No. 11-870

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In *Engle v. Isaac*, 456 U.S. 107 (1982), this Court recognized a split of authority over whether "[t]he Due Process Clause . . . forbids the States to disavow" a burden to disprove element-negating defenses. *Id.* at 122. Try as the State might in its Brief in Opposition (BIO) to obscure matters, there can be no doubt that Colorado has chosen a clear side of this split. A Colorado law enacted in 2003 provides that when, as here, self-defense negates an element of the crime, the prosecution "shall *not* have the burden of disproving self-defense." Colo. Rev. Stat. § 18-1-704(4) (emphasis added). Pursuant to that law, the jury was instructed here 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). In the Colorado Supreme Court, the State defended that state law and implementing jury instruction, arguing that the Due Process Clause does *not* "impose[] a burden on the prosecution to disprove defenses that negate an element of an offense." State's Reply Br. in Colo. S. Ct. 1; *accord id.* 5; State's Opening Br. 8. A bare majority of the Colorado Supreme Court agreed with the State, holding that "the prosecution bears *no burden* of disproving self-defense" in this situation. Pet. App. 9a (emphasis added).

The State nonetheless opposes certiorari, contending that (1) this case is an unsuitable vehicle for resolving the ever-deepening conflict this Court first noted in *Engle*; and (2) the Colorado Supreme Court's holding is correct. Neither of these arguments withstands scrutiny. This Court should grant certiorari and reverse.

1. The State advances two vehicle arguments. First, the State contends that this case is different than "many" of the cases in the conflict because the jury instructions here provided that the prosecution did not bear the burden of disproving an element-negating defense, instead of stating that petitioner had the burden of proving the defense. BIO 8-9. Second, the State suggests that even if the Due Process Clause requires the prosecution to disprove element-negating defenses, the error here was effectively harmless because the jury instructions "as a whole" adequately conveyed that principle. BIO 11-13. Neither argument has merit.[1]

a. It is immaterial that the jury instructions here provided that the prosecution did not bear the burden of disproving an element-negating defense, instead of stating that petitioner had the burden of proving the defense. *Engle* deemed instructions that "disavow"

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[1] The State also asserts at one point that petitioner "did not object" to the jury instruction stating that the prosecuiton did not bear the burden to disprove self-defense. BIO 3-4. But the State does not argue (nor has it ever argued) that any preservation problem exists with respect to the due process argument petitioner makes here. And for good reason: Colorado law holds that a defendant preserves an objection to a jury instruction by requesting an alternate instruction, *People v. Pahl*, 169 P.3d 169, 182-83 (Colo. App. 2006), and petitioner did that here when he requested that the jury be instructed that the prosecution bore the burden to disprove self-defense, Pet. 5; BIO 3. In any event, the Colorado Supreme Court squarely addressed the due process question presented here, and when a state supreme court passes on a federal question, any "concern with the proper raising of the federal question in the state courts disappears." Eugene Gressman et al., Supreme Court Practice 197 (9th ed. 2007).

the prosecution's duty to disprove an element-negating defense to be the same as ones that "shift the burden of proving" such a defense. 456 U.S. at 121-22.

Engle was correct to do so. The due process principle involved here is the rule of *In re Winship*, 397 U.S. 358, 364 (1970). The *Winship* rule requires "*the prosecution* to prove" all facts necessary for conviction. *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975) (emphasis added). Consequently, if the *Winship* rule mandates that the prosecution prove the absence of an element-negating defense, this requirement is violated just as surely by disavowing the prosecution's duty to do so as it is by shifting the burden of proving the defense. *See* Pet. 14. Either way, the prosecution is relieved of part of its constitutionally mandated burden of proof.

This equivalence explains why, regardless of the particular instructions in any particular case, courts holding that *Winship* applies in this context have repeatedly required *the prosecution to disprove* element-negating defenses. *Compare, e.g.*, *Barone v. State*, 858 P.2d 27, 28 (Nev. 1993) (adopting this rule in case lacking any burden-shifting instruction), *with In re Doe*, 390 A.2d 920, 926 (R.I. 1978) (same in case involving burden-shifting instruction); *see also* Pet. 15-18 (citing and discussing other cases in conflict). This equivalence also explains why the State itself urged the Colorado Supreme Court to follow the Washington Supreme Court's holding 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 the crime," *State v.*

Camara, 781 P.2d 483, 487 (Wash. 1989). State's Br. in Colo. S. Ct. 22-23.

Although the State now tries to distance the Colorado Supreme Court's ruling from the Washington Supreme Court's, BIO 9-10, the State was right the first time. Either the *Winship* rule applies to element-negating defenses or it does not. If it does, it prohibits disavowals as well as burden shifting. If it does not, it permits both.

b. The State also asserts that various "general instruction[s]" requiring it to prove every element beyond a reasonable doubt "directed the jury away from reading in isolation the [instruction] that the prosecution did not bear the burden of disproving self-defense," such that it would have cured any due process infirmity in that instruction. BIO 2, 13. But this Court has squarely held that language in other instructions "that merely contradicts and does not explain a constitutionally infirm instruction [concerning the prosecution's burden of proof] will not suffice to absolve the infirmity." *Francis v. Franklin*, 471 U.S. 307, 322 (1985). Thus, every court to address the issue has held that a specific, erroneous instruction concerning an element-negating defense mandates reversal even where other instructions informed the jury of the prosecution's general duty to prove each element beyond a reasonable doubt. Pet. 24-25 (citing cases). The State offers no answer to these cases, and they control here.

2. The State's argument on the merits might be understood in two different ways. But however it is understood, it cannot survive a basic due process analysis.

a. At times, the State contends that due process does not require an "additional instruction" stating the prosecution is required to disprove an element-negating defense. BIO 6; *accord* BIO i. Insofar as this assertion is meant to defend the decision below, it is a red herring. Petitioner does not argue that due process requires any such affirmative instruction. Rather, petitioner contends that a jury instruction stating the *exact opposite* – namely, that "the prosecution does *not* bear the burden" of disproving an element-negating defense, Pet. App. 24a (emphasis added) – violates due process. Assuming petitioner is correct, the judgment below must be reversed.

b. At other times, the State appears to argue that the prosecution need not disprove element-negating defenses because it already bears the burden of proving all of the elements beyond a reasonable doubt. *See* BIO 7. But this argument makes no sense. As petitioner has already explained, the State's argument implies a two-step fact-finding process – elements first, defenses second – that does not reflect reality in this context. Pet. 27-28. Jurors weigh evidence indicating the presence of offense elements at the same time they weigh evidence indicating the absence of any element. Therefore, when a defendant properly raises an element-negating defense, the *Winship* requirement that the prosecution prove every element necessarily requires the prosecution to disprove the defense.

Indeed, the State itself recognizes that "to prove the crime itself" in this case, "the prosecution as [a] matter of logic was required to disprove the defense." BIO 7. But the State fails to appreciate the

constitutional implication of that reality, instead continuing to defend the Colorado statute providing that the prosecution "shall *not* have the burden of disproving self-defense," Colo. Rev. Stat. § 18-1-704(4) (emphasis added), as well as the Colorado Supreme Court's decision upholding that provision as consistent with due process, Pet. App. 8a-9a. *See* BIO 7, 10.[2] So long as that statute and decision are in effect, the *Winship* rule cannot be satisfied in Colorado. This Court should grant certiorari to see that it is.

CONCLUSION

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

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[2] The State continues to defend and capitalize on the Colorado Supreme Court's decision in state courts as well. *See, e.g.*, State's Br. 29, *People v. Doubleday*, No. 08CA2433 (Colo. App. Dec. 20, 2011) (asserting, through same counsel of record as here, that the Colorado Supreme Court's decision here "is dispositive" and fatal to the argument that "[w]here the evidence raises a defense whose existence would negate an element of a charged offense, [the prosecution's *Winship*] burden necessarily includes the burden of disproving the defense beyond a reasonable doubt").

Respectfully submitted,

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