NO. 11-870

IN THE SUPREME COURT OF THE UNITED STATES

Jerad Allen Pickering,
Petitioner,

vs.

Colorado,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner asserted self defense against a charge of reckless manslaughter. The court instructed the jury that the prosecution—and not Petitioner—bore the burden to prove all elements of this crime. This included recklessness, which, if proven, necessarily forecloses the possibility that a person acted in self defense. Did due process nonetheless require the jury to be instructed that the prosecution was required to *disprove* self defense?

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STATEMENT

1. In the early morning hours of October 15, 2006, Petitioner Jared Allen Pickering stabbed Leon Villereal to death. Petitioner and his longtime friend Jesse Bates, seeking to obtain some cocaine, had gone to an apartment where two men were living as guests of Eugene Morgan. One of those men was Villereal.

At the apartment, Petitioner had his knife out and was "[f]lickering it back and forth." He began arguing with Villereal about why Villereal was not paying rent to Morgan. Villereal, who had a blood alcohol level of 0.139 and a small amount of methamphetamine and cocaine in his system, became so upset that Morgan, believing he might hurt someone, restrained him. Villereal was unarmed.

Witnesses had conflicting accounts of what happened next. According to Morgan, Petitioner attacked Villereal, and during the fight he stabbed him in the heart. Petitioner's friend Bates told a slightly different story. He maintained that Villereal ran at Petitioner and fell on Petitioner's blade. But Bates could not explain why Villereal would rush at someone holding a knife.

After the fight, Villereal staggered from the apartment and collapsed in the breezeway just outside. Meanwhile, Petitioner washed off Villereal's blood. Then, on his way out of the apartment, he laughed at Villereal, kicked him, and stabbed him in the buttocks. The police later found Petitioner and Bates hiding under a friend's house.

2. The prosecution charged Petitioner with second degree murder and second degree assault. In addition to the charged offenses, the jury was allowed to consider the lesser included offenses of reckless manslaughter and criminally negligent homicide. Petitioner did not testify at

trial or present any witnesses, but he asserted that he had killed Villereal in self-defense.

In Colorado, the legislature has placed "the burden of disproving affirmative defenses" on the prosecution, *Vega v. People*, 893 P.2d 107, 111 (Colo. 1995); *see also* Colo. Rev. Stat. § 18-1-407(2), although it need not have done so under the U.S. Constitution, *see Martin v. Ohio*, 480 U.S. 228, 236 (1987). Colorado defines an affirmative defense as one involving "issues of justification or exemption from criminal liability," Colo. Rev. Stat. § 18-1-710, and includes self-defense within this statutorily prescribed category of defenses. Colo. Rev. Stat. § 18-1-704.

In contrast to crimes that require intent, knowledge, or willfulness—such as second degree murder—self-defense is not an affirmative defense for crimes requiring only recklessness or criminal negligence, such as reckless manslaughter. *People v. Fink*, 574 P.2d 81 (Colo. 1978). Such mental states, which are precisely defined in Colo. Rev. Stat. §18-1-501, are "totally inconsistent" with self-defense, as "it is inherent in the affirmative defense of self-defense that the person not only reasonably believed that his actions were justified, but also that he acted in a reasonable manner." *Fink*, 574 P.2d at 83. Conversely, "if the jury is able to find that the defendant acted recklessly, they have already precluded any finding of affirmative defense." *Id.* (quoting The Notes on the Use of the Colorado Jury Instructions (Criminal) §9:7 (Manslaughter-Reckless)) (quotation marks omitted).

3. At trial, the jury was instructed on the elements of reckless manslaughter. Consistent with Colorado law, the jury was instructed that "[a] person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists." *See* Colo. Rev. Stat. §18-1-105(8). The jury received a general instruction that "[t]he burden of proof is upon the

prosecution to prove to the satisfaction of the jury beyond a reasonable doubt the existence of all of the elements necessary to constitute the crime charged." The jury was instructed that if it found "from the evidence that each and every element has been proven beyond a reasonable doubt," it was to find Petitioner guilty, and that if it found "from the evidence that the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt," it was to find Petitioner not guilty. Similar language was included in the elements instructions for all charges presented for the jury's consideration. The instructions also advised the jury to consider all the court's rules together as a whole, and to consider all the evidence presented at trial.

4. Petitioner requested two instructions concerning self-defense, both of which placed the burden to disprove self-defense on the prosecution for the reckless manslaughter charge. The first stated, "[i]f you found that the prosecution did not disprove that the defendant was acting in self-defense, then by definition you cannot find the defendant guilty of reckless manslaughter, reckless manslaughter—provoked passion, or criminally negligent homicide." The second was similar, stating, "[w]ith respect to [reckless manslaughter and criminally negligent homicide], the defendant does not bear the burden of proving that he acted in self-defense."

The trial court rejected these instructions, finding that they were repetitive to the extent that they explained Petitioner did not bear the burden of proving he acted in self-defense. Instead, the court gave, among others, the following instruction, to which Petitioner did not object:

The evidence in this case has raised the issue of self-defense.

With respect to the charges of

Murder in the Second Degree,

Assault in the Second Degree, and

Assault in the Third Degree (Knowingly)

self-defense is an affirmative defense. The prosecution bears the burden of proving beyond a reasonable doubt that Defendant did not act in self-defense with respect to these charges.

With respect to the charges of

Reckless Manslaughter,

Criminally Negligent Homicide,

Assault in the Third Degree (Recklessly),
and

Assault in the Third Degree (Deadly Weapon – Criminal Negligence)

self-defense is also a defense. However, self-defense is not an affirmative defense to these charges. That is, the prosecution does not bear the burden of proving beyond a reasonable doubt that Defendant did not act in self-defense with respect to these charges.

The jury found Petitioner guilty of reckless manslaughter, for which he was sentenced to the maximum of 12 years' imprisonment.

5. On appeal, the Colorado Court of Appeals reversed Petitioner's manslaughter conviction. *People v. Pickering*, (Colo. App. No. 07CA2322, Mar. 25, 2010) (not published). Petitioner argued that the trial court's self-defense instruction impermissibly altered the burden of proof, and the court agreed.

The Colorado Supreme Court granted the State's petition for writ of certiorari and reversed the decision of the court of appeals. Relying on *Fink* and this Court's decision in *Martin*, the majority concluded that "the prosecution's sole constitutional burden in cases implicating self-defense and . . . recklessness . . . is simply to prove recklessness . . . along with the other elements of the charged crime." Slip op. at 10. The court further held that the jury instructions were "an accurate statement of Colorado law" and "d[id] not improperly shift [to the defendant] the prosecution's burden to prove recklessness." *Id.* at 11.

ARGUMENT

Whether the Constitution forbids a state from placing upon a defendant the burden of proving a fact to negate an element of a crime may be an important and interesting question, but it is not one properly presented in this case. Colorado does not require a defendant to prove any fact negating an element of a crime, and did not do so in this case. Colorado's rule is that, consistent with *Martin*, a defendant may introduce evidence of self-defense to raise a reasonable doubt about the prosecution's proof of an element. *Pickering*, slip op. at 10. This distinguishes Colorado from the other jurisdictions Petitioner cites as

examples of confusion in the state and lower federal courts. *See, e.g., Hobgood v. Housewright*, 698 F.2d 962, 963 (8th Cir. 1983) ("[I]t is not a denial of due process for the state to place on the defendant the burden of proof by a preponderance of the evidence of an affirmative defense which negates an element of the crime."). If this question is as important and as widespread as Petitioner alleges, then the Court inevitably will have an opportunity to resolve the question in a case properly presenting it.

Here, however, Petitioner's arguments "founder[] on state law." *Martin*, 480 U.S. 235. As the Colorado Supreme Court held below, the jury instructions on self defense accurately stated Colorado law and did not shift the burden of proof to Petitioner. Slip. Op. at 11. The Court should therefore deny the petition.

There is no dispute here that the jury was instructed that the State was required to prove, and did prove, that Petitioner acted unreasonably. Nonetheless, Petitioner asks this Court to grant certiorari so that it may create a rule that would require the jury also to be instructed that the prosecution had the burden of proving that the defendant did not act reasonably. Colorado, like nearly all other states, already applies that rule, and did so here. There is no reason to use this case to resolve a problem that, if it exists, does not exist in this case.

Neither logic nor the Constitution requires an additional instruction. Where proof of the elements of a crime necessarily disproves a defense, no additional burden must be imposed on the prosecution. Instructing a jury that the prosecution must disprove an element-negating defense — where no burden is placed on the defendant to prove that defense — is redundant. Due process requires no more, and the jury instructions here stated no less.

I. In Colorado, criminal defendants never bear the burden of proof on any fact; this case therefore does not present an unresolved constitutional question.

States have the preeminent role in preventing and punishing crime. *Martin*, 480 U.S. at 232 (citing *Patterson*, 432 U.S. 197, 201–02 (1977)). State legislatures have power to define criminal conduct and the procedures by which the criminal laws are to be enforced in the courts, including the allocation of the burden of proof. *Id.* A state's authority is not unlimited, of course. A state cannot shift to the defendant the burden of disproving the elements of a crime. *Id.* at 233. Colorado complies with this requirement. It places no burden on a criminal defendant to prove any fact—including any fact relating to a defense. *See* Colo. Rev. Stat. §18-1-704(4). Here, the trial court followed this law. This case therefore cannot resolve the split Petitioner claims it presents.

Petitioner asserts that a state, in addition to bearing the burden to *prove* every element of a crime, must also bear the burden to *disprove* an element-negating defense. But this is a meaningless abstraction in a case where, to prove the crime itself, the prosecution as matter of logic was required to disprove the defense. Only by disproving self-defense – that is, reasonableness – did the prosecution, under the full weight of the burden of proof, negate any reasonable doubt created by Petitioner's theory of the case. Due process is implicated only when, contrary to the circumstances of this case, the law places overlapping burdens on the defendant and the prosecution, such that the prosecution's burden is lessened or is shifted to the defendant.

So, for example, in *Martin* the Court noted that although the defendant could be required to prove self

defense, "[i]t would be quite different if the jury had been instructed that self-defense evidence could not be considered . . . . Such an instruction would relieve the State of its burden . . . ." *See, e.g.*, *Martin*, 480 U.S. 233–34. This is why the "deep and intractable" divide that Petitioner asks this Court to resolve has no relevance to this case. Indeed, in many of the cases cited by Petitioner—at least those that are not entirely inapplicable—such an overlap existed. In those cases, an instruction had explicitly placed the burden on the defendant to prove an affirmative defense, and therefore to disprove an element of the crime itself, because the defense coincided with the element.[1] No

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[1] *See United States v. Prather*, 69 M.J. 338, 342–43 (C.A.A.F. 2011) (holding that it was error to impose the burden on defendant to prove consent, which negated a charge of sexual assault); *Humanik v. Beyer*, 871 F.2d 432, 440 (3d Cir. 1989) ("A different and more serious problem is presented in the situation where the element of the offense and the so-called 'affirmative defense' pose the same ultimate issue and a state places the burden of persuasion on the defendant with respect to that ultimate issue."); *Holloway v. McElroy*, 632 F.2d 605, 625, 626 n.33 (5th Cir. 1980) (same; self-defense under Georgia law negated the element of unlawfulness); *State v. Powdrill*, 684 So. 2d 350, 355 (La. 1996) (same; defense of lack of knowledge negated the willfulness element of securities fraud); *State v. Moore*, 585 A.2d 864, 870–71 (N.J. 1991) (same; defense of diminished capacity negated the mental state element for capital murder); *State v. Charlton*, 338 N.W.2d 26, 30–31 (Minn. 1983) (same; defense of duress negated element of intent, but error was harmless); *State v. Schulz*, 307 N.W.2d 151, 156 (Wis. 1981) (same; defense of intoxication negated the mental state for murder); *Connolly v. Commonwealth*, 387 N.E.2d 519, 522 (Mass. 1979) (same;

such thing happened here, because no burden was ever placed on Petitioner to prove anything.

Other cases Petitioner cites are simply off the mark. For example, *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000), is a routine affirmative defense case: the court simply affirmed a defendant's conviction when the burden was placed on a defendant to prove a defense that did *not* in fact negate any element of the charged crime. The same is true of *Virgin Islands v. Smith*, 949 F.2d 677 (3d Cir. 1991). There, self defense was an affirmative defense to murder, and the government had determined that the prosecution should bear the burden of proof. *Id*. at 680 ("The parties apparently agree that when self-defense is raised by a defendant, Virgin Islands law requires the prosecution to prove its absence beyond a reasonable doubt."). The fact that the trial court in *Smith* shifted the burden to the defendant and violated local law—as it would have done if it had been applying Colorado law—has no bearing in this case. Finally, in *United States v. Santos*, 932 F.2d 244 (3d Cir. 1991), the court merely applied the longstanding rule under *Martin* that "there is no constitutional bar to placing the burden upon a defendant to prove the affirmative defense of duress by a preponderance of the evidence where the crime charged contains no requirement of *mens rea*." *Id*. at 249.

Petitioner seeks to lump the decision of the Colorado Supreme Court below with cases from four states—Arkansas, Minnesota, South Carolina, and Washington—

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defense of self-defense negated malice element of murder); *Commonwealth v. Hilbert*, 382 A.2d 724, 731 (Pa. 1978) (same; self-defense negated unlawfulness and malice elements for murder); *In re Doe*, 390 A.2d 920, 926 (R.I. 1978) (same; defense of self-defense negated the unlawfulness element of murder).

that allowed defendants to bear the burden of proving element-negating defenses. This argument goes too far. In each of these cases—unlike what occurred here—the court held that the jury was properly instructed that the defendant was required to carry the burden of proving a defense that arguably negated an element of the crime.[2] Colorado law is to the contrary. Here, in accordance with Colorado law, no instruction placed any burden on Petitioner to prove any fact. This case simply does not present the issue that Petitioner claims it does.

Colorado's consistent emphasis on the prosecution's burden to prove the elements of the case avoids potential problems this Court has identified. In *Martin*, for example, a critical point for the dissent was that, in its view, instructions placing a burden on *both* parties with regard to an overlapping element might lessen the prosecution's burden: "If the jury is told that the prosecution has the

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[2] *See Flores v. Minnesota*, 906 F.2d 1300, 1303 (8th Cir. 1990) (holding, under Minnesota law, that where defense of intoxication "seemingly" negated element of premeditation, it was permissible to place burden of proof on defendant); *Smart v. Leeke*, 873 F.2d 1558, 1562 (4th Cir. 1989) (holding that it is permissible under South Carolina to require defendant to prove self-defense, notwithstanding an overlap with the malice element of murder); *Hobgood*, 698 F.2d at 963 ("[I]t is not a denial of due process for the state to place on the defendant the burden of proof by a preponderance of the evidence of an affirmative defense which negates an element of the crime."); *State v. Gregory*, 147 P.3d 1201, 1224–25 (Wash. 2006) (holding that it is permissible under Washington law to require a defendant to prove consent by preponderance of evidence, notwithstanding the "conceptual overlap between the consent defense and the forcible compulsion element").

burden of proving all the elements of a crime, but then also is instructed that the *defendant* has the burden of *disproving* one of those same elements, there is a danger that the jurors will resolve the inconsistency in a way that lessens the presumption of innocence" 480 U.S. at 237–38 (Powell, J., dissenting) (emphasis added). In the present case, however, the risk of any burden-lessening is even less than it was in *Martin*, as no instruction placed any burden on Petitioner.

II. This case is a poor vehicle for resolving the issue presented: the only real question involves the adequacy of the particular combination of instructions used here.

No instruction affirmatively placed any burden on Petitioner to prove any fact. Indeed, the instruction Petitioner claims violated his constitutional rights merely stated that "the prosecution does not bear the burden of proving beyond a reasonable doubt that Defendant did not act in self-defense with respect to [reckless manslaughter]." The dispute in this case therefore reduces to the case-specific dispute about whether the court's instructions misled the jury so clearly as to violate due process. That dispute does not warrant the Court's review.

The jury instructions, when read as a whole, clearly and correctly explained the prosecution's burden to prove every element beyond a reasonable doubt. Instruction 1 explained that if the jury "decide[d] that the prosecution has proved beyond a reasonable doubt that the defendant has committed the crime as charged," the possible punishment was not to enter into the jury's consideration. As noted above, Instruction 7 explained that the prosecution's burden of proof was "to prove to the satisfaction of the jury beyond a reasonable doubt the

existence of all of the elements necessary to constitute the crime charged." . These same two statements were contained in all the elements instructions, including the reckless manslaughter instruction.

Also as noted above, recklessness was defined for the jury as the conscious disregard of a substantial and unjustifiable risk, a mental state "totally inconsistent" with the reasonableness required for self-defense. *See Fink, supra.* In this regard, the jury was instructed that self-defense required that Petitioner reasonably believe he was defending himself from the use or imminent use of unlawful physical force by the victim, and reasonably believe that the degree of force was necessary for that purpose. Finally, the jury was instructed that self-defense was a defense to reckless manslaughter.

Closing arguments also emphasized the impossibility of finding that the prosecution had met its burden of showing recklessness without also recognizing that Petitioner had not acted reasonably. Defense counsel clearly explained: "If you're acting in self-defense, you are, by definition, not acting recklessly or negligently. That's why it's a complete defense, that's why the law says if you can't get by self-defense, he's not guilty."

And the instructions, when read as whole, allowed the jury to consider evidence of self-defense. Instruction 1 required the jury to consider the evidence presented at trial, and Instruction 7 required the jury to consider *all* the evidence. Because the court specifically instructed the jury to consider self defense, the jury was necessarily required to consider evidence tending to prove that theory.

Petitioner apparently regarded the court's instruction as adequate notwithstanding the lack of an affirmative instruction to the jury that it could consider evidence of self-defense. Petitioner's tendered instruction used the identical language that "[s]elf-defense is also a

defense to the charges of reckless manslaughter and criminally negligent homicide," and, like the court's instruction, was silent on whether the jury could consider evidence of self-defense. This would explain why Petitioner did not object to the absence of this language.

Finally, the jury was instructed that "[n]o single rule describes all the law which must be applied. Therefore, the rules must be considered together as a whole." This instruction directed the jury away from reading in isolation the statement that the prosecution did not bear the burden of disproving self-defense as to reckless manslaughter.

Because the jury was plainly and repeatedly instructed that the prosecution bore the burden to prove all elements of the crime, the jury could not have been confused that Respondent had any burden to prove the elements of reckless manslaughter. *United States v. Olano*, 507 U.S. 725, 740 (1993) ("[We] presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (quoting *Francis v. Franklin*, 471 U. S. 307, 324, n. 9 (1985))). The jury reasonably would have read the instructions to mean that it could only convict Petitioner if none of the evidence raised a reasonable doubt that he acted recklessly. *Martin*, 480 U.S. at 231 ("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.'" (quoting *In re Winship*, 397 U.S. 358, 364 (1970))).

CONCLUSION

The trial court in this case issued instructions squarely placing the burden of proof of recklessness on the prosecution; the prosecution thus had to prove that Petitioner did not act reasonably – that is, the prosecution had to disprove that he acted in lawful self-defense. No instruction placed any burden on Petitioner to prove any fact. This case therefore does not present the Court with an opportunity to address whether State law can impose a burden on a defendant to prove an element-negating defense. The petition should be denied.

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