-201(a)(iii). However, the district attorney in *Silva* pursued penalty provision (c) while *Rathbun* had (d) and the court sentenced *Silva* to a term of imprisonment of 12-15 years while *Rathbun* got the maximum of life without parole. Both *Rathbun* and *Silva* had KITE, C.J., and GOLDEN, HILL, and BURKE, JJ., decide their direct appeals.

Although *Rathbun* went on to opine that *Loomer*'s interpretation was constitutional *Id.* at 38-39, the United States Supreme Court is not bound by such a conclusion. See Cunningham v. California, 549 U.S. 270, 293 n.16 (2007) (rejecting argument that state court's "'construction' of [a state sentencing] law as consistent with the Sixth Amendment is authoritative," because state court's "interpretation of federal constitutional law plainly does not qualify for this Court's deference").

Tellingly, the State has never denied these inconsistencies, instead suggesting that the conflicting cases are outliers. But the sheer number of inconsistent cases and contradictory results suggests something much more than that. It reveals that the Wyoming Supreme Court has inconsistently interpreted and applied 6-2-201 over the past 30 years. *Loomer* said kidnapping was one crime comprising subsections (a) and (b), which, if met, required the sentence of 20 years to life in subsection (d); subsection (c) only provides mitigating circumstances. But

in the decades since, the state has consistently charged aggravated kidnapping under subsection (d). Further, the state has consistently charged kidnapping under subsection (c) and its accompanying lesser sentence, even though subsection (c), according to *Loomer*, concerns only mitigating circumstances. And notably, it appears from the above recitation of cases, the state is charging defendants with the nonexistent "aggravated kidnapping" charge under subsection (d) and then offering defendants reduced plea agreements to a similarly nonexistent "simple kidnapping" charge under subsection (c). Most importantly for the purposes of this Court, the Wyoming Supreme Court has repeatedly and consistently restated these facts and approved these convictions without mentioning *Loomer* or recognizing the seeming impossibility of such circumstances, post-*Loomer*.

It is true that state courts are the expositors of their own state law. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). However, when, as here, the state's highest court has interpreted its own state statute in an inconsistent and conflicting manner, this Court is not required to defer to any particular interpretation. Rather than ignore the inconsistencies or designate one interpretation as deserving of deference, Harrell asks the Court to review these cases, to ascertain for itself the significant inconsistencies in the interpretations and applications and to interpret the statute anew.

And, because it seems the Wyoming Supreme Court in *Loomer* " interpreted" its own state law by rewriting it, this case may also present the rare "extreme circumstance[]" in which federal courts are not "bound by the[] constructions" of

state courts. *Mullaney*, 421 U.S. at 691, n.11 (citing *Terre Haute & I. R. Co. v. Indiana*, 194 U.S. 579 (1904) as one such "rare occasion[]") ("The [charter's] language is plain. . . . The state court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation."). *Id.* at 587, 589. After all, a state's highest court should not be permitted to circumvent a defendant's constitutional rights by "interpreting" a statute to entirely ignore or erase an element or aggravating sentencing factor.

B. The Constitution's Protections

The State's entire argument rises and falls with *Loomer*. The State has never argued that the kidnapping statute was constitutionally applied to Harrell in the absence of *Loomer*'s supposedly controlling interpretation. Nevertheless, in the interest of clarity, Harrell will briefly explain why the kidnapping statute, interpreted de novo, violated his constitutional rights.

There are three possible interpretations of § 6-2-201. Under the first, subsection (d) provides the default penalty for the single crime of kidnapping, and nonrelease is an element of that crime. Under the second, subsections (c) and (d) create distinct crimes, and subsection (d) addresses "aggravated" kidnapping and its corresponding penalty. Under either of these interpretations, nonrelease is an element of either the single crime of kidnapping or the more specific crime of aggravated kidnapping that the state must prove beyond-a-reasonable-doubt. See *Winship*, 397 U.S. 358, 364 (1970).

Under the third interpretation, subsection (d) provides an aggravating factor through which the state may seek an enhanced penalty—an enhanced penalty that both increases the mandatory minimum from zero to 20 years and increases the statutory maximum from 20 years to life in prison. Here, too, the fact of nonrelease is one that must be proved by the state beyond-a-reasonable-doubt. *See Apprendi*, 530 U.S. at 476 (holding that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt" (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999))); *Alleyne*, 570 U.S. at, 111-16 (2013) (holding, any "facts increasing the mandatory minimum" must "be submitted to the jury and found beyond a reasonable doubt").

But in Harrell's case, the State was not held to its constitutionally mandated burden. No matter how § 6-2-201 is interpreted, the 20-to-life sentencing range in subsection (d) turns on the elemental factual predicate of nonrelease. But the Wyoming courts did not require the State to prove this factual predicate before sentencing Harrell within that range. Accordingly, under any of these interpretations, the result is the same: a violation of Harrell's constitutional rights. *See Winship*, 397 U.S. at 364; *Mullaney*, 421 U.S. at 685, 703; *Apprendi*, 530 U.S. at 476; and *Alleyne*, 570 U.S. at 115-16.

Because this Court cannot defer to all of the Wyoming Supreme Court's varying interpretations and contradictory applications and, because the statute, as

applied to Harrell, is vague and unconstitutional, for the foregoing reasons, this Court should grant the writ for certiorari and hear the merits of this case.

III. THIS COURT SHOULD RECONSIDER ITS DECISION IN *PATTERSON V. NEW YORK*, 432 U.S. 197 (1977).

In the Wyoming Supreme Court, Harrell challenged the district court's application of a 20 year mandatory minimum sentence to his conviction under Wyoming Statute § 6-2-201(d). The court rejected Harrell's claim because it said he was procedurally barred by *res adjudicata*. However, an illegal sentence or conviction cannot be grandfathered in. In a relatively recent case, the Supreme Court, in *Montgomery v. Louisiana*, 577 U.S. 190; 136 S. Ct. 718; 193 L. Ed. 2d 599 (2016) reiterated Justice Bradley, the author of *Ex parte Siebold*, 100 U.S. 371, 25 L. Ed. 717 (1880) and observed *Siebold* still has legs. The Court reiterated one of its earlier confirmations: "It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law." Under this rule, if a court errs in assuming jurisdiction where it does not possess it, or in interpreting a constitutional immunity or right secured by the Constitution or laws of the United States, thereby against the prisoner, or in refusing or depriving him a constitutional right, privilege or immunity, the jurisdiction over him ceases. Harrell alleged the district courts conduct violated rights guaranteed to him by constitutional, procedural and substantive elements of the Due Process Clauses of the Sixth and Fourteenth Amendments.

Albeit, a challenge to the constitutionality of a state statute is a threshold question, the Wyoming Supreme Court refused to conduct an unconstrained *de novo* review of its inconsistent interpretations and applications of § 6-2-201 so it may analyze its reliance on *Patterson* to determine whether or not *Alleyne* altered the courts stance with respect to *Patterson*. And, although the Wyoming Supreme Court lacked the power to overturn *Patterson*, because its principles have been seriously undermined by subsequent precedents and can no longer be reconciled with *Alleyne*, *Apprendi* and *Mullaney*, the time has come for this Court to do so.

Beginning with *Mullaney v. Wilbur*, 421 U.S. 684, 686, n.3 (1975), this Court considered whether Maine's murder statute met the constitutional due process requirement that the state must prove every element of a criminal offense beyond-a-reasonable-doubt. Under Maine law, murder required malice aforethought. Without malice aforethought, a "homicide would be manslaughter." *Id.* In practice, "if the prosecution established that the homicide was both intentional and unlawful, 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.* The Court found this burden shifting unconstitutional.

Like in *Mullaney*, in *Patterson*, the Court again considered the constitutionality of allocating a burden of proof to a criminal defendant. New York's homicide statute allowed a murder defendant "to raise an affirmative defense that he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." *Id.* (quotations omitted). "[T]he defendant had the burden of proving his affirmative defense by a preponderance of the evidence."

Id. at 200. Doing so would reduce the offense from second-degree murder to manslaughter. *Id.* at 198-99. This Court found the scheme constitutionally permissible. It "decline[d] to adopt as a constitutional imperative . . . that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." *Id.* at 210. The Court thus held that "the prosecution [must] prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged," but "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required." *Id.*

Nearly 25 years later, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court addressed what facts needed to be proved beyond-a-reasonable-doubt based on their sentencing impact. In *Apprendi*, the defendant pled guilty to a firearms offense that carried a maximum statutory punishment of 10 years in prison. *Id.* at 468-70. After the defendant entered his plea, the trial judge found by a preponderance-of-the-evidence that the defendant intended to intimidate his victims because of their race, and thus enhanced his sentence under a separate hate crime statute. *Id.* at 468-71. Under this statute, the defendant's maximum statutory punishment was 20 years. *Id.* at 469. The Court found the defendant's Sixth and Fourteenth Amendment rights had been violated. *Id.* at 476, 497. It stated: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

More recently, in *Alleyne v. United States*, 570 U.S. 99 (2013), the Court extended its *Apprendi* holding, Id. at 111-12, and overruled *Harris v. United States*, 536 U.S. 545 (2002), In *Alleyne*, a jury convicted the defendant of "using or carrying a firearm in relation to a crime of violence." *Id.* at 103-04. The statute of conviction required a mandatory minimum sentence of five years imprisonment, but if the firearm was "brandished," it required a mandatory minimum of seven years. *Id.* The jury's findings did not indicate that the firearm was "brandished."*Id.* at 104. But the sentencing judge determined it was, and thus applied the seven year mandatory minimum.

This Court found a constitutional violation. *Id.* at 117. "Apprendi concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Id.* at 111 (quoting *Apprendi*, 530 U.S. at 490). But "the principle applied in Apprendi applies with equal force to facts increasing the mandatory minimum." *Id.* at 112. "[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime." *Id.* at 114. And "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Id.* at 114-15. "Juries must find any facts that increase either the statutory maximum or minimum because the Sixth Amendment applies where a finding of fact both alters the legally prescribed range and does so in a way that aggravates the penalty." *Id.* at 113, n.2. "Because the finding of brandishing increased the penalty to which the defendant was subjected, it was an element, which had to be found by the jury beyond a reasonable doubt." *Id.* at 117. To

summarize, "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime. It must, therefore, be submitted to the jury and found beyond a reasonable doubt." *Id.* at 115-16.

The defendant in *Patterson* characterized *Mullaney* exactly as this Court did in *Apprendi.* In upholding a New York law allowing defendants to raise and prove extreme emotional distress as an affirmative defense to murder, the *Patterson* Court made clear that the state law still required the State to prove every element of that State's offense of murder and its accompanying punishment. However, § 6-2-201 does not operate in this same manner, rather, the Wyoming Supreme Court claims that the substantive elements in its sentencing provision (subsection (d)) are mitigating circumstances, regardless of its relationship to the punishment.

At the time *Apprendi* was decided, Justice O'Conner (dissenting) rejected the majorities position, explaining, that it was inconsistent with the Courts existing precedent and would require the Court to overrule, at a minimum, decisions like *Patterson* and *Walton v. Arizona*, 497 U.S. 639 (1990)) *Id.* 530 U.S. at 544. The principles of *Apprendi* and *Alleyne* are so firmly entrenched that this Court has now overruled several decisions inconsistent with them. See, e.g., *Hurst v. Florida*, 577 U.S. 92 (2016) (overruling *Hildwin v. Florida*, 490 U.S. 638 (1989); *Alleyne v. United States*, 570 U.S. 99 (overruling *Harris v. United States*, 536 U.S. 545 (2002); *Ring v. Arizona*, 536 U.S. 584 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)). Because *Apprendi* and *Alleyne* have been the law for some time, and because *Walton* and a host of others have been overruled, the time has come to

revisit *Patterson*. The dissenting Justices in *Apprendi* were correct in perceiving the logical and practical inconsistency of the plurality's position when comparing the principles of *Patterson* and *Mullaney*. *Patterson* is now an outlier and cannot be reconciled with the rule of *Apprendi* and its progeny.

With the development of *Alleyne* and *Apprendi*, and the overruling of *Harris*, and *Walton*, it is now irrelevant how the *Patterson* Court arrived at placing the affirmative defense label on "at least some elements" of traditional crimes because, as Justice Thomas has previously written, "a 'crime' includes every fact that is by law a basis for imposing or increasing punishment" - - "for establishing or increasing the prosecution's entitlement-it is an element." *Apprendi*, 530 U.S. at 501 (2000)(Thomas, J., concurring). Facts triggering mandatory minimum sentences "warrant constitutional safeguards" because as "a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense." See *United States v. O'Brien*, 560 U.S. 218 (2010) (Thomas, J., concurring). Indeed, in the context of § 6-2-201(d), the core crime and the factual predicates triggering the mandatory minimum sentencing enhancement provision constitutes a new, aggravated crime, *Alleyne*, 570 U.S. at 113, those factors effectively increase the sentence Harrell would otherwise receive, based on the facts proved to a jury, beyond-a-reasonable-doubt.

The incompatibility between *Patterson* and *Mullaney* and the *Apprendi* line of cases, *Patterson* is now positioned as the clear outlier among these decisions. Only this Court can harmonize this line of authority, and it can only do so by overruling *Patterson*. As Justice O'Conner said outright in *Apprendi*, especially now

following *Alleyne* and, the overruling of numerous cases, *Patterson* is ripe to be revisited and this case offers the Court an excellent vehicle to overturn *Patterson.*

A. This case and the controversial split amongst State Courts of Last Resort present an ideal vehicle for overruling *Patterson.*

The underlying issue was raised in Harrell's state habeas corpus petition, the State of Wyoming had the opportunity to litigate the constitutionality of its statute, the manner in which the state obtained a conviction and the constitutionality of Harrell's detention but has refused to do so.

The fact that the jury never found Harrell guilty of the crime in aggravation, only to have the court apply a mandatory minimum sentence (20 to life) anyway, places this case in the perfect posture for this Court to revisit *Patterson* should the Court wish to use a kidnapping/aggravated kidnapping case to overrule its prior decision. And, because this case involves both the "floor," and the "ceiling," it presents the issue in a relatively clean fashion, for example, the Court need only look to the definitions of the § 6-2-201 (c) and (d) (simple and aggravated kidnapping), where the finding affects both the minimum and maximum sentence.

Additionally, it is clear from the record that the district court only applied the twenty year mandatory minimum because Harrell did not disprove the aggravating factual predicates in subsection (d) by a preponderance-of-the-evidence, as countenanced in *Patterson.* Thus, the court did not understand the primacy of the jury's role that is at the heart of *Apprendi* and its progeny. After the court found that a mandatory minimum sentence of not less than 20 years applied, it sentenced Harrell to a 20 year mandatory minimum and up to a maximum of life

imprisonment. On this record, it would be impossible for the Court to impose a sentence of more than 20 years, if the aggravating enhancement did not apply. Therefore, the issue is dispositive in this case and likely to lead to significant relief for Harrell if the Court rules in his favor.

Patterson was wrongly decided and should be overruled. Until the Supreme Court of the United States provides direction, grave constitutional error affecting the most fundamental of rights will persist. For the reasons given above, this Court should grant the writ for certiorari and hear the merits of this case.

CONCLUSION

Based on the foregoing, it is requested, § 6-2-201 be declared unconstitutional and struck down; or that the 20 year to life term of imprisonment for Aggravated Kidnapping be overturned, and this case be remanded to the trial court for either resentencing or, a jury trial on the issue of whether there is proof beyond-a-reasonable-doubt that Harrell committed the crime of Aggravated Kidnapping.

Respectfully submitted,

Signed_____, Dated this June 11, 2025

Christopher D. Harrell, *pro se*

CERTIFICATE OF FILING AND SERVICE

The undersigned, hereby affirm and certify, under the penalty of perjury, pursuant to 28 USC § 1746 and 18 USC § 1621, that I placed this PETITION FOR WRIT OF CERTIORARI with first-class postage prepaid in the prison mail system on June 11, 2025 to:

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