No. 11-870

IN THE

Supreme Court Of The United States

JERAD ALLEN PICKERING,
Petitioner,

v.

COLORADO,
Respondent.

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

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

TIMOTHY P. O'TOOLE
Counsel of Record
JEFFREY HAHN
MILLER & CHEVALIER CHARTERED
655 Fifteenth St., N.W.
Suite 900
Washington, D.C. 20005
(202) 626-5800
Email: totoole@milchev.com

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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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit association of criminal defense lawyers with a national membership of more than 10,000 attorneys.[1] As practitioners representing clients in criminal trials throughout the federal and state court system, NACDL has a keen interest in ensuring that every court, no matter the jurisdiction, holds the prosecution to its constitutional burden of establishing beyond a reasonable doubt each element of a criminal charge. The reasonable doubt standard is a criminal defendant's most effective counter-weight to the many advantages enjoyed by the prosecution. Because the decision of the Colorado Supreme Court, and others with which it is in agreement, threatens to dilute this vital protection in cases where a defendant asserts an element-negating defense, this case is of the utmost interest to NACDL.

SUMMARY OF ARGUMENT

The requirement that the prosecution prove each element of the offense beyond a reasonable doubt is perhaps the single most important safeguard against wrongful convictions. This

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[1] Pursuant to Sup. Ct. Rule 37.2(a), counsel of record for all parties received notice of the intent of *amicus curiae* to file a brief at least 10 days prior to the due date. Also pursuant to Sup. Ct. Rule 37.2(a), a letter of consent from each party accompanies this filing. Pursuant to Sup. Ct. Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of this brief.

requirement is in many respects "the great equalizer," returning a semblance of balance to a criminal justice process in which a lone individual must face the awesome investigative, charging and prosecutorial powers of the state. But in the handful of jurisdictions that permit the government to meet its burden without disproving a properly raised element-negating defense, this balance is impermissibly skewed in favor of the government, which has a significantly stronger hand with respect to all aspects of the criminal process. As practitioners, we urge the Court to examine this problem closely and to restore the proper constitutional equilibrium on this important issue. While any dilution of the proof-beyond-a-reasonable-doubt standard is troubling to *amicus*, the Colorado statute at issue in this case -- which absolves the prosecution from having to disprove self defense -- is particularly so. Because element-negating defenses, like self defense here, often negate the mens rea needed for conviction, failing to require the prosecution to disprove a properly raised element-negating-defense continues a disturbing national trend that has seen the steady erosion of traditional intent requirements. As discussed below, this particular trend is of great concern to *amicus*. As a result, the Court's corrective intervention is warranted.

REASONS FOR GRANTING THE PETITION

I. The Requirement that the Prosecution Prove Guilt Beyond a Reasonable Doubt Is a Criminal Defendant's Foremost Safeguard Against a Wrongful Conviction

"[T]he duty of the Government to establish . . .guilt beyond a reasonable doubt," Justice Frankfurter once said, is "basic in our law and rightly one of the boasts of a free society." *Leland v. Oregon*, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting). It "provides concrete substance for the presumption of innocence -- that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law,'" and is thus "a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 363 (1970) (citation omitted). This Court in *Winship* confirmed 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." *Id.* at 364. So important to the integrity of a criminal trial is the reasonable doubt standard that "failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error." *Jackson v. Virginia*, 443 U.S. 307, 320 n.14 (1979); *see also Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (explaining that "a misdescription of the burden of proof . . . vitiates all the jury's findings.").

Based on these authorities, the majority of courts that have considered the issue have held

that Due Process requires the prosecution to disprove a properly raised element-negating defense. These holdings are compelled by simple logic: where a properly raised defense negates an element of the charged crime, the prosecution necessarily cannot prove that element beyond a reasonable doubt without disproving the defense. Demanding that the prosecution disprove an element-negating defense, therefore, ensures that the prosecution has satisfied its constitutional burden of proof. Conversely, in those jurisdictions, like Colorado, where the prosecution need not disprove self defense even if it negates an element of the charged crime, the prosecution is relieved of its burden to establish every element beyond a reasonable doubt.

To leave intact the decision of the Colorado Supreme Court -- and the handful of decisions from other courts with which it is in accord -- would substantially increase "the risk of convictions resting on factual error" in those jurisdictions. *In re Winship*, 397 U.S. at 363. This is because the reasonable doubt standard is perhaps the single most important corrective to the structural disadvantages faced by criminal defendants. And those disadvantages are many.

To build its case, the prosecution has behind it the investigatory capabilities and resources of the police and the subpoena power of the grand jury. In contrast, the public defenders or court-appointed lawyers who represent most criminal defendants often have crushing caseloads and minimal investigative resources, leaving them with neither the time nor the funding for anything approaching the government's investigation of the case. The

reasonable doubt requirement mitigates this stark disparity by holding the prosecution's evidence to the strictest of standards.

But even where the prosecution's evidence is thin, simply being charged with a criminal offense can be a stigma unto itself, no matter the eventual outcome. Here too, the reasonable doubt requirement protects individuals under investigation from the black mark of an unfounded criminal charge by ensuring that prosecutors bring only their most meritorious cases. Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 Hastings L.J. 457, 458 (Mar. 1989). The American Bar Association's Standards for Criminal Justice require prosecutors to consider the likelihood of conviction in making their charging decision, a calculus that depends in large part on where the burden of proof lies. Specifically, Standard 3-3.9(a) provides that "[a] prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction." *See* American Bar Association, *Standards For Criminal Justice*, Prosecution Function § 3-3.9, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html#3.9 (last visited Feb. 10, 2012). If, as in this case, the only disputed fact upon which a conviction turns is one that the prosecution need not disprove, a prosecutor may well be more likely to bring that case than if he or she was required to disprove it.

The reasonable doubt standard is also a critical equalizer in the context of plea bargaining.

Every criminal defendant faces the same choice: go to trial and risk the possibility of a potentially severe punishment, or opt for the guarantee of a more lenient sanction through a plea agreement. In making this decision, a key factor is the defendant's assessment of the prosecution's case, the strength of which directly correlates with the burden of proof. If the prosecution is relieved of its full constitutional burden as to a fact essential to conviction, a defendant may be more likely to plea. The reasonable doubt rule thus reduces the pressure defendants face to plead guilty to crimes they did not commit.

Once a case proceeds to trial, defendants also face evidentiary disadvantages for which the reasonable doubt requirement compensates. As virtually every prosecutor reminds jurors in opening statements, prosecutors represent the "people" or the "state" and claim the mantle of the community in way that tends to make jurors believe that prosecutors come to the case solely to do justice. By contrast, given the potential life-changing repercussions of a criminal conviction, criminal defendants begin their cases with their own interests front and center. This has many consequences for the criminal trial, the most important of which is that a criminal defendant's most compelling (and perhaps sole) exculpatory evidence -- his own testimony -- is inherently tainted by the defendant's interest in self preservation. The trier of fact is thus likely to discount even the most credible and reliable exculpatory testimony offered by the accused. *See* Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 Calif. L. Rev. 1665, 1695 (Oct. 1987). And this is before accounting for the

myriad other factors unrelated to a defendant's guilt or innocence that can diminish the defendant's credibility in the eyes of the fact finder, such as a prior conviction, or simply whether the defendant appears nervous or unlikeable. Placing the burden of proof squarely, and solely, on the prosecution puts the onus on the prosecution's evidence, and ensures that the defendant's subjective credibility or objective bias does not become the issue upon which the case turns.

Not only is a criminal defendant's exculpatory testimony potentially counter-productive as an evidentiary matter, but putting defendants in the position where they feel they have no choice but to offer such testimony impinges on the Fifth Amendment. This Court has made clear that "[e]very criminal defendant is privileged to testify in his own defense, *or to refuse to do so*." *Harris v. New York*, 401 U.S. 222, 225 (1971) (emphasis added). But where guilt or innocence turns on a fact that the prosecution is absolved from having to disprove, and for which the only evidence is the defendant's own testimony, a defendant effectively *cannot* refuse to testify in his own defense, since the alternative is likely to be a prison term. Ensuring that the prosecution is held fully to its constitutional burden of proving each element beyond a reasonable doubt thus gives effect to the Fifth Amendment's testimonial privilege.

In short, the prosecution's burden to prove guilt beyond a reasonable doubt offers vital protections to defendants at virtually every stage of the criminal justice process, from charging decisions, to plea agreements, to the conduct of

trials themselves. Diluting the reasonable doubt requirement, therefore, would increase the number of defendants charged with crimes they did not commit, increase the likelihood that defendants will plea to such crimes, and increase the pressure on defendants to offer their own testimonial evidence despite their Fifth Amendment rights.

II. By Relieving the Prosecution From Having to Disprove Self Defense, Colorado's Self Defense Statute Creates the Very Problems that the Reasonable Doubt Requirement Serves to Correct

The particular facts of this case highlight many of the problems that the reasonable doubt requirement serves to correct, and further demonstrate the problems associated with shifting the burden of proof to defendants on an issue relevant to their mens rea. As a result, this case is especially worthy of certiorari.

The defense at issue in this case, self-defense, directly negates the mens rea element of the charged crime of reckless manslaughter. In Colorado, reckless manslaughter requires the defendant to have acted "recklessly" -- that is, by "consciously disregard[ing] a substantial and unjustifiable risk that a result will occur or that a circumstance exists." Colo. Rev. Stat. § 18-1-501(8). Self-defense, on the other hand, "requires one to act justifiably." Pet. App. 5a-6a. Even the Colorado Supreme Court recognized that the mens rea element of reckless manslaughter and self-defense are "totally inconsistent." *Id.* at 5a. Thus, by excusing the prosecution from having to disprove

self defense, the Colorado self-defense statute (Colo. Rev. Stat. § 18-1-704,) absolved the prosecution of having to prove a fact essential to establishing Mr. Pickering's mens rea.

Relieving prosecutors of their full constitutional burden to establish or negate a defendant's mental state, such as self defense, is particularly problematic. The mens rea requirement "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States*, 342 U.S. 246, 250 (1952). But as this Court recognized in *Mullaney v. Wilbur*, unlike other elements of a charged crime, "intent is typically considered a fact peculiarly within the knowledge of the defendant." 421 U.S. 684, 702 (1975). As a result, if prosecutors need not disprove an element-negating mental state -- such as justifiable self defense -- defendants may have no choice but to testify in their own defense, with all of the evidentiary and constitutional downsides that such testimony entails. Not only may such testimony be counter-productive at trial by taking the jury's focus off of the prosecution's case and shifting it to the defendant's perceived credibility, but the possibility of being forced to offer it would certainly factor into the defendant's decision whether to accept a plea or go to trial.

The problem of relieving prosecutors of their obligation to sufficiently prove a criminal defendant's mental state, as happened in this case, is an especially salient one. A joint report released in 2010 by NACDL and the Heritage Foundation detailed the proliferation of federal criminal

offenses with a deficient or non-existent mens rea requirement. *See* Brian W. Walsh and Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, at IX (Apr. 2010), http://www.nacdl.org/criminaldefense.aspx?id=10287&terms=withoutintent (explaining that of the 446 non-violent criminal offenses proposed by the 109th Congress, "57 percent lacked an adequate *mens rea* requirement"). The groups recognized that "[*m*]ens *rea* requirements . . . not only help to assign appropriate levels of punishment, but also to protect from unjust criminal punishment those who committed prohibited conduct accidentally or indadvertently." *Id.* at 4-5. With "the disappearance of adequate *mens rea* requirements," the criminal law "becomes a broad template for the misuse and abuse of governmental power." *Id.* at 10. Ensuring that prosecutors bear fully the burden of establishing a defendant's mental state, therefore, is a critical check on prosecutorial power.

None of this is to suggest, of course, that Mr. Pickering or other criminal defendants in like circumstances should play no role in establishing an element-negating mental state, or any other element-negating defense. To the contrary, this Court in *Wilbur*, after holding that Maine impermissibly required a defendant charged with murder to prove that he acted in the heat of passion, explicitly approved of the requirement in many states that the defendant "show that there is 'some evidence' indicating that he acted in the heat of passion before requiring the prosecution to negate this element." *Wilbur*, 421 U.S. at 702 n.28. Indeed, the Court made clear that "[n]othing in [its] opinion is intended to affect that requirement." *Id.*

Thus, even if this Court grants certiorari and reverses, Mr. Pickering and others in his position would still be required to at least put in issue their element-negating defenses.

But once an element negating defense is properly raised, the prosecution, in order to satisfy its constitutional burden to prove each element beyond a reasonable doubt, must disprove that defense. Relieving the prosecution of this obligation not only offends this Court's precedents and the United States Constitution, but, as explained, it substantially undermines the fairness of trial by diluting one of the most important protections against wrongful convictions.

CONCLUSION

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

Respectfully submitted,

TIMOTHY P. O'TOOLE
Counsel of Record
JEFFREY HAHN
MILLER & CHEVALIER CHARTERED
655 Fifteenth St., N.W., Suite 900
Washington, D.C. 20005
(202) 626-5800
Email: totoole@milchev.com

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