No. _____

IN THE
Supreme Court of the United States

JT MYORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under federal law, murder is defined as "the unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111. Voluntary manslaughter is defined as "the unlawful killing of a human being without malice[, u]pon a sudden quarrel or heat of passion." 18 U.S.C. § 1112(a).

In *Mullaney v. Wilbur*, 421 U.S. 684, 692-704 (1975), after examining the historical development of homicide crimes, this Court held that Due Process requires the prosecution to prove the absence of the heat of passion in order to convict a defendant of murder, when the evidence would also support a jury's conclusion that the defendant acted in the heat of passion.

The question presented here is: In a federal homicide prosecution, must the jury be instructed that the government has the burden of proving the absence of the heat of passion before the jury can find a defendant guilty of second degree murder whenever a party requests that the jury consider the lesser included offense of voluntary manslaughter? Or is such an instruction only required when the defendant argues for or requests instruction on the lesser included offense?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

United States v. JT Myore, No. 5:21-cr-50130, United States District Court for the District of South Dakota. Judgment entered February 7, 2024.

United States v. JT Myore, No. 24-1390, United States Court of Appeals for the Eighth Circuit. Judgment entered June 27, 2025.

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PETITION FOR A WRIT OF CERTIORARI

JT Myore respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-18a) is reported at 142 F.4th 606 (8th Cir. 2025). The district court's relevant final jury instructions and verdict form are provided as App. 20a-26a.

JURISDICTION

The court of appeals entered judgment on June 27, 2025. App. 1a. The court of appeals denied Myore's timely petition for rehearing *en banc* on September 18, 2025. App. 19a. This petition is timely filed under Rule 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

18 U.S.C. § 1111(a):

> Murder is the unlawful killing of a human being with malice aforethought. . . .

18 U.S.C. § 1112(a):

> Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
>
> > Voluntary—Upon a sudden quarrel or heat of passion. . . .

INTRODUCTION

This petition presents an important question of federal law that can only be settled by this Court: In a federal homicide prosecution, must the jury be instructed that the government has the burden of proving the absence of the heat of passion before the jury can find a defendant guilty of second degree murder whenever a party requests that the jury consider the lesser included offense of voluntary manslaughter? Or is such an instruction only required when the defendant argues for or requests instruction on the lesser included offense?

This Court has never addressed this precise issue, and the Eighth Circuit's decision below created a circuit split concerning the application of *Mullaney v. Wilbur*, 421 U.S. 684 (1975) to federal homicide prosecutions. All other circuit courts to consider the issue have required juries to be instructed on the government's burden of disproving the existence of heat of passion before determining a defendant's guilt on second degree murder, if the jury is also instructed to consider the lesser included offense of voluntary manslaughter.

In the case below, however, the jury was not instructed on the government's burden to disprove the existence of the heat of passion before convicting Myore of second degree murder under 18 U.S.C. § 1111, even though the lesser included offense of voluntary manslaughter was properly before them. The Eighth Circuit did not recognize an error in the instructions, reasoning that because Myore did not request an instruction on or argue for the lesser included offense, no such instruction on the government's burden was required.

There are compelling reasons for this Court to grant this petition for a writ of certiorari. The decision below is in conflict with the decisions of other circuit courts concerning this important federal question. Sup. Ct. R. 10(a). Additionally, this case is worthy of review by this Court because it raises an important question of federal law that has not been, but should be, settled by this Court, or was decided in a way that conflicts with the relevant discussion in *Mullaney*. Sup. Ct. R. 10(c).

STATEMENT OF THE CASE

This petition arises out of J.T. Myore's conviction for second degree murder under 18 U.S.C. § 1111 for the killing of Leon Lakota in May 2021. Dist. Ct. Dkt. 1; Dist. Ct. Dkt. 87.[1] The government indicted Myore for second degree murder under 18 U.S.C. § 1111. Dist. Ct. Dkt. 1. On the second day of trial, the government requested a lesser included offense instruction on voluntary manslaughter. App. 11a. The district court granted the government's request, over Myore's objection, after finding sufficient evidence for the jury to conclude that Myore "rather than having malice aforethought in the stabbing . . . was acting on heat of passion." *Id.*

The jury instructions did not, however, require the government to prove that the killing was not done in the heat of passion as an element of second degree murder. App. 21a. Instead, the "heat of passion" was only to be considered by the jury as an element of voluntary manslaughter if the jury "unanimously [found] the Defendant 'not guilty' of second degree murder or if after reasonable efforts [were] unable to determine the guilt or innocence of the Defendant as to the crime of second degree murder . . . ." App. 23a; *see also* App. 25a (defining heat of passion). Similarly, the verdict form directed the jury to consider voluntary manslaughter "[i]f and only if, you found the Defendant 'not guilty' [of second degree murder] or [were] not able to reach a verdict after all reasonable efforts as to [second degree murder.]" App. 26a.

[1] All citations to "Dist. Ct. Dkt." are to the docket in *United States v. Myore*, No. 5:21-cr-50130 (D.S.D.).

The jury found Myore guilty of second degree murder. Dist. Ct. Dkt. 73. Therefore, it never considered whether the killing was done in the heat of passion, even though evidence existed to support that conclusion. The jury instructions did not require the government to prove the absence of the heat of passion, or require the jury to even consider the issue during its deliberations on second degree murder. The jury was not called upon to distinguish between the two crimes.

On appeal, Myore argued that the district court plainly erred in failing to instruct the jury that it must determine whether the heat of passion existed before convicting him of second degree murder. App. 12a. He argued the instructions violated his Due Process rights under this Court's prior decisions in *In re Winship,* 397 U.S. 358 (1970) and *Mullaney v. Wilbur*, 421 U.S. 684 (1975). App. 12a-16a. A panel of the Eighth Circuit Court of Appeals disagreed. *Id.*

The Eighth Circuit's analysis framed the issue as an unresolved question, "Myore's argument raises the unresolved question whether 'heat of passion' is an affirmative defense to a second degree murder charge, or whether its presence 'negates' an element of that offense." *Id.* at 14a. Further, it found that "[t]he Supreme Court has not directly addressed this burden of proof issue [regarding federal homicide crimes of second degree murder and voluntary manslaughter]." *Id.* The Eighth Circuit reasoned that "[b]ecause Myore did not raise heat of passion *as a defense*, the case law on which he relies does not directly support his burden-of-proof contention." *Id.* at 15a (emphasis added).

Ultimately, the Eighth Circuit concluded that there was no plain error based on a lack of precedent and defendant's failure to argue for or request a heat of passion instruction. *Id.* at 15a-16a. It also found no impact on his substantial rights, because the jury found he had killed with malice aforethought and neither he nor the government argued that the crime was done in the heat of passion. *Id.* at 16. On September 18, 2025, the Eighth Circuit denied Myore's petition for rehearing *en banc*. App. 19a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

Over fifty years ago, this Court held that Due Process requires the prosecution to prove, beyond a reasonable doubt, every fact necessary to constitute the crime with which a defendant is charged. *In re Winship*, 397 U.S. 358, 364 (1970). Five years after deciding *Winship*, the Court held, in the context of a state homicide statute, "that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation *when the issue is properly presented* in a homicide case." *Mullaney*, *v. Wilbur*, 421 U.S. 684, 704 (1975) (emphasis added); *see also* U.S. Const. amend. V. This principle is the key holding of *Mullaney* and the core of Myore's petition to this Court.

Under federal law, murder is defined as "the unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111. Voluntary manslaughter is defined as "the unlawful killing of a human being without malice[, u]pon a sudden quarrel or heat of passion." 18 U.S.C. § 1112(a). Circuit courts interpreting these statutes have concluded that the malice required for murder is negated by the heat

of passion. *See, e.g.*, *United States v. Browner*, 889 F.2d 549, 551-52 (5th Cir. 1989); *United States v. Paul,* 37 F.3d 496, 499 (9th Cir. 1994) ("The finding of heat of passion and adequate provocation negates the malice that would otherwise attach." (citing *Browner,* 889 F.2d at 552)); *United States v. Scafe*, 822 F.2d 928, 932 (10th Cir. 1987) ("Malice is negated by the heat of passion." (citing *United States v. Lofton*, 776 F.2d 918, 920 (10th Cir. 1985))); *United States v. Serawop*, 410 F.3d 656, 664-66 (10th Cir. 2005); *see also Mullaney*, 421 U.S. at 692-96 (discussing the common law history of the heat of passion issue and the federal rejection of *Commonwealth v. York*, 50 Mass. 93 (1845), which imposed the burden of proving the heat of passion on the defendant, in *Davis v. United States*, 160 U.S. 469 (1895)).

"[T]he presence or absence of the heat of passion on sudden provocation—has been, almost from the inception of the common law of homicide, the *single most important factor* in determining the degree of culpability attaching to an unlawful homicide." *Mullaney,* 421 U.S. at 696 (emphasis added). On appeal below, there was no dispute that the voluntary manslaughter and heat of passion issues were appropriate for the jury's consideration. The district court clearly understood that the evidence might support a voluntary manslaughter finding by the jury, rather than a second degree murder. App. 11a. In other words, there was a very real possibility that the jury could have held Myore culpable for the lesser crime, had it been allowed to consider the issue of heat of passion prior to its determination on second degree murder. Thus, like in *Mullaney*, "[b]oth the stigma to the defendant

and the community's confidence in the administration of the criminal law are also of greater consequence in this case . . . ." 421 U.S. at 700.

However, the Eighth Circuit found no plain error when the instructions failed to require the government to disprove the existence of the heat of passion before Myore's conviction of the greater offense. *See* App. 11a-16a. In reaching this conclusion, the Eighth Circuit applied a previously unrecognized distinction between cases where the defendant advocates for application of the lesser offense, and cases where the defendant does not. *Id.* at 14a-15a.

The Eighth Circuit's analysis cannot be squared with the rationale of *Mullaney* or other circuit courts considering the application of *Mullaney* to federal homicide prosecutions. As *Mullaney*'s analysis of murder and manslaughter suggests, the heat of passion issue is not specifically a defense but is something the government must disprove when the two offenses are properly presented in a homicide case. *See Mullaney*, 421 U.S. at 696-701, 703-04. Yet here, the jury was not required to distinguish between the two homicide crimes, even though they were both properly presented. The Court should grant the petition to make clear that the Eighth Circuit's holding is incompatible with the Due Process standards established by this Court.

I. The decision below creates a circuit split on the question presented.

The Eighth Circuit's decision and analysis of the Due Process issues are incompatible with the decisions of other circuit courts, creating a circuit split on the question presented. The Fifth, Seventh, Ninth, and Tenth Circuits require the government to carry the burden of disproof of the heat of passion in federal homicide prosecutions under 18 U.S.C. §§ 1111 and 1112. *See Frascarelli v. United States Parole Comm'n*, 857 F.3d 701 (5th Cir. 2017); *United States v. Delaney*, 717 F.3d 553 (7th Cir. 2013); *United States v. Lesina*, 833 F.2d 156 (9th Cir. 1987); *United States v. Lofton*, 776 F.2d 918 (10th Cir. 1985). Applying *Mullaney*'s Due Process rationale, these courts held that juries must be instructed on the government's burden to disprove the heat of passion when both federal murder and voluntary manslaughter are properly under consideration. Thus, the Eighth Circuit stands alone. Its analysis creates division in the circuits. This Court should address and resolve the divide.

In 1985, the Tenth Circuit found plain error in jury instructions omitting the heat of passion issue from the elements section of second degree murder instructions, analyzing 18 U.S.C. §§ 1111, 1112, and *Mullaney*. *Lofton*, 776 F.2d at 919-22. As in Myore's case, the "heat of passion was referred to only in the manslaughter instruction." *Id.* at 921. The Tenth Circuit determined that the presence of the heat of passion issue in other instructions, not applicable to the murder instruction itself, was "insufficient to inform the jury that, to obtain a conviction for murder, the prosecution must prove beyond a reasonable doubt that

Lofton did *not* act in the heat of passion." *Id.* Notably, like here, Lofton's defense counsel did not object to the instructions as written, yet the Tenth Circuit, unlike here, found plain error in the instructions and reversed his conviction. *Id.* at 922. The *Lofton* decision became the leading authority on these issues and its rationale has been adopted by all other circuit courts to consider these issues, other than the Eighth Circuit.

In 1987, the Ninth Circuit adopted *Lofton*'s analysis of *Mullaney* and federal homicide. *See Lesina*, 833 F.2d at 158-160 (discussing the difference in mens rea between murder and manslaughter, then finding reversable error because the district court refused to give a requested heat of passion instruction). Notably, in *Lesina*, like here, the defendant argued a theory other than the heat of passion. *Id.* (Lesina's theory was that the killing was accidental). Even so, the Ninth Circuit, unlike the Eighth Circuit below, found the defense's position did not absolve the government of its burden to prove the absence of the heat of passion in order to convict the defendant of second degree murder:

> The government attempts to evade *Mullaney* on the ground that Lesina did not raise the heat of passion argument because the "central theme" of his defense was accident. We disagree. Alternate defenses are generally permitted.

Id. at 160.

This line of authority was briefly broken in 1988, when the Fifth Circuit decided *United States v. Molina-Uribe*, rejecting *Lofton* and *Lesina*'s application of *Mullaney* to federal homicide. *See United States v. Molina-Uribe*, 853 F.2d 1193, 1200-05 (5th Cir. 1988) (concluding, in part, "*Lofton* and *Lesina* go too far in making

the prosecution prove the absence of heat of passion even when the element of malice is neither presumed nor required to be disproved by the defendant").

However, in 1989, only one year after *Molina-Uribe*, the Fifth Circuit more fully analyzed federal homicide crimes and recognized "the malice element of the traditional offense of murder implicitly forces prosecutors to *disprove* the existence of adequate provocation *when the evidence suggests that it may be present*" in a federal homicide case. *Browner*, 889 F.2d at 552 (second emphasis added). The Fifth Circuit found that under federal homicide law "[t]he malice that would otherwise attach is *negated* by the fact that [an] intentional killing occurred in the heat of passion in response to a sufficient provocation." *Id.* Decades later, in 2017, the Fifth Circuit affirmed its conclusion that jury instructions for murder must include the government's burden to disprove the heat of passion when both theories properly exist in a case. *See Frascarelli*, 857 F.3d at 707 (applying *Browner*'s analysis of federal homicide statutes to join *Delaney*'s and *Lofton*'s analyses). Thus, the Fifth Circuit's brief rejection of *Lofton* proved inconsequential. It quickly rejoined its sister circuits and has now applied *Mullaney* to federal homicide cases for over three decades.

In 2013, these issues were analyzed in detail by the Seventh Circuit. The *Delaney* court, like other circuit courts, held that the government carries the burden of disproving the existence of the heat of passion in federal homicide cases and the jury must be so instructed. *Delaney*, 717 F.3d at 559. Moreover, it recognized that the heat of passion issue is not a traditional "defense:"

> It remains only to note the seeming oddity that the government bore—and has been held required by the due process clause to bear—the burden of proving absence of heat of passion beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684, 703–04[.]
>
> . . .
>
> Probably "heat of passion" shouldn't be thought a defense. The jury had to find malice beyond a reasonable doubt in order to convict the defendant of murder, and so evidence that he acted in the heat of passion and therefore without malice would if believed require the jury to acquit him of the charge of murder. . . . The heat of passion "defense" just puts the government to its proof.

Id. (additional citations omitted).

In summary, all circuit courts, other than the Eighth Circuit, that have considered these issues have concluded that when both federal second degree murder and voluntary manslaughter are properly before a jury, the jury must be instructed that the government carries the burden to disprove the heat of passion in order to convict the defendant of the greater crime. The Eighth Circuit's decision below stands alone, creating a significant fracture in the analysis and application of *Mullaney* to federal homicide cases. This Court should address the application of *Mullaney* to federal homicide statutes to resolve this circuit split.

II. The decision below was decided in a way that conflicts with this Court's decision in *Mullaney*.

The Eighth Circuit's rationale is inconsistent with *Mullaney*'s holding. *Mullaney* held that juries must be instructed on the government's burden to prove the absence of the heat of passion when "the issue is properly presented in a homicide case." *Mullaney*, 421 U.S. at 704; *see also id.* at 704-06 (Rehnquist, J., concurring) (noting that Mullaney had not objected to the instructions at trial, the matter was before the Court on a federal habeas corpus petition, and distinguishing the heat of passion issue from the insanity defense discussed in *Leland v. Oregon*, 343 U.S. 790 (1952)). The Eighth Circuit's conclusion that no such instruction is necessary when a defendant does not urge the "heat of passion" as a defense, and stating that it is unresolved whether or not the heat of passion is an affirmative defense, overlooks *Mullaney*'s focus on whether the lesser included offense is properly before the jury. This Court should consider and address the conflict between *Mullaney* and the Eighth Circuit's decision.

The Eighth Circuit's analysis focused on the defendant's litigation decisions and improperly minimized the common law history and Due Process requirements discussed in *Mullaney*. *See Mullaney*, 421 U.S. at 692-96 ("[T]he presence or absence of the heat of passion on sudden provocation—has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide."). In considering Myore's argument, the Eighth Circuit emphasized that Myore had not raised the "heat of passion" as an affirmative defense. App. 15a. The Eighth Circuit noted that courts

have not resolved whether the "heat of passion" is an affirmative defense or a negating factor. *Id.* at 14a ("Myore's argument raises the unresolved question whether 'heat of passion' is an affirmative defense to a second degree murder charge, or whether its presence 'negates' an element of that offense."). Further, it stated that it could find no authority addressing a situation where a defendant had not argued to the jury that a killing was done in the heat of passion:

> To our knowledge, no federal case, in our circuit or elsewhere, has held what Myore urges -- that *Winship* and *Mullaney require* district courts in second-degree murder cases to instruct the jury that the government must prove the killing was not done in the heat of passion when the defense has not pleaded or presented evidence in support of a heat of passion "defense," has not proposed that jury instruction or objected to its absence, and has argued to the jury that "I did not do it," not that "I did it in the heat of passion."

Id. at 15a. Therefore, the Eighth Circuit concluded that there was no plain error. *Id.* at 15a-16a.

Thus, the Eighth Circuit's rationale turned on Myore's litigation decisions, rather than considering the propriety of the jury's consideration of alternative homicide charges. The Eighth Circuit's analysis departed from *Mullaney*'s recognition of Due Process protections and instead recognized a distinction between Myore's theory of the defense and the theories of defendants in other cases. In other words, rather than considering the Due Process requirements resulting from the existence of alternative prosecutorial theories, the Eighth Circuit based its decision on alternative defense theories. In effect, the Eighth Circuit imposed a burden on defendants to advocate for a heat of passion theory of the case to invoke the Due Process protections set out in *Mullaney*, a conclusion concerningly close to shifting

the burden of proof on this issue to the defense when the government had requested the lesser included offense instruction.

Mullaney stands for the proposition that it does not matter which party raises the lesser included offense; the question is whether the lesser included offense is appropriate for consideration, and, if so, the government carries the burden of disproving the existence of the heat of passion. *Mullaney*, 421 U.S. at 703-04; *see also id.* at 704-06 (Rehnquist, J., concurring). Here, voluntary manslaughter was raised by the government. *See* App. 11a. The district court recognized that the jury could find Myore had acted in the heat of passion. *Id.* The district court granted the government's request to include the lesser included offense as an option for the jury. *Id.* In other words, the heat of passion issue *was* properly raised in this case, albeit by the government not the defendant. *See Keeble v. United States*, 412 U.S. 205, 208 (1973) ("[T]he lesser included offense doctrine developed at common law to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged . . . .").

Under *Mullaney* and these circumstances, the jury needed to be instructed on the government's burden to prove the absence of the heat of passion as an element of second degree murder. *See Mullaney*, 421 U.S. at 704. The posture of the government's lesser included homicide theory was no different than if the government had initially indicted the two theories in the alternative. No additional action from the defense was required. Yet, the Eighth Circuit's holding required Myore to raise or argue for the heat of passion before the burden of disproof was

imposed on the government. This rationale is incompatible with *Mullaney*. Whether the heat of passion is an affirmative defense or not should not affect the Due Process analysis.

Moreover, the jury instructions directed the jury *not* to consider the existence of the heat of passion until *after* it determined whether Myore had committed second degree murder. The "heat of passion" was only to be considered if the jury "unanimously [found] the Defendant 'not guilty' of second degree murder or if after reasonable efforts [was] unable to determine the guilt or innocence of the Defendant as to the crime of second degree murder." App. 23a; *see also id.* at 26a (verdict form directing the jury to consider voluntary manslaughter "[i]f and only if, you found the Defendant 'not guilty' [of second degree murder] or [were] not able to reach a verdict after all reasonable efforts as to question 1"). Instructing the jury in this manner relieved the government of its burden to prove every element of the crime. As this Court explained in *Martin*, in the self-defense context:

> It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, *i.e.,* that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance standard. *Such an instruction would relieve the State of its burden and plainly run afoul of Winship's mandate.*

Martin v. Ohio, 480 U.S. 228, 233-34 (1987) (emphasis added, citation omitted). The separated, two-part homicide instructions used below created the "quite different" scenario hypothesized by *Martin*. The instructions precluded the jury's consideration of the "defense" in relation to the element of the crime it negates. According to *Martin*'s hypothetical, the government was relieved of its burden, in

violation of *Winship*. *Id.* at 233-34. The Eighth Circuit's analysis failed to properly apply this Court's Due Process standards to the defective, two-part jury instructions.

III. The Court should act to address this important question.

It is beyond dispute that the government must prove every element of its criminal allegations beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364. Because the distinction between murder and manslaughter is "the single most important factor in determining the degree of culpability attaching to an unlawful homicide," *Mullaney,* 421 U.S. at 696, this is an issue of significant importance in federal homicide cases arising in Indian Country or other areas of federal maritime and territorial jurisdiction. Further, this Court recognizes that "it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter," therefore, proper jury instructions and holding the government to its burden of proof is critical to the fair administration of justice. *Id.* at 703-04 (paraphrasing *In re Winship*, 397 U.S., at 372 (Harlan, J., concurring)).

The Due Process requirement to distinguish between federal murder and manslaughter is a significant issue that is likely to recur. Any Indian who commits a homicide in Indian country may be prosecuted in federal court pursuant to the Major Crimes Act. 18 U.S.C. § 1153. Further, any homicide committed by non-Indians against an Indian in Indian country may be prosecuted in federal court pursuant to the General Crimes Act. 18 U.S.C. § 1152; *United States v. Ramirez*,

537 F.3d 1075, 1082 (9th Cir. 2008). It is imperative for federal juries to be properly instructed on the distinction between murder and manslaughter whenever heat of passion is an issue in such cases. Without guidance from this Court, district courts will be left to speculate whether the government carries the burden to disprove the existence of the heat of passion on this critical Due Process issue. The Court should grant Myore's petition for certiorari to address and clearly resolve these issues.

IV. This case is an ideal vehicle for the question presented.

This case squarely raises the question presented. Here, there is no dispute that the jury should have resolved the question of whether the killing was murder or manslaughter. The government asked that the jury be allowed to make this determination. The district court agreed that the jury could reach either conclusion. However, despite the need to have the jury answer this question, the jury was never asked to make the critical determination of whether the killing was murder or manslaughter.

The Due Process issue identified in *Mullaney* is clearly framed and presented here. The government was not required to prove that the killing was not done in the heat of passion, beyond a reasonable doubt, as an element of second degree murder. App. 21a. The jury was not called upon to consider the heat of passion at all, given the language of the instructions. App. 23a; App. 25a; App. 26a. The conflict between the Eighth Circuit's rationale and that of other circuit courts is evident.

This case is an ideal vehicle for this Court to clarify *Mullaney*'s application to federal homicide cases and resolve the circuit split resulting from the Eighth Circuit's decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 15th day of December, 2025.

Respectfully submitted,

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