No. 11-___

IN THE

Supreme Court of the United States

JERAD ALLEN PICKERING,

Petitioner,

v.

COLORADO,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Colorado

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the accused in a criminal case properly raises a defense that negates an element of the charged crime, does the Due Process Clause require the prosecution to disprove that defense?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jerad Allen Pickering respectfully petitions for a writ of certiorari to review the judgment of the Colorado Supreme Court in *People v. Pickering*, No. 10SC446.

OPINIONS BELOW

The opinion of the Colorado Supreme Court is not yet published, but is available on Westlaw at 2011 WL 4014400 and reproduced at Pet. App. 1a. The opinion of the Colorado Court of Appeals is unpublished and reproduced at Pet. App. 22a. The relevant proceedings of the trial court are unpublished.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on September 12, 2011. On November 30, 2011, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including January 11, 2012. No. 11A532. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment states in relevant part that "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Colo. Rev. Stat. Ann. § 18-1-704, entitled "Use of physical force in defense of a person," provides in relevant part:

(4) In a case in which the defendant is not entitled to a jury instruction regarding self-defense

as an affirmative defense, the court shall allow the defendant to present evidence, when relevant, that he or she was acting in self-defense. If the defendant presents evidence of self-defense, the court shall instruct the jury with a self-defense law instruction. The court shall instruct the jury that it may consider the evidence of self-defense in determining whether the defendant acted recklessly, with extreme indifference, or in a criminally negligent manner. However, the self-defense law instruction shall not be an affirmative defense instruction and the prosecuting attorney shall not have the burden of disproving self-defense. This section shall not apply to strict liability crimes.

STATEMENT OF THE CASE

This Court made clear in *In re Winship*, 397 U.S. 358 (1970), that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt every fact necessary for conviction. This burden of proving every essential fact interacts with two distinct types of defenses to a criminal charge. The first type contends that even if the prosecution proves all the elements of the crime, the defendant cannot be held criminally responsible because of some additional fact, such as an excuse. This is often called an affirmative defense. Wayne R. LaFave, Substantive Criminal Law § 1.8(c) (2d ed. 2003). The second type denies that the prosecution can prove all of the elements because of some fact that is mutually exclusive with an element of the crime. *Id.* This is an element-negating defense. Some defenses, such as an alibi, are always element-negating. Other defenses are affirmative defenses to some crimes but element-negating defenses as to others. For instance,

duress is an affirmative defense where the crime charged lacks any *mens rea* element, but is an element-negating defense where the offense requires the government to prove criminal intent. *See Dixon v. United States*, 548 U.S. 1, 6-7 (2006); *United States v. Santos*, 932 F.2d 244, 249 (3d Cir. 1991).

This Court has held that due process does not require the prosecution to disprove affirmative defenses. *See Martin v. Ohio*, 480 U.S. 228, 232 (1987); *Patterson v. New York*, 432 U.S. 197, 210 (1977). But, as this Court has previously noted, courts are divided over whether the prosecution's duty to prove all facts necessary for conviction, as established in *Winship* and elaborated in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), encompasses disproving element-negating defenses. This case presents that issue.

I. Facts

1. One evening in 2006, petitioner Jerad Pickering and Jesse Bates went to Eugene Morgan's apartment. Pickering and Bates knocked, and Leon Villarreal, an acquaintance of both men, opened the door and let them in. The three men went to the bedroom, where they joined Morgan. As the group talked, Pickering played with his pocket knife, flicking it open and closed.

An argument soon started between Villarreal, who was under the influence of alcohol and methamphetamine, and Pickering. According to Bates, it began because Pickering said Villarreal was taking advantage of Morgan by staying in the apartment without paying rent. Although Morgan was unsure, he thought the argument was about

drugs. Villarreal was yelling at Pickering and threatened to throw him off the balcony.

Accounts of an ensuing fight, during which Pickering stabbed Villarreal, varied. Bates said that as Pickering began to leave the apartment, still holding his knife, Villarreal charged and knocked him onto the couch. Morgan did not mention a charge, but said at one point he tried to restrain Villarreal from attacking Pickering, and was holding Villarreal when the stabbing happened. Another man who was in the apartment said Bates and Villarreal started fighting, with Pickering and Morgan joining in on Bates' side. At any rate, during the scuffle Pickering stabbed Villarreal in the chest. Villarreal stumbled out of the apartment, collapsed, and died.

That evening, Pickering told someone that he had accidentally stabbed Villarreal in a fight, and that later, on his way out, he had stabbed him again in the buttocks. The coroner concluded that the chest wound caused Villarreal's death.

II. Procedural History

1. The State charged Pickering with second-degree murder for the stabbing in the chest. A lesser-included offense of second-degree murder, and the offense central to this case, is reckless manslaughter. Pet. App. 2a-3a. Reckless manslaughter has two key elements: (1) recklessly (2) causing the death of another person. Colo. Rev. Stat. Ann. § 18-3-104. A person acts "recklessly" under Colorado law "when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists." Colo. Rev. Stat. Ann. § 18-1-501(8).

Pickering maintained at trial that he stabbed Villarreal in self-defense – that is, in response to Villarreal's charging and attacking him. In Colorado, self-defense is an "element-negating" defense to reckless manslaughter. Pet. App. 5a. As the Colorado Supreme Court has explained, the two are "totally inconsistent" because "self-defense requires one to act *justifiably*, while recklessness requires one to act with conscious disregard of an *unjustifiable* risk." *Id.* 5a-6a (citing *People v. Fink*, 574 P.2d 81, 83 (1978), and other cases) (emphasis added).

At the close of the trial, the court instructed the jury, consistent with the requirement of *Winship*, that "[t]he burden is always upon the prosecution to prove beyond a reasonable doubt each and every material element" of the crime charged. Jury Inst. 15.

Pickering asked the court further to instruct the jury with respect to the reckless manslaughter charge that "the prosecution [must] disprove that the defendant was acting in self-defense." Def. Proposed Inst. 4. The trial court rejected this request. Pet. App. 24a. Instead, it instructed the jury – consistent with a statute Colorado enacted in 2003 to govern self-defense claims that would negate an element of the crime, Colo. Rev. Stat. Ann. § 18-1-704(4) – that "the prosecution does *not* bear the burden of proving beyond a reasonable doubt that Defendant did not act in self-defense." Pet. App. 24a (emphasis added).

The jury convicted Pickering of reckless manslaughter. He was sentenced to twelve years in prison for the offense.[1]

2. The Colorado Court of Appeals reversed Pickering's reckless manslaughter conviction, holding that the Due Process Clause requires the prosecution to disprove self-defense when raised as an element-negating defense. Pet. App. 24a-26a. The court reasoned that "because the prosecution must prove all the elements of an offense beyond a reasonable doubt," it "necessarily follows that the prosecution must also disprove beyond a reasonable doubt any defenses that negate an element of the charged offense." *Id.* 24a-25a (quotation marks and citations omitted). That being so, Pickering was entitled to a new trial because he raised a triable self-defense claim to the reckless manslaughter charge but the jury instructions denied that the prosecution had the burden to disprove self-defense. *Id.* 25a.

In reaching this decision, the Colorado Court of Appeals followed the decision it had issued the year before in *People v. Lara*, 224 P.3d 388 (Colo. App. 2009). In that opinion, which is attached for this Court's convenience at Pet. App. 30a, the Colorado Court of Appeals elaborated at greater length why it believed that due process requires the prosecution to

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[1] The State also convicted Pickering of second-degree assault for the later stabbing in the buttocks. The Colorado Court of Appeals affirmed that separate conviction but remanded for the imposition of a shorter sentence. That limited remand does not affect the finality of the judgment at issue here for purposes of establishing this Court's jurisdiction. *See Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963).

"disprov[e] all element-negating defenses beyond a reasonable doubt." Pet. App. 37a. *Lara* also expressly followed decisions from several federal courts of appeals and the Minnesota Supreme Court interpreting this Court's *Winship* jurisprudence to require the prosecution to "disprove beyond a reasonable doubt any defenses that negate an element of the charged offense." *Id.* (quoting *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000), and also citing *United States v. Diaz*, 285 F.3d 92, 97 n.5 (1st Cir. 2002); *United States v. Solorzano-Rivera*, 368 F.3d 1073, 1079 (9th Cir. 2004); *State v. Hage*, 595 N.W.2d 200, 205 (Minn. 1999)).

3. The State appealed to the Colorado Supreme Court, arguing that the cases followed by the Colorado Court of Appeals in *Lara* "relied on a questionable and overbroad interpretation" of this Court's *Winship* jurisprudence. State's Reply Br. 4. As an alternative to those cases, the State urged the Colorado Supreme Court to adopt the reasoning of the Washington Supreme Court's decision in *State v. Camara*, 781 P.2d 483 (Wash. 1989). State's Br. 22-23; State's Reply Br. 4. In *Camara*, the Washington Supreme Court construed this Court's decision in *Martin v. Ohio*, 480 U.S. 228 (1987), to dictate that the prosecution need not disprove any "defense [that] 'negates' an element of a crime." *Camara*, 781 P.2d at 487. *Martin* involved a claim of self-defense as an affirmative defense, not an element-negating defense. But in the Washington Supreme Court's view, the reasoning *Martin* used in refusing to require the prosecution to disprove affirmative defenses applies with equal force to element-negating defenses. *Id.*

A bare majority of the Colorado Supreme Court agreed with the State and reversed, holding that the Due Process Clause does not require the prosecution to disprove element-negating defenses. Pet. App. 9a. The majority acknowledged that self-defense is an "element-negating" defense to reckless manslaughter because "self-defense requires one to act justifiably, while recklessness requires one to act with conscious disregard of an unjustifiable risk." *Id.* 5a-6a (citations and quotation marks omitted). Nonetheless, it held that, under *Martin*, "the prosecution bears no burden of disproving self-defense" in this situation. *Id.* 9a.

Three justices dissented. Like the Colorado Court of Appeals, they agreed with "the great weight of federal authority" that the Due Process Clause requires the prosecution "to disprove any defense that necessarily negates an element of the charged offense." *Id.* 15a-17a (citing several cases). In the dissent's view, the majority's "reliance on *Martin* is misplaced" because there, "even if the prosecution had proven its case beyond a reasonable doubt, it would not have necessarily disproved any of the elements of self-defense." *Id.* 11a-12a. The situation here, the dissent emphasized, is different; here, self-defense negates an element. Consequently, "the prosecution must," by virtue of its obligation under *Winship* to prove every element beyond a reasonable doubt, "disprove self-defense evidence raised by the defendant." *Id.* 14a.

Having construed the Due Process Clause in this manner, the dissent, like the Colorado Court of Appeals, readily concluded that Pickering should receive a new trial because the jury was instructed

here "that the prosecution had no burden to disprove evidence of self-defense." *Id.* 17a-18a. The dissent acknowledged that the jury was also instructed that "the prosecution ha[d] the burden to prove all the elements of reckless manslaughter." *Id.* 18a. But, quoting this Court's precedent, the dissent explained that a new trial is required when there is "no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Id.* (quoting *Francis v. Franklin,* 471 U.S. 307, 322 (1985)).

REASONS FOR GRANTING THE WRIT

Several years ago, this Court noted a conflict among state high courts and federal courts of appeals over whether, once the defendant raises a defense that would negate an element of the charged offense, "the State must disprove that defense" beyond a reasonable doubt. *Engle v. Isaac*, 456 U.S. 107, 121-22 (1982). Since then, this conflict over how to interpret this Court's due process jurisprudence has deepened. The decision below widens the split to eleven to four.

This Court should use this case to resolve this important and recurring issue. As this Court emphasized in *In re Winship*, 397 U.S. 358 (1970), the burden of proof must be allocated correctly in order to maintain the integrity of criminal trials and to guard against wrongful convictions. This case is an excellent vehicle for considering the question presented because it is undisputed that the defense is element-negating, and because the question presented is outcome determinative. Furthermore, the Colorado Supreme Court's holding that the prosecution bears no burden of disproving an

element-negating defense has no basis in logic. *Winship* requires the prosecution to prove every fact necessary for conviction. When the accused raises a defense that negates an element of the charge, it necessarily follows from that due process mandate that the prosecution must disprove that defense beyond a reasonable doubt.

I. Courts Are Deeply And Intractably Divided Over Whether The Prosecution Must Disprove An Element-Negating Defense.

It is settled that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). But this Court's cases implementing that rule have given rise to a deep conflict over whether *Winship* requires the prosecution to disprove a properly raised defense that would negate an element of the charged offense.

A. Legal Background

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), this Court seemingly held that the *Winship* rule applies not only to elements of the crime charged but also to defenses that would negate such elements. There, Maine law conclusively presumed all homicide to be murder (that is, an unlawful killing with malice aforethought) unless the defendant proved that he acted in the heat of passion on sudden provocation. "[M]alice aforethought and heat of passion on sudden provocation are two inconsistent things; thus by proving the latter the defendant would negate the

former." *Id.* at 686-87 (internal quotation marks and citations omitted). Under these circumstances, this Court held that Maine's allocation of the burden of proof violated *Winship*. Once the defendant properly raises a defense that would negate a fact essential to conviction, this Court explained, "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of [that fact]." *Id.* at 704.

Two years later, this Court clarified in *Patterson v. New York*, 432 U.S. 197 (1977), that the prosecution need not disprove every kind of defense that the accused might advance. In *Patterson*, the defendant raised a defense that did not negate any elements of the crime, but rather "constitute[d] a separate issue" because it would have merely excused his actions. *Id.* at 206-07. This Court held that when the prosecution is required to prove every element of the crime and the defense "does not serve to negative any facts of the crime," the government may constitutionally require the defendant to carry the burden of proof on that defense. *Id.*

Later in the *Patterson* opinion, however, this Court spoke in arguably broader terms. Ignoring *Mullaney*'s statement that the prosecution's obligation under *Winship* is not necessarily "limited to a State's definition of the elements of a crime," 421 U.S. at 699 n.24, the *Patterson* Court suggested that the Due Process Clause does nothing more than require the prosecution to prove beyond a reasonable doubt "the elements included in the definition of the offense of which the defendant is charged." 432 U.S. at 210. Under this formulation, as the *Patterson* dissenters pointed out, the prosecution would no

longer be required to disprove an element-negating defense "so long as [state law] is careful not to mention the nonexistence of that factor in the statutory language that defines the crime." *Id.* at 223 (Powell, J., dissenting).

These divergent strands in *Patterson* quickly produced a circuit split. In *Engle v. Isaac*, 456 U.S. 107 (1982), state prisoners argued – echoing the holding in *Mullaney* – that their trial violated due process because they properly raised an element-negating defense (self-defense in the context of a homicide charge) and yet the prosecution had not been required to "disprove that defense as part of its task of" satisfying its burden of proof. *Id.* at 121-22. This Court noted that "[s]everal courts have applied our *Mullaney* and *Patterson* opinions to charge the prosecution with the constitutional duty . . . to prove absence of self-defense if that defense negates an element, such as purposeful conduct, of the charged crime." *Id.* at 122 & n.23 (citing, among other cases, *Holloway v. McElroy*, 632 F.2d 605 (5th Cir. 1980), and *Commonwealth v. Hilbert*, 382 A.2d 724 (Pa. 1978)). Yet this Court also noted that "other courts have rejected this type of claim." *Id.* at 122 & n.24 (citing, among other cases, *Carter v. Jago*, 637 F.2d 449 (6th Cir. 1980)). This Court, however, declined to resolve the conflict because the argument had not been properly preserved in earlier proceedings. *Id.* at 135.

In *Martin v. Ohio*, 480 U.S. 228 (1987), this Court once again considered whether *Winship* required the prosecution to disprove a defense. There, the defendant argued, and four dissenting Justices agreed, that the *Winship* rule "require[d] the

state to prove the nonexistence of the defense beyond a reasonable doubt" because the defense at issue "negate[d] an element of the crime." *Martin*, 480 U.S. at 237 (Powell, J., dissenting).

The majority concluded, however, that this argument "founder[ed] on state law." *Id.* at 235. As the majority understood Ohio law, the defense and the elements at issue merely "overlap[ped] in the sense that evidence to prove the latter will often tend to negate the former." *Id.* at 234; *see also id.* at 235. Accordingly, the majority held that the case was controlled by *Patterson*'s rule that due process does not require the prosecution to disprove a defense that constitutes "a separate issue" from the elements. *Id.* at 231-36.

But, as in *Patterson* itself, the *Martin* Court gave divergent rationales for its holding. On one hand, the Court emphasized the fact that the defense did not necessarily negate any element, noting also that the defendant "did not dispute" the elements of the crime, "but rather sought to justify her actions" on independent grounds. *Id.* at 234 (quotation marks omitted). This reasoning was all that was necessary to resolve the case and is perfectly consistent with *Mullaney*'s holding that the prosecution must disprove a fact that would negate an essential ingredient of the offense. On the other hand, the *Martin* Court echoed *Patterson*'s suggestion that the prosecution might not be required to disprove *any* fact that a state characterizes as a defense. "As in *Patterson*," this Court reasoned, the prosecution satisfied the *Winship* rule simply by proving "each of the elements of the crime" as "defin[ed]" under state law. *Id.* at 233.

This Court has never returned to the issue of whether the prosecution must disprove a truly element-negating defense. The split this Court identified in *Engle* persists and, indeed, has deepened considerably.

B. The Conflict Among Federal And State Courts

Eleven courts – three federal courts of appeals and eight state high courts – have held that the Due Process Clause, as explicated in *Winship* and *Mullaney*, requires the prosecution to disprove any properly raised defense that negates an element of the crime. Numerous other courts, despite holding that due process was satisfied under the particular circumstances they confronted, have endorsed this same rule.

On the other hand, four courts – two federal courts of appeals and two state high courts, including the Colorado Supreme Court in this case – have invoked *Patterson* or *Martin* to hold that due process does not require the prosecution to disprove element-negating defenses.

1. As this Court indicated in *Engle*, a requirement under *Winship* that the prosecution disprove an element-negating defense could be violated in two basic ways. First, the jury instructions could, as here, "disavow" the prosecution's duty to "disprove [the] defense." 456 U.S. at 122. Second, the instructions could "shift the burden of proving" the defense to the defendant. *Id.* at 121. Courts in eleven jurisdictions have found due process violations in one or both of these scenarios, reasoning that the *Winship* rule applies to element-negating defenses.

The Nevada Supreme Court's decision in *Barone v. State*, 858 P.2d 27 (Nev. 1993), is an example of these holdings. In *Barone*, that court held that where self-defense "negates [an] element" of the charged crime, failing to require the prosecution to disprove that defense violates due process. *Id.* at 28. In these circumstances, the Nevada Supreme Court explained, "the State's burden [under *Winship*] extends to showing the absence of self-defense." *Id.* at 29.

As several of the Colorado judges below recognized, *see* Pet. App. 16a (Martinez, J., dissenting), 25a (Colorado Court of Appeals opinion), the Third Circuit has adopted the same view. The law in that circuit is that "the Due Process Clause . . . requires the government to disprove beyond a reasonable doubt any defenses that negate an element of the charged offense." *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000). Accordingly, on three separate occasions, the Third Circuit has found due process violations where the prosecution was not required to disprove element-negating defenses. *See Gov't of Virgin Islands v. Smith*, 949 F.2d 677, 680-83 (3d Cir. 1991) (holding it was plain error of "constitutional dimension" to fail to require the prosecution to disprove element-negating defense); *United States v. Santos*, 932 F.2d 244, 249 (3d Cir. 1991) (reiterating that under *Winship*, "the government should from the outset bear the burden of disproving duress beyond a reasonable doubt" when it negates an element, but declining to reverse conviction because defendant invited the error); *Humanik v. Beyer*, 871 F.2d 432, 440-42 (3d Cir. 1989) (requiring the defendant to prove an element-negating defense violated due process because it

"freed [the prosecution] of the burden of establishing each constituent element of the crime charged beyond a reasonable doubt") (quotation marks omitted).

Last summer, the Court of Appeals for the Armed Forces similarly held that due process was violated where the accused was required to prove a defense (consent in a sexual assault case) that would have negated an element. *United States v. Prather*, 69 M.J. 338, 342-43 (C.A.A.F. 2011). The court reasoned that neither *Patterson* nor *Martin* applied to this scenario because the defense in the former case "d[id] not serve to negative any facts of the crime" and, in the latter case, it did not necessarily negate an element. *Id.* at 342 (quoting *Patterson*, 432 U.S. at 207).

Eight other courts have held that due process was violated where the prosecution was not required to disprove an element-negating defense. *See Holloway v. McElroy*, 632 F.2d 605, 625, 626 n.33 (5th Cir. 1980) (Under "[t]hat part of *Mullaney* which survives *Patterson*," the prosecution must prove the absence of any defense that "would necessarily negate an essential element of the crime charged."); *State v. Powdrill*, 684 So. 2d 350, 355 (La. 1996) (Due process forbids requiring a defendant to prove any defense that "negates an essential element of the offense as defined by the legislature."); *State v. Moore*, 585 A.2d 864, 870-71 (N.J. 1991) (requiring a defendant to prove a defense that would "negate[] the presumed culpability that attended his doing of the act" violates due process); *State v. Charlton*, 338 N.W.2d 26, 30-31 (Minn. 1983) (Once a defendant raises a defense that "negates [an element] the state is required to show," the burden is on "the state to

show lack of [the defense].");[2] *State v. Schulz*, 307 N.W.2d 151, 156 (Wis. 1981) (When a defendant raises a defense that "negate[s] a fact which the state must prove," the prosecution must "prove [its] absence.");[3] *Connolly v. Commonwealth*, 387 N.E.2d 519, 522 (Mass. 1979) (Where "self-defense negates [an element], it follows from *Mullaney*" that the prosecution must prove "that there was not a proper exercise of self-defense.") (citation omitted);[4] *Commonwealth v. Hilbert*, 382 A.2d 724, 731 (Pa. 1978) (When a defense "negates specific elements of the crime" the state may not "require a criminal defendant to carry [the] burden of proof" on that defense.);[5] *In re Doe*, 390 A.2d 920, 926 (R.I. 1978) ("[O]nce the defendant introduces some evidence" of a defense that "necessarily refutes an element of the crime," "the prosecution must negate the defense beyond a reasonable doubt.").[6]

Beyond these eleven jurisdictions, eight more – in the course of concluding that due process was

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[2] Although this case predates *Martin*, the Minnesota Supreme Court has since reaffirmed it. *See State v. Hage*, 595 N.W.2d 200, 205 (Minn. 1999); *State v. Auchampach*, 540 N.W.2d 808, 817 (Minn. 1995).

[3] Reaffirmed after *Martin* in *State v. McGee*, 698 N.W.2d 850, 856 (Wis. App. 2005).

[4] Reaffirmed after *Martin* in *Commonwealth v. Waite*, 665 N.E.2d 982, 992 (Mass. 1996); *see also Commonwealth v. Rodriguez*, 352 N.E.2d 203, 208 (Mass. 1976).

[5] Reaffirmed after *Martin* in *Commonwealth v. Collins*, 810 A.2d 698, 701 (Pa. Super. 2002).

[6] Reaffirmed after *Martin* in *State v. Urena*, 899 A.2d 1281, 1288 (R.I. 2006).

satisfied in the cases at issue – have explained that "if a defendant asserts a defense that has the effect of negating any element of the offense, the prosecution must disprove that defense beyond a reasonable doubt." *United States v. Deleveaux*, 205 F.3d 1292, 1298 (11th Cir. 2000); *see also United States v. Moore*, 651 F.3d 30, 89 (D.C. Cir. 2011) ("[W]hen a defendant raises . . . a defense that negates an element of the charged offense, the government bears the burden of persuasion to disprove the defense."); *United States v. Leahy*, 473 F.3d 401, 409 (1st Cir. 2007) (If a defense "negate[s] an element . . . the burden of disproving the defense would rest on the prosecution."); *United States v. Unser*, 165 F.3d 755, 764 (10th Cir. 1999) ("[W]hen evidence has been produced of a defense which . . . would negate an element of the offense, the government must . . . disprov[e] the defense."); *United States v. Toney*, 27 F.3d 1245, 1250-51 (7th Cir. 1994) ("[I]f a substantive defense negates an essential element of a crime, the prosecution must disprove the defense beyond a reasonable doubt."); *State v. Drej*, 233 P.3d 476, 481 (Utah 2010) ("[T]he state must shoulder the burden of proof" on all defenses "that act to negate an element of the charged offense."); *State v. Baker*, 579 A.2d 479, 481 (Vt. 1990) ("[T]he constitutional requirement that the burden rest upon the State" extends to defenses, unless the defense "does not challenge an element of the crime."); *Ward v. State*, 438 N.E.2d 750, 753 (Ind. 1982) (If a defense "negates an element of the crime, then the burden of proof lies on the State to establish beyond a reasonable doubt the absence of [that] defense." (quotation marks omitted)).

2. In its divided decision here, the Colorado Supreme Court reached the opposite conclusion. Specifically, the majority relied on *Martin*'s refusal to require the prosecution to disprove a defense that tended to – but did not always – negate an element to hold that, even when a defense is "totally inconsistent" with an element, "the prosecution bears no burden of disproving" that defense. Pet. App. 5a, 9a.

As the State emphasized in the Colorado Supreme Court, *see supra* at 7, the Washington Supreme Court has interpreted this Court's jurisprudence in the same manner. In *State v. Camara*, 781 P.2d 483 (Wash. 1989), that court held that due process allows requiring a defendant to prove consent in a rape case, even though it is the "conceptual opposite" of the element of forcible compulsion. *Id.* at 486-87. "Following *Martin*," the court concluded, "it appears that assignment of the burden of proof on a defense to the defendant is not precluded by the fact that the defense 'negates' an element of a crime." *Id.* at 487; *see also State v. Gregory*, 147 P.3d 1201, 1224-25 (Wash. 2006) (reaffirming *Camara*).

Over three dissenting votes, an en banc majority of the Fourth Circuit has reached the same conclusion. In *Smart v. Leeke*, 873 F.2d 1558 (4th Cir. 1989) (en banc), the Fourth Circuit reasoned that the *Martin* Court "implicitly question[ed]" *Mullaney* by electing not to cite it. *Id.* at 1562 n.6. The Fourth Circuit then concluded that due process allows requiring a defendant to prove a defense even when it negates an element of the crime. In the Fourth Circuit's view, an element-negating defense is

"fundamentally indistinguishable" from an affirmative defense, such as the one in *Martin*, that "may negate" an element. *See id.* at 1563 & n.8.

Likewise, the Eighth Circuit has held based on both *Patterson* and *Martin* that "it is not a denial of due process" to require a defendant to prove a "defense which negates an element of the crime." *Hobgood v. Housewright*, 698 F.2d 962, 963 (8th Cir. 1983) (relying on *Patterson*); *see also Flores v. State of Minnesota*, 906 F.2d 1300, 1303 (8th Cir. 1990) ("In *Martin* the Court clarified that the states may shift to the defendant the burden to prove even those affirmative defenses that directly negate an element of the crime which the state must prove.").[7]

3. Only this Court can resolve the split of authority over whether the prosecution must disprove element-negating defenses. Numerous federal courts of appeals and state high courts have now addressed the issue and reached diametrically contrary conclusions. Indeed, the majority below did not dispute the dissent's observation that "the great

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[7] As this Court noted in *Engle*, the Sixth Circuit held in 1980 that due process does not command the prosecution to disprove element-negating defenses. *Engle*, 456 U.S. at 122 & n.24 (citing *Carter v. Jago*, 637 F.2d 449 (6th Cir. 1980)). Subsequent cases, however, suggest that the Sixth Circuit may no longer adhere to that view. *See United States v. Brown*, 367 F.3d 549, 556 (6th Cir. 2004) (Due process allows burden of persuasion to be placed on the accused when a defense "does not negate any element of the offense."); *Rhodes v. Brigano*, 91 F.3d 803, 809 (6th Cir. 1996) ("The constitutional inquiry, rather, is whether [the defense at issue] bears a necessary relationship to an element of the offense . . . such that shifting the burden to the defendant on the issue negates an element of the crime.").

weight of federal authority" supports the proposition that "the prosecution must carry the burden to disprove any defense that necessarily negates an element of the charged offense." Pet. App. 15a-16a (Martinez, J., dissenting). Nevertheless, it elected to hold the opposite. On the other side of the divide, despite acknowledging the split of authority on the issue, the Third Circuit has adhered to its position that the prosecution must disprove an element-negating defense. *See Smith*, 949 F.2d at 682-83.

Furthermore, this conflict derives from irreconcilable interpretations of this Court's opinion in *Martin*. For example, the Washington Supreme Court and the Fourth Circuit believed before *Martin* that the prosecution "bears the burden of proving beyond a reasonable doubt the absence of a defense" if the defense negates "one or more elements of the offense." *State v. McCullum*, 656 P.2d 1064, 1068-69 (Wash. 1983); *see also Guthrie v. Warden, Md. Penitentiary*, 683 F.2d 820, 824 n.5 (4th Cir. 1982) ("[T]he state must disprove" a defense that is "wholly inconsistent" with an offense element.). "Following *Martin*," however, both courts concluded that "assignment of the burden of proof on a defense to the defendant is not precluded by the fact that the defense 'negates' an element of a crime." *Camara*, 781 P.2d at 487; *accord Smart*, 873 F.2d at 1563 n.8. In direct contrast, the Third Circuit indicated before *Martin* that a defendant could be required to prove an element-negating defense. *See United States ex rel. Goddard v. Vaughn,* 614 F.2d 929 (3d Cir. 1980). But that court later concluded that this notion "cannot survive the analysis of the Supreme Court in *Martin*." *Humanik*, 871 F.2d at 443 n.3.

When a decision from this Court not only reinforces divergent understandings of what the Constitution requires, but triggers courts on both sides of the divide to move from one side of the split to the other, it is time for this Court to resolve the matter.

II. The Question Presented Is Of Substantial Importance.

The question whether the prosecution must disprove element-negating defenses is a fundamental issue of criminal procedure. As this Court noted in *Winship*, the reasonable doubt rule "is a prime instrument for reducing the risk of convictions resting on factual error." 397 U.S. at 363; *see also Hankerson v. North Carolina*, 432 U.S. 233, 242 (1977) (The *Winship* rule is "designed to diminish the probability that an innocent person would be convicted."). Accordingly, to the extent that some jurisdictions view the scope of the rule more narrowly than others, the risk of wrongful convictions in those jurisdictions is higher.

Furthermore, element-negating defenses are common in criminal trials. For instance, alibi defenses always negate the element of identity; consent negates the element of compulsion in sexual assault cases; and, as here, self-defense negates recklessness when it is an element in cases involving homicides or assaults. Judges, prosecutors, and defense lawyers alike need clear guidance concerning whether the prosecution must prove the absence of such defenses.

The same is true for those who draft model jury instructions and criminal laws themselves. Washington's pattern instructions for rape cases, for

example, instruct – consistent with that state's case law – that the defendant must prove consent by a preponderance of the evidence. 11 Wash. Prac., Pattern Jury Instr. Crim. 18.25 (2008). The Colorado Legislature similarly has enacted a statute providing that when self-defense negates an element of a crime, "the prosecuting attorney shall not have the burden of disproving [that defense]," Colo. Rev. Stat. Ann. § 18-1-704(4), and the Colorado Supreme Court has now endorsed that statute. Pet. App. 9a.

By contrast, Massachusetts' pattern instruction for self-defense provides, citing its case law interpreting *Winship*, that the Commonwealth "must prove beyond a reasonable doubt that the defendant did not act in self-defense." 1-4 Mass. Jury Instructions – Criminal 4-1 (2007). And courts in other jurisdictions have nullified statutes requiring defendants to prove other element-negating defenses. *See United States v. Prather,* 69 M.J. 338, 339-40 (C.A.A.F. 2011) (invalidating a section of the Uniform Code of Military Justice); *State v. Powdrill*, 684 So. 2d 350, 356 (La. 1996) (invalidating Louisiana statute); *Humanik v. Beyer*, 871 F.2d 432, 442 (3d Cir. 1989) (nullifying New Jersey statute).

III. This Case Is An Ideal Vehicle For The Court To Resolve This Issue.

For two reasons, this case is an ideal vehicle for this Court to resolve the conflict over whether the Due Process Clause requires the prosecution to disprove element-negating defenses.

First, there is no doubt that under Colorado law, the defense at issue (self-defense) is an "element-negating" defense to the crime charged here (reckless manslaughter). Pet. App. 5a; *accord* Pet. App. 34a-

35a. As the Colorado Supreme Court explained, "acts committed recklessly . . . are 'totally inconsistent' with self-defense." *Id.* 5a (quoting *People v. Fink*, 574 P.2d 81, 83 (1978)). It is "impossible for a person to act both recklessly and in self-defense." *Id.* 5a-6a. Thus, this case squarely and exclusively turns on the dictates of the Due Process Clause.

Second, the question whether the Due Process Clause requires the prosecution to disprove element-negating defenses is outcome-determinative here. This Court made clear in *Sandstrom v. Montana*, 442 U.S. 510 (1979), that a new trial is required when a "reasonable juror could have interpreted" a jury instruction to dilute the prosecution's *Winship* obligation. *Id.* at 514; *see also Boyde v. California*, 494 U.S. 370, 380 (1990) (inquiry is whether there is a "reasonable likelihood that the jury has applied the challenged instruction" to relieve prosecution of its burden to prove an element). Thus, if petitioner is correct that due process requires the prosecution to disprove an element-negating defense, his conviction must be overturned because the jury here was told the exact opposite – namely, that "the prosecution does *not* bear the burden of proving beyond a reasonable doubt that Defendant did not act in self-defense." Pet. App. 24a (emphasis added).

It does not matter that the jury was also instructed here that the prosecution had the burden of proof on all of the elements. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Francis v. Franklin*, 471 U.S. 307, 322 (1985). Thus, as the dissent noted and numerous courts have recognized, telling the jury

about the prosecution's general *Winship* duty cannot overcome a specific, erroneous instruction concerning an element-negating defense. *See* Pet. App. 17a-18a (Martinez, J., dissenting); *Prather*, 69 M.J. at 343-44; *Humanik*, 871 F.2d at 440-41.

IV. The Colorado Supreme Court's Decision Misconstrues This Court's Due Process Jurisprudence.

Fundamental principles of due process, as well as a proper understanding of this Court's precedent, require the prosecution to disprove any element-negating defense.

1. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). If the accused raises a defense that necessarily negates one of those elements, it is impossible for the prosecution to meet that burden of proof without disproving the defense. Consequently, the *Winship* rule requires the prosecution to prove beyond a reasonable doubt the absence of any properly raised element-negating defense.

This Court effectively held as much in *Mullaney v. Wilbur*, 421 U.S. 684 (1975). There, a fact essential to conviction and the defense at issue were "two inconsistent things" such that "by proving the latter the defendant would negate the former." *Id.* at 686-87. This Court ruled that the prosecution's *Winship* burden extended to proving "the absence" of that defense beyond a reasonable doubt. *Id.* at 704. To be sure, state law in that case presumed the fact that the defense in that case negated, *id.* at 686,

whereas here state law explicitly makes that fact an element of the crime, Pet. App. 5a-6a. But that distinction only strengthens the due process imperative here. The critical question for *Winship* purposes is whether a given fact is something that is essential to a conviction. Elements are always essential to conviction. Hence, when the accused raises an element-negating defense, the absence of that defense is unquestionably something the prosecution must prove to convict.

2. Neither *Patterson v. New York*, 432 U.S. 197 (1977), nor *Martin v. Ohio*, 480 U.S. 228 (1987), undermines that core understanding of *Winship*. To the contrary, *Patterson* refused to require the prosecution to disprove the defense at issue only after emphasizing that it "d[id] *not* serve to negative any facts of the crime which the State is to prove in order to convict." 432 U.S. at 207 (emphasis added). This Court's broader language suggesting that the prosecution's sole burden is to prove "the elements included in the definition of the offense," *id.* at 210, was correct in the context of that case, in which the defense "constitute[d] a separate issue" from the definition of the crime, *id.* at 207. However, where a properly-raised defense negates an element of the crime, it is impossible for the prosecution to meet its burden of proving every element without disproving that defense.

Just as in *Patterson*, the defense at issue in *Martin* did not negate any element. While the defense "overlap[ped]" with an element "in the sense that [it] often tend[ed] to negate" it, the defense did not necessarily do so. *Martin*, 480 U.S. at 234. Instead, the defense "sought to justify" the crime on

independent grounds. *Id.* (quoting state court's explanation of state law). The *Martin* Court thus relied on *Patterson*'s holding – that it is permissible to require a defendant to prove a defense that does not negative any essential ingredients of the crime – as "authority for [its] decision" that a defendant may be required to prove a defense that merely overlaps or tends to negate an element of the crime. *Id.* at 236.

The Colorado Supreme Court was, therefore, quite mistaken in parroting *Martin*'s "tends to" negate language with respect to the defense at issue here. Pet. App. 8a. That language in *Martin* referred to a defense that, as a matter of state law, did not necessarily cancel out any elements. *Martin*, 480 U.S. at 234-35. Here, by contrast, the defense is "totally inconsistent" with an element; it is "impossible" to prove the element without also disproving the defense. Pet. App. 5a-6a. In this situation, the prosecution must bear the burden of disproving the defense in order to satisfy *Winship*'s mandate that the prosecution prove every element of the crime. *See Id.* 14a (Martinez, J., dissenting).

3. The Colorado Supreme Court also reasoned that the prosecution does not need to disprove element-negating defenses because the prosecution's "sole constitutional burden" is to prove the elements of crimes. *Id.* 8a. "Once the prosecution has made a prima facie case proving all the elements of the charged crime beyond a reasonable doubt," the court continued, "the prosecution need not do anything else to convict." *Id.*

This vision of fact-finding playing out in a two-step process – elements first, defenses second –

comports with the way a jury considers an affirmative defense. In that context, the defense is "a separate issue" that the jury considers only after the prosecution has proven its case. *Patterson*, 432 U.S. at 207; *see also Martin*, 480 U.S. at 233-34.

In the context of an element-negating defense, however, only a single step is involved; the prosecutorial burden of proving all of the elements requires it *simultaneously* to disprove the defense. Consequently, the Colorado Supreme Court's suggestion that the prosecution need not disprove an element-negating defense because it already is required to prove all of the elements makes no sense. The only way to prove all of the elements in the first place is to do what the Colorado Supreme Court held the prosecution does *not* have to do: "disprove" the element-negating defense. Pet. App. 8a.

As this Court has observed, such a requirement of "proving a negative" imposes "no unique hardship" on the prosecution. *Mullaney*, 421 U.S. at 702. It is common for the prosecution to have to prove the absence of facts. *See id.* at 701-02.

Nor does the obligation to disprove element-negating defenses require the prosecution to disprove every possible such defense in order to convict. For example, if a defendant claims he acted in self-defense, the prosecution need not disprove an alibi defense, even though an alibi would negate the element of identity inherent in any crime. *See Mullaney*, 421 U.S. at 701 n.28; Wayne R. LaFave, Substantive Criminal Law § 1.8(a), at 77-78 (2d ed. 2003 & Supp. 2011); *see also State v. Auchampach*, 540 N.W.2d 808, 817 n.8 (Minn. 1995); Pet. App. 17a n.3 (Martinez, J., dissenting). But when, as here, the

accused properly raises an element-negating defense, the situation changes. When such a defense is put into play, it is impossible for the prosecution to meet its burden of proving every element of the crime without disproving that defense. *Winship* requires nothing less.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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