No. 22-5019

IN THE

Supreme Court of the United States

AMBER RENEE GUYGER,
Petitioner,

v.

TEXAS,
Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals for the
Fifth District of Texas at Dallas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

A jury convicted Petitioner Amber Renee Guyger of murder and assessed her punishment at ten years' confinement. The Court of Appeals for the Fifth District of Texas at Dallas (the Dallas COA) affirmed Guyger's conviction, and the Texas Court of Criminal Appeals (the TCCA) refused her petition for discretionary review. In her petition for certiorari review of the Dallas COA's decision, Guyger presents one question:

> Texas law provides a mistake-of-fact defense that applies only when a defendant's mistaken belief about a matter of fact negated the required culpable mental state for the charged offense. When conducting a legal-sufficiency review under *Jackson v. Virginia*, does a state intermediate appellate court violate a murder defendant's due process rights by concluding that a mistake-of-fact defense cannot be incorporated into a self-defense theory in an attempt to justify what was otherwise an unjustified and admittedly intentional killing?

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BRIEF IN OPPOSITION

On the evening of September 6, 2018, 26-year-old Botham Jean was in his own apartment and had just sat down on his living-room couch to eat a bowl of ice cream when Petitioner Amber Guyger, an off-duty Dallas Police Officer who lived in the apartment directly below Jean's, opened his front door and shot him. Guyger claimed that she shot Jean because she thought that Jean's apartment was hers, that Jean was an intruder, and that he was going to kill her. The trial court's charge to the jury included instructions on two separate statutory defenses under the Texas Penal Code: mistake of fact and self-defense. The jury rejected both defenses, convicted Guyger of murder, and assessed her punishment at ten years' confinement.

Guyger appealed her conviction to the Dallas COA, arguing that the evidence was legally insufficient to support the jury's guilty verdict and implicit rejection of her defensive theories. Applying the legal-sufficiency standard set out by this Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), the Dallas COA overruled Guyger's arguments and affirmed the trial court's judgment in an unpublished opinion. Guyger then petitioned the TCCA for discretionary review of the Dallas COA's decision. The TCCA refused Guyger's petition with two justices joining in a published dissent.

Guyger now petitions this Court for a writ of certiorari, arguing that the Dallas COA violated her right to due process by not considering the defensive issue of mistake of fact in its *Jackson* sufficiency review after deciding that, because there was no evidence of a mistake that negated Guyger's intent to kill Jean, Texas law did not permit her to claim mistake of fact as a defense to murder. This Court should

deny Guyger's petition because (1) the Dallas COA's decision that the evidence in this case did not raise the mistake-of-fact defense was based on a fact-specific application of state statutory law and involved no federal question; (2) Guyger did not present her due process claim to the state courts; and (3) there is nothing unconstitutional about keeping different statutory defenses separate. Guyger's disagreement with the result below does not compel certiorari review.

STATEMENT OF THE CASE

I. The Trial

A. The murder of Botham Jean

The Dallas COA accurately summarized the evidence presented at the guilt phase of Guyger's trial:

> In July 2018, Guyger moved to the Southside Flats Apartments in Dallas where she lived alone in apartment 1378. Residents of the apartment complex use key fobs rather than traditional keys to unlock their apartment doors. The complex has a multilevel garage with entrances on each floor. Each hallway entrance lacks any placard or other indicator showing which floor of the complex the hallway accesses or which floor of the garage can be accessed by exiting the hallway.
>
> On September 6, 2018, Guyger, a Dallas police officer, left work at 9:33 p.m. Guyger and her partner Martin Rivera exchanged texts about getting together later that evening. Rivera called Guyger at 9:38 p.m., and she was on the phone with him at 9:46 p.m. when she pulled into the parking garage at her apartment complex. Guyger continued speaking to Rivera until almost 10:00 p.m.
>
> Guyger testified that, when she parked in the garage, she believed she was on the third floor. She did not notice the garage roofline on the fourth floor was different from the roofline on the third floor. As Guyger walked down the hallway on the fourth floor, she believed she was on the third floor where her apartment was located. When she reached apartment 1478, she believed she was outside her own apartment. Guyger testified that, while she was standing outside the apartment, she heard loud shuffling, like someone was walking inside.

Guyger admitted that, before she opened the door, she concluded there was a threat inside the apartment; however, she did not take a position of cover and concealment or call for backup.

The door was ajar and not latched closed. Guyger turned her key fob in the lock, which opened the door farther. Using her left arm, Guyger pushed open the door. Guyger testified these events occurred in the span of two seconds. There was no light on inside the apartment, but Guyger said she "heard moving around inside" and was "scared to death."

Guyger testified she dropped her police vest and other equipment in front of the door to keep the door propped open. Looking into the apartment, which had the same floor plan as her apartment, she saw a "silhouette figure" standing in the back of the apartment. From where she was standing near the doorway, she could not see the figure's hands. Guyger pulled her weapon and yelled, "Let me see your hands. Let me see your hands." According to Guyger, the figure walked towards her at a fast pace, yelling "hey, hey, hey" in "an aggressive voice." Guyger was focused only on the figure—Botham Jean, the lawful inhabitant of apartment 1478—and she testified she believed he was going to kill her. Guyger fired two shots at Jean, intending, in her words, "to kill him." One round struck the south wall of Jean's apartment, and the other struck Jean in the chest. Jean fell to the ground with his feet pointed away from the couch on which he had been sitting and his head close to an ottoman and couch.

When Guyger walked into the kitchen, she saw the interior of the apartment and realized she was not in her apartment. Confused, Guyger knelt next to Jean. She knew she had shot him, but she did not know where the bullet hit him. At 9:59 p.m., Guyger called 911 with the phone in her right hand. She testified that, at the same time, she began chest compressions on Jean with her left hand. She identified herself as a police officer to the 911 operator, requested an "officer assist," and repeatedly told the operator she thought she had shot someone in what she believed was her apartment. She did not know where she was and went out in the hallway to look at the apartment number so she could provide that information to the operator. While on the phone with the operator, Guyger performed a sternum rub, which she had seen paramedics perform to wake up someone who is unconscious. From the five-minute 911 recording, the jury heard Guyger say twenty times she thought she was in her own apartment. They also heard her say, "stay with me, Bud," several times, "I f***ed up," and "I'm gonna lose my job."

In response to Guyger's "officer assist" call, officers Keenan Blair and Michael Lee were the first to arrive at Jean's apartment. Guyger directed the officers into apartment 1478. As reflected in body camera video, Lee instructed Guyger to move away from Jean as he and then Blair performed CPR on Jean, who was alive but unconscious. Lee's body camera video showed Jean bleeding from a gunshot wound and Guyger saying repeatedly that she had shot Jean.

When paramedic John Farleigh arrived at Jean's apartment at 10:08 p.m., Dallas police officers were performing CPR on Jean, but he had no pulse and was not breathing. The paramedics took over first aid from the officers and transported Jean to Baylor Medical Center, where he died without regaining consciousness.

Detective Eduardo Ibarra testified that a blood test was performed on Guyger at approximately 3:00 a.m. No drugs or alcohol were detected in Guyger's blood. Ibarra also seized all parts of Guyger's uniform for lab analysis of any biological evidence on the uniform. No blood was found on her uniform, and none of the latex gloves Guyger carried while on duty that day had been used.

Detective Dale Richardson testified that he arrived on the scene around 11:10 p.m. and initially met with Ibarra. After receiving a search warrant, Richardson located a set of keys hanging from the door that he believed were Guyger's. The jury saw video evidence demonstrating how the locking mechanism on the doors worked. A small blinking red light lit up when the wrong fob was inserted, but a small blinking green light lit up and the door electronically unlocked when the correct fob was inserted. Video of Richardson and Ibarra comparing use of Guyger's key and Jean's key was also played, which demonstrated that when inserted into the door of apartment 1478, Guyger's key generated a red light and would not activate the lock, but Jean's key generated a green light and made a "whirring sound" while it unlocked the door.

The Texas Rangers took over the investigation from the Dallas Police Department the day after the shooting, met with Ibarra and Richardson, and reviewed the evidence collected by DPD. Texas Ranger David Armstrong characterized the layout of the apartment complex as "confusing" and discovered that about 23% of residents who lived on the third and fourth floors and 15% of residents in the entire building had, at some point, put their key fob in the wrong door. Armstrong testified residents gave numerous reasons why they realized they were in the wrong place: the red blinking light on the door lock, nearby decorations indicating a different resident's apartment, or an incorrect apartment

number. In the same vein, several residents testified about having gone to the wrong floor or apartment.

April Kendrick, a supervisor of the firearm and tool mark unit at the Southwestern Institute of Forensic Sciences, confirmed the shell casings found in Jean's apartment were fired from Guyger's nine millimeter pistol. Kendrick also testified that the bullet trajectory indicated Jean may have been bent over and rising from the couch when he was shot. Testimony from the medical examiner, Dr. Chester Gwin, revealed that Jean died from the single gunshot to his chest. The bullet entered his chest just above his nipple and traveled on a steep trajectory downward through his left lung, heart, diaphragm, stomach, and intestine, stopping in a muscle in his left abdomen near his spine. Dr. Gwin explained the bullet's path indicated that either the shooter was standing over Jean and shooting down, or Jean was lying down or bent forward, in the process of getting up from the couch or ducking. Guyger could not explain the inconsistency between her testimony that Jean was standing straight up and moving toward her when she shot him and the bullet trajectory evidence indicating Jean was shot from above or while in the process of getting up or ducking.

Texas Ranger Michael Adcock testified about the trajectory of the bullet that hit the back wall in Jean's apartment. The flight path of that bullet indicated it had been fired from the doorway, which was also confirmed by gunshot residue recovered on the doorframe.

Guyger v. State, No. 05-19-01236-CR, 2021 WL 5356043, at *1–3 (Tex. App.—Dallas Nov. 17, 2021, pet. ref'd) (not designated for publication).

B. The jury charge

The trial court instructed the jury that Guyger was guilty of murder as charged in the indictment if she (1) intentionally or knowingly caused Jean's death by shooting him with a firearm; or (2) intended to cause serious bodily injury to Jean and committed an act clearly dangerous to human life by shooting him with a firearm,

thereby causing his death. (8 C.R.[1] at 2331, 2559). *See* Tex. Penal Code Ann. § 19.02(b)(1)–(2). The trial court further instructed the jury that Guyger's conduct in shooting Jean with a firearm was justified under the law of self-defense if she reasonably believed her use of such deadly force was immediately necessary to protect herself against Jean's use or attempted use of unlawful deadly force or his imminent commission of one of a number of enumerated violent felonies, including murder. (8 C.R. at 2561–65). *See* Tex. Penal Code Ann. § 9.32(a). As to whether Guyger had any duty to retreat before resorting to the use of deadly force, the charge instructed the jury that no such duty existed if, among other factors, Guyger had "a right to be present at the location" where she used the deadly force. (8 C.R. at 2563–64). *See* Tex. Penal Code Ann. § 9.32(c).

Directly following the instructions on self-defense and over the State's objections, the court's charge also included what purported to be an instruction on the statutory defense of "mistake of fact" under Texas Penal Code section 8.02. (8 C.R. at 2491–96, 2565–67). Tex. Penal Code Ann. § 8.02(a). This instruction told the jury that if it found beyond a reasonable doubt that Guyger committed murder, it must nevertheless find her not guilty if it also found that she reasonably yet mistakenly believed she was in her own apartment and Jean was an intruder. (8 C.R. at 2565–67).

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[1] "C.R." refers to the clerk's record from Guyger's trial and is preceded by the volume number and followed by the relevant page number.

The jury returned a general verdict, finding Guyger guilty of murder as charged in the indictment. (8 C.R. at 2553).

II. The Appeal

A. Proceedings in the Dallas COA

On appeal, Guyger argued that the evidence was legally insufficient to support the jury's guilty verdict. *Guyger*, 2021 WL 5356043, at *3. Applying the *Jackson v. Virginia* legal-sufficiency standard, the Dallas COA first held that Guyger's testimony that she intended to kill Jean when she shot him supplied sufficient evidence for a rational jury to find that she committed murder. *Guyger*, 2021 WL 5356043, at *4. Turning to the sufficiency of the evidence to support the jury's rejection of Guyger's defensive theories,[2] the Dallas COA held that the trial court should not have instructed the jury on the mistake-of-fact defense because no evidence raised it. *Id.* at *4–5. Thus, because a mistake-of-fact instruction would not have been part of the "hypothetically correct jury charge"[3] under the facts of this case,

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[2] Both self-defense and mistake of fact are "defenses" under the Texas Penal Code. *See* Tex. Penal Code Ann. §§ 2.03(a), 8.02(a), 9.02. When a defensive issue is raised by the evidence, regardless of the strength of that evidence, the State has the burden of persuasion to disprove the defense beyond a reasonable doubt. *Braughton v. State*, 569 S.W.3d 592, 608 (Tex. Crim. App. 2018); *Saxton v. State*, 804 S.W.2d 910, 913 (Tex. Crim. App. 1991); *see also* Tex. Penal Code Ann. § 2.03(c)–(d). This burden of persuasion does not require the State to produce evidence; it requires only that the State prove its case beyond a reasonable doubt. *Braughton*, 569 S.W.3d at 608–09; *Saxton*, 804 S.W.2d at 913.

[3] Texas courts employ the hypothetically-correct-jury-charge construct in analyzing legal sufficiency under *Jackson*. *See Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997); *cf. Musacchio v. State*, 577 U.S. 237, 243 (2016) (holding that a legal-sufficiency review does not rest on how the jury was instructed at trial but on how a properly instructed jury would have assessed the evidence). A hypothetically correct jury charge is one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Malik*, 953 S.W.2d at 240.

the Dallas COA excluded mistake of fact from its sufficiency analysis and addressed only whether the evidence was sufficient, under *Jackson,* to support the jury's rejection of Guyger's other defensive theory, self-defense. *Guyger*, 2021 WL 5356043, at *5–6. After discussing all the evidence that would have allowed a rational jury to find beyond a reasonable doubt that Guyger did not reasonably believe her use of deadly force against Jean was immediately necessary, the court held that the evidence was sufficient and affirmed Guyger's conviction. *Id.* at *6–7.

In concluding that the evidence at Guyger's trial did not raise the mistake-of-fact defense, the Dallas COA relied on the plain language of the relevant statute, as it has been interpreted by the TCCA. *Id.* at *4–5. Mistake of fact is a general defense to criminal responsibility that applies when the defendant formed a reasonable-yet-mistaken belief about a matter of fact, and that mistaken belief "negated the kind of culpability required for commission of the offense." Tex. Penal Code Ann. § 8.02(a). The TCCA has held that "kind of culpability" means the statutory culpable mental state for the charged offense.[4] *Celis v. State*, 416 S.W.3d 419, 430 (Tex. Crim. App. 2013); *Granger v. State*, 3 S.W.3d 36, 41 (Tex. Crim. App. 1999). Thus, reasoned the Dallas COA, the mistake-of-fact defense would apply in this case only if there were some evidence that at the time she shot Jean, Guyger held a mistaken belief that, if

[4] Thus, for instance, a murder defendant who shot into an occupied car while believing it to be empty would be entitled to a mistake-of-fact instruction under Texas law since the defendant could not have intentionally or knowingly caused the victim's death or intended to cause serious bodily injury to the victim if he did not know the victim was in the car. *See Granger*, 3 S.W.3d at 41.

accepted as true, negated her intent to cause Jean's death. *Guyger*, 2021 WL 5356043, at *4.

Noting the distinction between mistake-of-fact and self-defense—a justification defense that appears in a different chapter of the penal code—the court held that Guyger's alleged reasonable-yet-mistaken beliefs that she was in her own apartment and that Jean was intruder did not negate her admitted intent to cause Jean's death when she shot him. *Id.* at *4–5; *see* Tex. Penal Code Ann. §§ 9.02, 9.31–.32. Instead, the court held, any mistaken beliefs Guyger held about the circumstances that existed at the time of the shooting were relevant only to a determination of whether her conduct was justified by self-defense. *Guyger*, 2021 WL 5356043, at *5.

In analyzing the sufficiency of the evidence to support the jury's rejection of Guyger' self-defense claim, the Dallas COA rebuffed what it saw as Guyger's attempt to "bootstrap[]" the statutory mistake-of-fact defense to reach a presumption, under the self-defense statute, that her belief in the immediate necessity of using deadly force against Jean was reasonable. *Id.* at *6; *see* Tex. Penal Code Ann. § 9.32(b). After reviewing the evidence, the Dallas COA concluded that a rational jury could have found beyond a reasonable doubt that the presumption did not apply and that Guyger's belief that deadly force was immediately necessary was not reasonable. *Id.* at *6–7.

B. Proceedings in the TCCA

In her petition for discretionary review in the TCCA, Guyger asserted that in overruling her legal-sufficiency challenge, the Dallas COA erroneously held that the

mistake-of-fact defense could not "coexist" with a claim of self-defense. Petition for Discretionary Review at 16, 27, *Guyger v. State*, No. PD-0918-21, 2022 WL 945798 (Tex. Crim. App. Mar. 30, 2022). She argued that Texas courts should construe "kind of culpability" under the mistake-of-fact statute to encompass concepts of general blameworthiness or guilt that are broader than just the elemental culpable mental state required for a particular offense. Petition for Discretionary Review at 18–23, 30–31. According to Guyger, her mistaken belief that she was in her own apartment and that Jean was an intruder negated her culpability for murder because she acted without evil intent or improper motive and because, had the circumstances been as she mistakenly believed them to be, she would have been justified in shooting and killing Jean. Petition for Discretionary Review at 25–29, 32–34. The TCCA refused Guyger's petition without comment. *Guyger*, 2022 WL 945798, at *1.

In a dissenting opinion, two justices argued that the TCCA should grant the petition to decide whether the Dallas COA "was correct to regard the two defenses [of mistake of fact and self-defense] as mutually exclusive and to conduct its sufficiency analysis as if they were." *Id.* at *2 (Yeary, J., joined by Slaughter, J., dissenting). According to the dissent, the TCCA has "never authoritatively decided" whether culpable-metal-state negation "is the *exclusive* context in which mistake of fact might be available under the language of Section 8.02(a) of the Penal Code." *Id.* And, the dissent argued, the TCCA has never addressed "whether the defense of mistake of fact may be applied to mental-state components of statutory defenses, such as self-defense." *Id.* at *3. The dissent posited that the Dallas COA might have resolved

Guyger's legal-sufficiency claim differently if the hypothetically correct jury charge for this case would have applied the mistake-of-fact defense to both the reasonable-belief and duty-to-retreat components of self-defense. *Id.* at *4. This, the dissent reasoned, is because the lower court could not have rejected Guyger's self-defense claim based "on nothing more than" her failure to retreat from what was undisputedly not her apartment—and therefore not a location at which she had a right to be—without also considering whether she reasonably yet mistakenly believed she *was* in her own apartment. *Id.*

REASONS FOR DENYING THE PETITION

No compelling reason exists for this Court to grant certiorari review in this case. The court below did not pass upon a federal issue when it held that state law precluded Guyger from asserting mistake of fact as a defense to an admittedly intentional killing. Guyger's unsuccessful attempt to make a constitutional issue out of her disagreement with the state court's fact-bound and state-law-grounded decision does not warrant the Court's attention. The petition should be denied.

I. The Issue Decided Below Was a State-Law Matter Over Which This Court Has No Jurisdiction.

This Court "hold[s] no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Smith v. Phillips*, 455 U.S. 209, 221 (1982). Thus, this Court will not address a federal question if the state court's decision rests on grounds that are independent of the federal issue and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This rule applies whether the state-law ground is substantive or procedural,

and in the context of direct review of a state-court judgment, the rule is jurisdictional. *Id.*

In concluding that Guyger was not entitled to a mistake-of-fact instruction in the jury charge—and therefore that the mistake-of-fact issue would not be part of its sufficiency analysis—the Dallas COA applied well-established state-court precedent to the unique facts of this case. Its decision on this issue was entirely grounded in state law, specifically, Texas's mistake-of-fact statute and the caselaw interpreting it. *Guyger*, 2021 WL 5356043, at *4–5. This Court has recognized that state courts are the "ultimate authority" on issues involving the interpretation of state laws. *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015). Guyger's disagreement with the Dallas COA's interpretation and application of state law is not a federal issue on which this Court's jurisdiction may rest. Merely labeling an allegedly erroneous state-court decision a due process violation does not create a federal question. *See Gryger v. Burke*, 334 U.S. 728, 731 (1948) ("We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.").

Nor does the fact that the Dallas COA decided the mistake-of-fact issue in the context of addressing Guyger's legal-sufficiency challenge alter the fundamental state-law character of the court's decision. Guyger frames her Question Presented as a claim that the state court violated her due process rights under *Jackson v. Virginia* by not considering both mistake of fact and self-defense in its sufficiency analysis. (Pet. at i, 13). But her actual argument is not that the Dallas COA misstated or even

misapplied the *Jackson* standard. Instead, her argument is that the Dallas COA erroneously decided, as a matter of state law, that mistake of fact was not an available defensive issue in this case and the State therefore had no burden of proof on that issue. (Pet. at 13–14). *See Shaw v. State*, 243 S.W.3d 647, 658 (Tex. Crim. App. 2007) (holding that whether a defensive issue is raised by the evidence is a question of law). That unquestionably state-law-grounded decision is unassailable on certiorari, and Guyger's invocation of *Jackson* does not transform a purely state-law issue into a federal one. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court . . . ."). The Court must deny Guyger's petition.

II. Guyger Did Not Raise Her Constitutional Complaint in the Courts Below.

Even if Guyger's petition presents a federal question, it is a question that was neither raised nor addressed during the state-court appellate proceedings. This additional jurisdictional—or, at the very least, prudential—reason compels denial of certiorari in this case.

This Court has the authority to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any. . . right . . . is *specially set up or claimed* under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. § 1257(a) (emphasis added); *see Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (per curiam). The 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 that rendered the decision we have been asked to review.'" *Howell*, 543 U.S. at 443 (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam)). And the Court has a "long line of cases clearly stating" that the failure to present the federal claim in state court is a jurisdictional bar to review on certiorari. *Id.* at 445; *see also Heath v. Alabama*, 474 U.S. 82, 87 (1985). This Court has also recognized, as a prudential matter, that "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams*, 520 U.S. at 90 (quoting *Webb v. Webb*, 451 U.S. 493, 500 (1981)).

Guyger has done nothing to meet her burden of showing that she properly presented her federal claim in state court. *See id.* at 86–87. Tellingly, her petition fails to comply with this Court's Rule 14.1(g)(i), which requires that a petition for review of a state-court judgment specify when and how the federal question sought to be reviewed was raised and addressed in the state-court system "so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." Sup. Ct. R. 14.1(g)(i). Guyger's petition contains no such information about the due process issue she presents here because she never raised that issue in state court, nor did the state courts address it.

Nothing excuses Guyger's failure to meet the presentation requirement. Although she might not have been expected to argue in her initial briefing to the

Dallas COA that due process entitled her to a sufficiency review that included the mistake-of-fact issue (since the trial court had instructed the jury on mistake of fact), she could have raised this claim in her reply brief in response to the State's argument that mistake of fact did not apply in this case. And she certainly could have raised the issue in a motion for rehearing after the Dallas COA issued its opinion. But she did neither of those things. In fact, in her reply brief, Guyger reiterated that "[t]his case is about mistake of fact under Tex. Penal Code § 8.02 . . . and its relationship with whether Guyger's belief that her use of deadly force was reasonable and immediately necessary." Guyger's Reply Brief at 5, *Guyger*, No. 05-19-01236-CR, 2021 WL 5356043. The Dallas COA could therefore have reasonably believed it was presented with a state-law issue regarding the interplay, if any, between the statutory defenses of mistake of fact and self-defense, and that the only due process issue before it was whether the evidence was sufficient to prove all the elements of murder—as defined under Texas law—beyond a reasonable doubt. *See Adams*, 520 U.S. at 89 (considering, in holding that the petitioner's federal due process claim did not satisfy the presentation requirement, that the petitioners did not address the due process issue in their reply brief after the respondents raised the issue in their briefing to the state court).

Even in her briefing to the TCCA, Guyger never argued that the Dallas COA's decision that the mistake-of-fact defense did not apply in this case—and the court's resulting exclusion of the mistake-of-fact issue from its sufficiency analysis—violated her right to due process. *See* Petition for Discretionary Review, *Guyger*, No. PD-0918-

21, 2022 WL 945798. Indeed, she never mentioned "due process," or any constitutional provision, in her petition for discretionary review. Guyger's failure to raise her constitutional claim at any point in the state-court appellate proceedings is fatal to her petition for certiorari review, "because even treating the rule as purely prudential, the circumstances here justify no exception." *Adams*, 520 U.S. at 90. The Court should deny Guyger's petition.

III. Guyger Fails to Show a Constitutional Violation.

In her attempt to manufacture a basis for certiorari, Guyger asserts that the Dallas COA decided that self-defense and mistake of facts "are mutually exclusive and cannot be considered simultaneously in a legal sufficiency review if the facts support consideration of both." (Pet. at 13). But this assertion—the entire premise of Guyger's due process claim—misconstrues the Dallas COA's holding. The Dallas COA did not decide that mistake of fact can never coexist with self-defense; it simply held that the evidence *in this case* did not raise mistake of fact. Guyger's argument thus collapses at the outset.

A. The *Jackson* standard

The Due Process Clause of the Fourteenth Amendment protects an accused from criminal conviction "except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson*, 443 U.S. at 316; *see In re Winship*, 397 U.S. 358, 364 (1970). The relevant question in reviewing the sufficiency of the evidence to support a conviction "is whether, after viewing the evidence in the light most favorable to the

prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.

While *Jackson* announced a federal constitutional standard for appellate review of evidentiary-sufficiency challenges, it also reaffirmed the well-established rule that defining and interpreting crimes and defenses is generally the province of state legislatures and state courts. *See id.*; *see also, e.g.*, *Bradshaw*, 546 U.S. at 76; *Patterson v. New York*, 432 U.S. 197, 201–02, 210–11 (1977). Responding to concerns that the constitutional standard it laid out would "invite intrusions upon the power of the States to define criminal offenses," the *Jackson* Court instructed that the standard "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324 n.16.

B. Mistake of fact and self-defense in Texas

Mistake of fact and self-defense are separate defensive issues in different chapters of the Texas Penal Code. Mistake of fact appears in chapter 8 of the penal code, a chapter entitled *General Defenses to Criminal Responsibility*:

> It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense.

Tex. Penal Code Ann. § 8.02(a). "Kind of culpability" means the culpable mental state for the charged offense. *Celis*, 416 S.W.3d at 430; *see also* Tex. Penal Code Ann. § 6.02 (requiring "culpability" to establish criminal responsibility and setting out four distinct culpable mental states—intentional, knowing, reckless, and criminal negligence). The required culpable mental state for murder, as charged in this case, is intent or knowledge. *See* Tex. Penal Code Ann. § 19.02(b)(1). Because murder is a

"result of conduct" offense, the culpable mental state relates to the result of the defendant's conduct—causing the death of an individual. *Cook v. State*, 884 S.W.2d 485, 491 (Tex. Crim. App. 1994). Thus, a murder defendant in Texas is entitled to a mistake-of-fact instruction only if there is some evidence the defendant held a mistaken belief that negated either her intent to kill or her knowledge that her actions would result in an individual's death.

Self-defense, meanwhile, appears in chapter 9 of the penal code, entitled *Justification Excluding Criminal Responsibility*:

> A person is justified in using deadly force against another . . . if the actor would be justified in using force against the other . . . and . . . when and to the degree the actor reasonably believes the deadly force is immediately necessary . . . to protect the actor against the other's use or attempted use of unlawful deadly force; or . . . to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, robbery, or aggravated robbery.

Tex. Penal Code Ann. § 9.32(a).

A "reasonable belief" is a belief that would be held by an ordinary and prudent person in the same circumstances as the actor. Tex. Penal Code Ann. § 1.07(a)(42). Because self-defense examines the reasonableness of the defendant's belief, it can accommodate reasonably mistaken beliefs regarding the immediate necessity of using deadly force. Indeed, under Texas law, a person has the right to defend herself from apparent danger to the same extent as she would if the danger were real. *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996). "[A] reasonable apprehension of danger, whether it be actual or apparent, is all that is required before one is entitled

to exercise the right of self-defense against his adversary." *Valentine v. State*, 587 S.W.2d 399, 401 (Tex. Crim. App. [Panel Op.] 1979).

Guyger is therefore incorrect when she argues that the Dallas COA effectively held that a defendant's mistaken beliefs as to the circumstances surrounding an intentional killing can never provide a justification for murder. (Pet. at 17). They can—if those mistaken beliefs translated into a reasonable belief that deadly force was immediately necessary. But that is self-defense, not mistake of fact. And mistake of fact, a failure-of-proof defense, is not an element of a justification defense like self-defense.

C. The Dallas COA's proper application of *Jackson*

The Dallas COA first decided, as a matter of state law, that no evidence raised the mistake-of-fact defense, and thus the trial court should not have included a mistake-of-fact instruction in the jury charge. The Dallas COA then correctly applied *Jackson* to the elements of murder and to the only defensive issue raised by the evidence in this case—self-defense. Guyger does not explain how the Dallas COA could have violated her due process rights by not reviewing the sufficiency of the evidence to support the jury's rejection of her mistake-of-fact claim, a defensive issue that was not raised by the evidence and that, therefore, should not have been submitted to the jury in the first place. An appellate court's review of the sufficiency of the evidence "does not rest on how the jury was instructed," but rather on how a properly instructed jury would have assessed the evidence. *Musacchio*, 577 U.S. at 243. A properly instructed jury would not receive an instruction on a defense that the evidence did not support as a rational alternative to the defendant's criminal liability.

Cf. Hopper v. Evans, 456 U.S. 605, 611–12 (1982) (holding that due process requires that a lesser-included-offense instruction be given only when the evidence would permit a rational jury to find the defendant guilty of the lesser offense and not guilty of the greater).

Additionally, even if the Dallas COA had just assumed that mistake-of-fact applied and proceeded to address the sufficiency of the evidence to support the jury's implicit negative finding on that issue, the result of its *Jackson* analysis would have been the same. Because there was no evidence that Guyger held any mistaken belief that negated her intent to kill Jean, a rational jury could have found against her on the mistake-of-fact defense beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319. Guyger testified that she shot Jean intending to kill him. Her mistaken beliefs about where she was at the time of the shooting, however reasonable those beliefs might have been, did nothing to negate her intent to cause Jean's death. The jury could therefore have rationally found her guilty of murder.

Moreover, assuming for the moment that mistake of fact could apply to self-defense, as the dissenters in the TCCA suggested, the evidence would still be legally sufficient to support Guyger's conviction. Contrary to the dissent's assertion, the Dallas COA did not reject Guyger's self-defense claim based "on nothing more than the fact that" she admitted she could have retreated and called for backup rather than immediately shooting Jean.[5] *Guyger*, 2022 WL 945798, at *4. The court also

[5] The State did not argue in its briefing to the Dallas COA that Guyger's failure to retreat should factor into the analysis of whether the jury could have rationally concluded that she did not reasonably believe the use of deadly force was immediately necessary. *See* State's Response Brief at 72, *Guyger*,

discussed evidence that would have permitted a rational jury to find, even without considering her failure to retreat, that an ordinary and prudent person in Guyger's circumstances would not have believed it was immediately necessary to use deadly force against Jean:

> This evidence includes the conflicting evidence as to whether Jean was seated or rising from a sitting position rather than standing and moving quickly towards Guyger; the conflicting evidence as to whether Guyger demanded that Jean show his hands; the absence of any pockets in which Jean's hands might have been concealed; the ambiguous nature of Jean's "hey, hey, hey" exclamation; and the lack of evidence suggesting Jean held a weapon.

Guyger, 2021 WL 5356043, at *7 (footnote omitted). Thus, even if it could not consider Guyger's failure to retreat in deciding whether her belief in the immediate necessity of using deadly force was reasonable, the jury could still have rationally rejected her self-defense claim.[6]

No. 05-19-01236-CR, 2021 WL 5356043. Instead, the State argued that the jury could have rationally determined that an ordinary and prudent person in the same circumstances as Guyger would not have decided to shoot another human being without first considering all their surroundings. *See* State's Response Brief at 71–72. Thus, the State argued, even if Guyger had no duty to retreat, the jury could have concluded that she at the very least had a duty to "*stop and think*, even if just for a moment, before shooting and killing a man." State's Response Brief at 72.

[6] Guyger claims in her petition that had she entered her actual apartment, "under Texas law, there would be no question that she had the right to shoot an intruder inside." (Pet. at 14). She seems to suggest that Texas law permits a person to shoot and kill anyone who enters their residence uninvited, no questions asked. But that is not at all the law in Texas. Under certain circumstances, Texas law accords a presumption of reasonableness to an actor's belief in the immediate necessity of using deadly force. *See* Tex. Penal Code Ann. § 9.32(b); *Villarreal v. State*, 453 S.W.3d 429, 431 (Tex. Crim. App. 2015). One of the situations in which this presumption arises—and the one Guyger appears to be referring to—is when the actor "knew or had reason to believe that the person against whom deadly force was used . . . unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's *occupied* habitation." Tex. Penal Code Ann. § 9.32(b)(1)(A) (emphasis added). The jury in Guyger's case was charged on this presumption of reasonable belief and, by its verdict, rejected it. (8 C.R. at 2562–63). Sufficient evidence supported that finding because even if she mistakenly believed Jean to be an intruder in her apartment, because she lived alone and had been at work all day, there was no rational or logical basis for her to conclude that the apartment had been "occupied" when Jean entered it.

The Dallas COA reviewed all the evidence in this case and determined that it was sufficient to allow a rational trier of fact to find beyond a reasonable doubt that Guyger committed unjustified murder when she shot and killed Jean. Thus, the appellate court afforded Guyger all that due process requires under *Jackson*. This Court should deny her petition.

CONCLUSION

Respondent respectfully asks this Court to deny Guyger's petition for a writ of certiorari.

Respectfully submitted,

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