No. 17-___

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 permit the court to instruct a jury that the prosecution does not have the burden of disproving 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 published at 276 P.3d 553 and reproduced at Pet. App. 1a. The pertinent opinion of the Colorado Court of Appeals is unpublished and reproduced at Pet. App. 22a. The relevant proceedings of the trial court, recounted at Pet. App. 24a, are unpublished.

JURISDICTION

The Colorado Supreme Court's opinion rejecting petitioner's claim here and remanding for further proceedings was entered on September 12, 2011. The Colorado Court of Appeals issued a decision rejecting those remaining claims and affirming petitioner's conviction on August 11, 2016. Pet. App. 30a. The Colorado Supreme Court denied review of that decision on June 26, 2017. Pet. App. 46a. This Court has jurisdiction under 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. § 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."

INTRODUCTION

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. In cases involving the first type of defense—often called an "affirmative defense"—the defendant 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. Wayne R. LaFave, Substantive Criminal Law § 1.8(c) (2d ed. 2003). The *Winship* rule does not require the prosecution to disprove such a defense. *See Martin v. Ohio*, 480 U.S. 228, 232 (1987); *Patterson v. New York*, 432 U.S. 197, 210 (1977).

In cases involving the second type of defense—typically called an "element-negating defense" or a "traverse"—the defendant denies that the prosecution can prove all of the elements because of some fact that

is mutually exclusive with an element of the crime. LaFave, *supra*, at § 1.8(c)."[1]

At the time the Colorado Supreme Court first considered petitioner's case, in 2011, the lower courts were divided over whether *Winship* and its progeny require the prosecution to disprove element-negating defenses. *See Engle v. Isaac*, 456 U.S. 107, 122 (1982) (recognizing the conflict). The Colorado court aligned itself with those courts that held that juries may be instructed that "the prosecution does *not* bear the burden of proving" the absence of an element-negating defense. Pet. App. 3a n.3 (emphasis added) (quoting jury instruction); *see also id.* 8a-9a (legal holding).

While petitioner's case continued to play out on remand from that decision, this Court issued *Smith v. United States*, 133 S. Ct. 714 (2013). In that opinion, this Court explained that *Winship* requires the prosecution to prove the "nonexistence" of defenses that "negate an element of the crime." *Id.* at 719 (quoting *Martin*, 480 U.S. at 237 (Powell, J., dissenting)). Nevertheless, in *Montoya v. People*, 394 P.3d 676 (Colo. 2017), the Colorado Supreme Court reaffirmed its view that even when self-defense negates an element of the crime, due process permits "instructing the jury . . . that the prosecution d[oes] not

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[1] Some defenses, such as an alibi, are always element-negating. Other defenses are ordinary 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).

bear the burden to disprove [that defense]." *Id.* at 686-87. The Colorado Supreme Court then denied further review here. Pet. App. 46a.

Petitioner seeks certiorari to vindicate his due process rights and to dispel any lingering confusion over *Winship*'s application to element-negating defenses.

STATEMENT OF THE CASE

A. Factual background

1. One evening in 2006, petitioner Jerad Pickering and Jesse Bates visited an apartment belonging to Eugene Morgan. When they knocked, Leon Villarreal, an acquaintance of both men, opened the door, let them in, and led them to the bedroom to see Morgan. As the four men talked, petitioner played with a pocket knife, flicking it open and closed.

An argument soon started between Villarreal, who was under the influence of alcohol and methamphetamine, and petitioner. Villarreal yelled at petitioner and threatened to throw him off the balcony.

Accounts of an ensuing fight, during which petitioner stabbed Villarreal, varied. Bates said that as petitioner 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 he tried to restrain Villarreal from attacking petitioner at one point and was holding Villarreal when the stabbing occurred. Another man who was present in the apartment said that *Bates* and Villarreal started fighting, with petitioner and Morgan subsequently joining in on Bates's side. At any rate, during the scuffle, petitioner stabbed Villarreal

in the chest. Villarreal stumbled out of the apartment, collapsed, and died.

That evening, petitioner told an acquaintance 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 had caused Villarreal's death.

B. Procedural history

1. The State charged petitioner with second-degree murder for the stabbing in the chest.[2] 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. § 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." *Id.* § 18-1-501(8).

Petitioner 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 crime and the defense 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).

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[2] The State also charged and convicted Pickering of second-degree assault for the later stabbing in the buttocks. That conviction is not at issue here.

A Colorado statute enacted in 2003 further provides that when self-defense is an element-negating defense, "the prosecuting attorney shall *not* have the burden of disproving self-defense." Colo. Rev. Stat. § 18-1-704(4) (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. Over petitioner's objection, *see* Pet. App. 25a, the court also instructed the jury—consistent with Colo. Rev. Stat. § 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 found Pickering guilty of reckless manslaughter. He was sentenced to twelve years in prison for the offense.

2. Petitioner appealed, arguing, among other things, that the jury instruction denying the prosecution's duty to disprove self-defense violated his due process rights under *Winship*. The Colorado Court of Appeals agreed and reversed Pickering's reckless manslaughter conviction. Pet. App. 24a-26a. The court of appeals 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.* 25a (quotation marks and citations omitted). That being so, Pickering was entitled to a new trial on the reckless manslaughter charge because he raised a triable self-defense claim

to that charge but the jury instruction tracking Colo. Rev. Stat. § 18-1-704(4) denied that the prosecution had the burden to disprove self-defense. Pet. App. 25a.

In reaching this conclusion, the Colorado Court of Appeals relied on its then-recent decision in *People v. Lara*, 224 P.3d 388 (Colo. App. 2009), which had, after careful examination, held that due process requires the prosecution to "disprov[e] all element-negating defenses beyond a reasonable doubt." *Id.* at 394. *Lara* expressed agreement with decisions of 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 obtained review in the Colorado Supreme Court, arguing that the cases that the Colorado Court of Appeals followed in *Lara* had "relied on a questionable and overbroad interpretation" of this Court's *Winship* jurisprudence. State's Reply Br. 4. The State urged the Colorado Supreme Court instead 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 interpreted *Martin v. Ohio*, 480 U.S. 228 (1987), to establish that the prosecution need *not* disprove any "defense [that] 'negates' an element of a crime." *Camara*, 781 P.2d at 487. *Martin* absolved the prosecution of the need to

disprove an affirmative defense, not an element-negating defense. But in the Washington Supreme Court's view, *Martin*'s analysis applied with equal force to element-negating defenses. *Camara*, 781 P.2d at 487.

A bare majority of the Colorado Supreme Court agreed with the State and reversed the appellate court's decision. 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, the Colorado Supreme Court held that, under *Martin*, the jury instructions here were acceptable because "the prosecution bears no burden of disproving self-defense" in this situation. Pet. App. 9a. "So long as the trial court properly instructs the jury regarding the elements of the charged crime, a carrying instruction using the language of [Colo. Rev. Stat. §] 18-1-704(4) is not constitutionally erroneous." Pet. App. 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." Pet. App. 16a-17a (citing several cases). In the dissent's view, the majority's reliance on *Martin* was "misplaced" because in that case, the prosecution could have proven its case beyond a reasonable doubt without necessarily [having] disproved any of the elements of self-defense." *Id.* 11a-12a. The situation in petitioner's case, the dissent emphasized, was

different. Here, self-defense negated the element of an unjustified risk of death. 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.

Under this understanding of the Due Process Clause, the dissent agreed with the Colorado Court of Appeals that petitioner should receive a new trial. Pet. App. 18a-19a. The dissent acknowledged that the jury was instructed that "the prosecution ha[d] the burden to prove all the elements of reckless manslaughter." *Id.* 18a. But that did not cure the problem with the instruction "that the prosecution had no burden to disprove evidence of self-defense." *Id.* In cases where there is "no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict," the dissent explained, a new trial is the necessary and proper remedy. *Id.* (quoting *Francis v. Franklin,* 471 U.S. 307, 322 (1985)).

4. Petitioner sought certiorari in this Court. This Court denied review, 132 S. Ct. 2429 (2012), thereby allowing the Colorado Court of Appeals to consider petitioner's remaining claims on remand from the Colorado Supreme Court. Pet. App. 32a-33a.

5. While the case was pending on remand, this Court decided *Smith v. United States*, 133 S. Ct. 714 (2013). *Smith* held that the *Winship* rule does not require the prosecution to disprove the defense of withdrawal from a conspiracy. *Id.* at 719. "Far from contradicting an element of the offense, withdrawal presupposes that the defendant committed the offense." *Id.* But the opinion in *Smith*, joined by all nine Justices, was equally emphatic about the

converse: "when an affirmative defense *does* negate an element of the crime," the Constitution requires the prosecution to disprove the defense. *Id.* (quoting *Martin v. Ohio*, 480 U.S. 228, 237 (1987) (Powell, J., dissenting)) (emphasis in original).

6. Petitioner then filed a motion in the Colorado Court of Appeals asking it to reconsider his due process claim in light of *Smith.* The court of appeals denied this motion, stating that any "reconsideration would be solely the province of the [Colorado] [S]upreme [C]ourt." Pet. App. 44a. The court of appeals also rejected petitioner's arguments on the claims the Colorado Supreme Court had left for the remand, and it affirmed his conviction. Pet. App. 30a-40a.

7. Petitioner sought discretionary review in the Colorado Supreme Court, arguing that *Smith* had abrogated that court's prior holding condoning the jury instruction here. Petitioner pointed out that even the Washington Supreme Court—whose pre-*Smith* views the State had successfully propounded as the better reading of *Winship*—had subsequently abandoned its tolerance for instructions disavowing the prosecution's duty to disprove element-negating defenses, recognizing that *Smith* "clarified that the prosecution must always bear the burden of disproving a defense that necessarily negates an element of the charged offense." Pet. for Cert. 9 (quoting *State v. W.R.*, 336 P.3d 1134, 1137-38 (Wash. 2014)).

While that petition was pending, the Colorado Supreme Court addressed the issue and reaffirmed its pre-*Smith* position. In *Montoya v. People*, 394 P.3d 676 (Colo. 2017), the Colorado Supreme Court

acknowledged that—"unlike in *Pickering*"—the jury "was never instructed that the prosecution did not bear the burden to disprove self-defense." *Id.* at 688. But speaking beyond the facts of that case, the Colorado Supreme Court reaffirmed its view from *Pickering* that due process permits "instructing the jury . . . that the prosecution d[oes] not bear the burden to disprove self-defense with regard to reckless manslaughter." *Montoya*, 394 P.3d at 686-87. The court asserted that "*Smith* nowhere purports to address the circumstances, or particular kinds of instructions, that might be understood to shift the prosecution's burden to prove the elements of the offense with which the defendant is charged." *Id.* at 687.

One month later, the Colorado Supreme Court denied review in this case without comment. Pet. App. 46a.

REASONS FOR GRANTING THE WRIT

A Colorado pattern jury instruction—derived from a state statute, given to the jury in petitioner's case, and now approved by the Colorado Supreme Court—provides that, even when self-defense would negate an element of the charged crime, "the prosecution does not bear the burden of proving" that defense. Pet. App. 3a n.3. This instruction squarely contravenes this Court's precedent implementing the Due Process Clause's beyond-a-reasonable-doubt rule. It particularly flouts this Court's explanation in *Smith v. United States*, 133 S. Ct. 714 (2013), that when a defense "negate[s] an element of the crime,'" the prosecution must prove "the nonexistence of [the] defense[]." *Id.* at 719 (quotation marks and citations omitted). Not surprisingly, the Colorado Supreme

Court's decision also conflicts with every other post-*Smith* lower court decision to address the prosecution's burden with respect to element-negating defenses (and with numerous pre-*Smith* decisions as well).

The Colorado Supreme Court's decision is so plainly incorrect that summary reversal would be appropriate. But, one way or another, this Court's intervention is vital. The due process guarantee of proof beyond a reasonable doubt is the Constitution's core protection against wrongful convictions. And it was especially necessary in the jury room here. The State's allegation that petitioner recklessly caused the death of the victim was the subject of conflicting evidence, and petitioner raised a serious claim that he was justifiably protecting himself. Fairness demands that petitioner, and others in the same position, have opportunities to contest their guilt before properly instructed juries.

I. The Colorado Supreme Court's due process holding squarely contravenes this Court's precedent, as well as case law from numerous lower courts.

A. Legal background

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). This Court first applied this principle to a defense in *Mullaney v. Wilbur*, 421 U.S. 684 (1975). 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, 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, the Court stated, "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of [that fact]." *Mullaney*, 421 U.S. 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 of extreme emotional distress. That defense 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. The Court held that under that circumstance, jury instructions may constitutionally require the defendant to carry the burden of proof on his defense. *Id.*

Elsewhere in the *Patterson* opinion, however, this Court spoke in arguably broader terms. Without mentioning *Mullaney*'s admonition that the prosecution's obligation under *Winship* is not necessarily "limited to a State's definition of the elements of a crime," *Mullaney*, 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 "the elements included in the

definition of the offense of which the defendant is charged." *Patterson*, 432 U.S. at 210. Under this formulation, as the *Patterson* dissenters pointed out, the prosecution would not 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).

The divergent strands of reasoning in *Patterson* quickly produced confusion. 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 and yet the prosecution had not been required to "disprove that defense as part of its" burden of proof. *Engle*, 456 U.S. at 121-22. This Court acknowledged 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. But it noted that "other courts have rejected this type of claim." *Id.* The Court then declined to resolve the conflict because the petitioners had not properly preserved the argument 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 certain defense. The defendant argued, and four dissenting Justices agreed, that the *Winship* rule "require[d] the state to prove the nonexistence of the defense" because the defense at issue "negate[d] an element of the crime." *Martin*, 480 U.S. at 237 (Powell, J., dissenting). The

dissenting justices further reasoned that the constitutional infirmity in an instruction stating that the prosecution need not disprove an element-negating defense cannot be cured by also instructing the jury that "the prosecution has the burden of proving all the elements of a crime." *Id.* at 237. It is "settled law," the dissent explained, that "when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside." *Id.* at 238 n.1 (quoting *Francis v. Franklin*, 471 U.S. 307, 323 n.8 (1985)).

The majority concluded, however, that Martin's due process argument "founder[ed] on state law." *Martin*, 489 U.S. 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.

In *Smith v. United States*, 133 S. Ct. 714 (2013), the Court unanimously endorsed the *Martin* dissent's understanding of how *Winship* applies when a defense really does negate an element of the crime. *Smith* first reaffirmed that *Winship* does not apply to defenses that "do[] *not* controvert any of the elements of the offense itself." 133 S. Ct. at 719 (quotation marks and citation omitted) (emphasis added). The Court then continued—quoting the *Martin* dissent—that "'when an affirmative defense *does* negate an element of the crime,'" the prosecution must prove the nonexistence

of defense. *Smith*, 133 S. Ct. at 719 (quoting *Martin*, 480 U.S. at 237 (Powell, J., dissenting) (emphasis in original).

B. The conflict

The Colorado Supreme Court has deployed two strands of reasoning in holding that due process allows juries to be instructed that the prosecution does not bear the burden of disproving an element-negating defense. First, that court has stated that "the prosecution bears no burden of disproving" an element-negating defense. Pet. App. 9a. Second, the Colorado Supreme Court has suggested that even if the Due Process Clause does place this burden on the prosecution, instructing the jury that the prosecution need not disprove an element-negating defense remains permissible "[s]o long as the trial court [also] properly instructs the jury" that the prosecution must prove "the elements of the charged crime beyond a reasonable doubt." *Id.*; *see also Montoya v. People*, 394 P.3d 676, 686-87 (Colo. 2017) (characterizing the prior holding in petitioner's case as resting on that reasoning).

Both strands of reasoning defy this Court's precedent and conflict with case law from every other jurisdiction to have considered the question presented.

1. The Colorado Supreme Court's assertion that "the prosecution bears no burden of disproving" an element-negating defense, Pet. App. 9a, flatly contradicts this Court's decision in *Smith*. This Court explained there that the prosecution must prove the nonexistence of a defense "'when an affirmative defense *does* negate an element of the crime.'" *Smith*, 133 S. Ct. at 719 (quoting *Martin*, 480 U.S. at 237 (Powell, J., dissenting)).

The Colorado Supreme Court claimed to find support for its contrary conclusion in the majority opinion in *Martin*. Pet. App. 8a-9a. But *Martin* dealt with to a defense that, as the majority construed state law, did not necessarily cancel out an offense element. *Martin*, 480 U.S. at 234-35. In petitioner's case, by contrast, the Colorado Supreme Court recognized that the defense was "totally inconsistent" with an element; it is "impossible" to prove the element (an unjustifiable risk of death) without also disproving the defense (a justifiable use of force). Pet. App. 5a-6a. In this situation, *Smith* makes clear that the *Winship* rule requires the prosecution to disprove the defense. *See Smith*, 133 S. Ct. at 719.[3]

The Colorado Supreme Court's holding here also conflicts with numerous lower court decisions, both before and after *Smith*, concluding that the *Winship* rule requires the prosecution to disprove element-negating defenses. *See United States v. Prather*, 69 M.J. 338, 342-43 (C.A.A.F. 2011); *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000); *Holloway v. McElroy*, 632 F.2d 605, 625, 626 n.33 (5th Cir. 1980); *State v. W.R.*, 336 P.3d 1134, 1137-38 (Wash. 2014);

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[3] The due process obligation to disprove element-negating defenses does not require the prosecution to disprove *every* possible such defense. 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). But where, as here, the accused properly raises an element-negating defense, the prosecution cannot meet its burden of proving every element without disproving that defense.

State v. Powdrill, 684 So. 2d 350, 355 (La. 1996); *Barone v. State*, 858 P.2d 27 (Nev. 1993), *State v. Moore*, 585 A.2d 864, 870-71 (N.J. 1991); *State v. Charlton*, 338 N.W.2d 26, 30-31 (Minn. 1983); *State v. Schulz*, 307 N.W.2d 151, 156 (Wis. 1981); *Connolly v. Commonwealth*, 387 N.E.2d 519, 522 (Mass. 1979); *Commonwealth v. Hilbert*, 382 A.2d 724, 731 (Pa. 1978); *In re Doe*, 390 A.2d 920, 926 (R.I. 1978).

The Washington Supreme Court's opinion in *W.R.* is illustrative. The court observed there that *Smith* "clarified that the prosecution must always bear the burden of disproving a defense that necessarily negates an element of the charged offense." 336 P.3d at 1137. "Read together, *Martin* and *Smith* hold that the State may burden a defendant with proving an affirmative defense that excuses otherwise criminal conduct even when the defense overlaps one of the elements under most circumstances, but the State may not burden a defendant with proving a defense that necessarily negates an element of the charged offense." *W.R.*, 336 P.3d at 1137-38.

Beyond all these jurisdictions, several other decisions have recognized, in cases involving ordinary affirmative defenses, 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) (emphasis added); *accord United States v. Westbrooks*, 780 F.3d 593, 596 (4th Cir. 2015); *United States v. Moore*, 651 F.3d 30, 89 (D.C. Cir. 2011); *United States v. Leahy*, 473 F.3d 401, 409 (1st Cir. 2007); *United States v. Unser*, 165 F.3d 755, 764 (10th Cir. 1999); *United States v. Toney*, 27 F.3d 1245, 1250-

51 (7th Cir. 1994); *State v. Drej*, 233 P.3d 476, 481 (Utah 2010); *State v. Baker*, 579 A.2d 479, 481 (Vt. 1990); *Ward v. State*, 438 N.E.2d 750, 753 (Ind. 1982).

The Colorado Supreme Court's decision here conflicts with all these decisions. And the Colorado Supreme Court stands alone. No court since *Smith* (save the Colorado Supreme Court in its *Montoya* decision reaffirming the rule earlier announced in petitioner's case) has held that the prosecution need not disprove an element-negating defense. The Colorado Supreme Court's decision should not be allowed to stand.

2. The Colorado Supreme Court is equally mistaken in suggesting that due process permits a court to instruct a jury the prosecution need not disprove an element-negating defense "[s]o long as the trial court [also] instructs the jury" that the prosecution must prove "the elements of the charged crime beyond a reasonable doubt." Pet. App. 9a. As the dissenters in this case recognized, this reasoning directly contradicts Justice Powell's dissenting opinion in *Martin. See* Pet. App. 15a, 18a-19a (Martinez, J., dissenting). In that opinion, Justice Powell explained that a general instruction that the prosecution must prove every element of the crime cannot cure the due process infirmity of giving an additional instruction absolving the prosecution of its obligation to disprove an element-negating defense:

> If the jury is told that the prosecution has the burden of proving all the elements of a crime, but then also is instructed that the defendant has the burden of *dis*proving 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. For example, the jury might reasonably believe that by raising the defense, the accused has assumed the ultimate burden of proving that particular element. Or, it might reconcile the instructions simply by balancing the evidence that supports the prosecutor's case against the evidence supporting the affirmative defense, and conclude that the state has satisfied its burden if the prosecution's version is more persuasive. In either case, the jury is given the unmistakable but erroneous impression that the defendant shares the risk of nonpersuasion as to a fact necessary for conviction.

Martin, 480 U.S. at 237-38 (Powell, J., dissenting).

Perhaps the Colorado Supreme Court thought it could disregard Justice Powell's reasoning because it appears in a dissent. *See Montoya*, 376 P.3d at 687 (declaring, without mentioning Justice Powell's dissent, that jury instructions like those used in *Pickering* "cannot reasonably be understood to relieve the prosecution of its burden to prove all the statutory elements of the offense"). If so, the court was wrong. The majority and dissent in *Martin* disagreed only over a question of *state* law: whether the defense at issue negated an element. They did not disagree over the *due process* rules that apply to jury instructions when a defense does in fact negate an element. And in *Smith*, this Court expressly adopted the due process reasoning Justice Powell advanced in *Martin* as the law. *See Smith*, 133 S. Ct. at 719.

Furthermore, it has been clear all along that Justice Powell's due process reasoning was correct. In *Francis v. Franklin*, 471 U.S. 307 (1985), the Court considered whether an instruction relieving the prosecution of its *Winship* duty regarding a particular element violated due process. *Francis*, 471 U.S. at 319. The State argued that another instruction explaining that the prosecution is "required to prove every element of the offense beyond a reasonable doubt" precluded the defendant's due process challenge. *Id.* at 319.

This Court rejected that argument. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Francis*, 471 U.S. at 322. In that situation, "[a] reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Id.* And it is "settled law" that "when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, the verdict must be set aside." *Id.* at 322 n.8.

Based on this reasoning, numerous courts have recognized—contrary to the Colorado Supreme Court's decision here—that the constitutional infirmity in an instruction denying the prosecution's duty to prove a specific fact covered by *Winship* cannot be cured by telling a jury about the prosecution's general duty to prove all elements beyond a reasonable doubt. *See Prather*, 69 M.J. at 343-44; *Humanik v. Beyer*, 871 F.2d 432, 440-43 (3d Cir. 1989); *State v. Oglesby*, 585 A.2d 916, 528-30 (N.J. 1991). Once again, the Colorado Supreme Court's decision here conflicts with all of these cases.

II. It is vital that this Court correct the Colorado Supreme Court's error.

The question how juries must be instructed with respect to element-negating defenses is a recurring issue of criminal procedure. It is also a question of fundamental importance. As this Court put it in *In re Winship*, the requirement that the prosecution prove all elements of a crime beyond a reasonable doubt "is a prime instrument for reducing the risk of convictions resting on factual error." 397 U.S. 358, 363 (1970); *see also Hankerson v. North Carolina*, 432 U.S. 233, 242 (1977) (*Winship* rule is "designed to diminish the probability that an innocent person would be convicted"). Accordingly, so long as Colorado is allowed to view the scope of the rule more narrowly than other jurisdictions, the risk of wrongful convictions in Colorado is unacceptably higher.

The problem is particularly acute because the defective jury instruction here derives directly from a state statute, which directs that "the prosecuting attorney shall not have the burden of disproving self-defense" when it negates an element of the crime. Colo. Rev. Stat. § 18-1-704(4). The instruction given here also tracks the State's model jury instruction for cases in which self-defense is at issue. *See* Colorado Jury Instructions, Criminal H:13 (Model Crim. Jury Instructions Comm. of the Colo. S. Ct. 2016) (When self-defense is an element-negating defense, "the prosecution does not have an additional burden to disprove self-defense"); *see also id.* at cmt. 3 (citing *Pickering* as support for this instruction). Consequently, until this Court steps in, juries in cases such as petitioner's will continually receive instructions that violate the Due Process Clause.

To be sure, Colorado is an outlier here; this Court's case law is so crystalline that no other jurisdiction appears to have made the same mistake the Colorado Supreme Court has made. But that simply reinforces the need for this Court to correct Colorado's unconstitutional approach. The Due Process Clause is designed in part to guard against one state's adopting a deleterious rule of criminal procedure that contravenes the "near-uniform" practice in other jurisdictions. *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996). And this Court has frequently granted review and reversed where, as here, a single state's rule of criminal procedure violates a constitutional norm. *See, e.g.*, *Nelson v. Colorado*, 137 S. Ct. 1249 (2017); *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017); *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016) (per curiam).

This case calls for the same treatment. The Colorado Supreme Court's holding applies across the board to all cases in which self-defense is an element-negating defense—cases ranging from certain types of first-degree murder to criminally negligent assault. And the erroneous jury instruction was highly prejudicial here. The State's allegation that petitioner recklessly caused the death of the victim was the subject of conflicting evidence, and petitioner raised a serious claim that he was justifiably protecting himself. Therefore, "on the evidence presented, [the jury] could have found that defendant acted in self-defense." Pet. App. 25a (Colorado Court of Appeals' holding that instructional error was not harmless). For the sake of petitioner's right to a fair trial, as well as innumerable other Coloradans', this Court should grant certiorari and reverse.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF COLORADO
En Banc

The PEOPLE of the State of Colorado,
Petitioner,
v.
Jerad Allen PICKERING,
Respondent.

No. 10SC446
Sept. 12, 2011

OPINION

Justice RICE delivered the Opinion of the Court.

We review the court of appeals' decision in *People v. Pickering*, No. 07CA2322 (Colo. App. Mar. 25, 2010) (not selected for official publication), reversing respondent Jerad Allen Pickering's conviction for reckless manslaughter. The court of appeals, relying on *People v. Lara*, 224 P.3d 388 (Colo. App. 2009), cert. denied, No. 09SC906 (Colo. Feb. 8, 2010) and *People v. Taylor*, 230 P.3d 1227 (Colo. App. 2009), *cert. denied,* No. 10SC102 (Colo. May 24, 2010), held that the trial court's self-defense jury instructions impermissibly shifted the burden of the Petitioner, the People of the State of Colorado ("People"), to prove beyond a reasonable doubt that Pickering acted recklessly. We conclude that the trial court's instruction to the jury did not shift the People's burden, and accordingly reverse the judgment of the court of appeals and overrule the contrary rules announced in *Lara* and *Taylor.*

I. Facts and Procedural History

Pickering and his friend, Jesse Bates, went to the apartment of another friend, Eugene Morgan, where Morgan and two other men, Leon Villarreal and Jose Torres, were present. An argument ensued between Pickering, Bates, Morgan, and Villarreal, leading to a fight during which Pickering allegedly stabbed Villarreal to death. The People charged Pickering with second-degree murder under section 18-3-103(1), C.R.S. (2010).[1] At trial, Pickering's counsel asserted that Pickering acted in self-defense.

The trial court gave an elemental jury instruction on second-degree murder, which required the People to prove beyond a reasonable doubt that Pickering had knowingly caused Villarreal's death and that Pickering did not act in self-defense. The trial court gave another elemental instruction on the lesser-included charge of reckless manslaughter, which required the People to prove beyond a reasonable doubt that Pickering recklessly caused Villarreal's death. The latter instruction made no mention of self-defense. The trial court then gave a carrying instruction explaining the interaction between self-defense and the knowing and reckless requirements of the respective charges, and another instruction defining self-defense.

The jury found Pickering guilty of reckless manslaughter under section 18-3-104(1)(a), C.R.S. (2010), a lesser-included charge of second-degree

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[1] The People also charged Pickering with second-degree assault with a deadly weapon under section 18-3-203(1)(b), C.R.S. (2010).

murder,[2] and Pickering appealed to the court of appeals. The court of appeals reversed the conviction, focusing on a portion of the carrying instruction that stated, pursuant to the language of section 18-1-704(4), C.R.S. (2010), that "the [People] do[] not bear the burden of proving beyond a reasonable doubt that [Pickering] did not act in self-defense with respect to [the reckless manslaughter] charge." The court of appeals concluded that the instruction could have led the jury to misunderstand the relationship between recklessness and self-defense and find Pickering guilty of reckless manslaughter even if it concluded that the People failed to prove that he did not act in self-defense. The People petitioned for, and we granted, certiorari review of the court of appeals' decision.[3]

II. Analysis

Under both the United States and Colorado Constitutions, due process requires the trial court to properly instruct the jury on every element of the substantive offense with which the defendant is charged so the jury may determine whether all the elements have been established beyond a reasonable doubt. *Griego v. People*, 19 P.3d 1, 7 (Colo. 2001)

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[2] The jury also found Pickering guilty of second-degree assault.

[3] Specifically, we granted certiorari to consider:

> Whether the court of appeals erred in reversing respondent's conviction for reckless manslaughter because the trial court instructed the jury pursuant to section 18–1–704(4), C.R.S. (2010), that the prosecution does not bear the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.

The court of appeals also remanded for resentencing and reclassification of the second-degree assault conviction, an issue not before us here.

(citing U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI; U.S. Const. amend. XIV, § 1; Colo. Const. art. II, §§ 16, 23 and 25; *Bogdanov v. People*, 941 P.2d 247, 252 (Colo. 1997); *People v. Snyder*, 874 P.2d 1076, 1080 (Colo. 1994)). How a defense is conceptualized in relation to the elements of a crime depends on the type of defense.

A. Types of Defenses

There are, generally speaking, two types of defenses to criminal charges: (1) "affirmative" defenses that admit the defendant's commission of the elements of the charged act, but seek to justify, excuse, or mitigate the commission of the act; and (2) "traverses" that effectively refute the possibility that the defendant committed the charged act by negating an element of the act. *See People v. Huckleberry*, 768 P.2d 1235, 1238 (Colo. 1989) (citations omitted); *see also People v. Miller*, 113 P.3d 743, 750 (Colo. 2005) (further explaining the distinction between affirmative defenses and traverses). In Colorado, if presented evidence raises the issue of an affirmative defense, the affirmative defense effectively becomes an additional element, and the trial court must instruct the jury that the prosecution bears the burden of proving beyond a reasonable doubt that the affirmative defense is inapplicable. *See* § 18-1-407, C.R.S. (2010); *Huckleberry*, 768 P.2d at 1238 (citations omitted). If, on the other hand, the presented evidence raises the issue of an elemental traverse, the jury may consider the evidence in determining whether the prosecution has proven the element implicated by the traverse beyond a reasonable doubt, but the defendant is not

entitled to an affirmative defense instruction. *See Huckleberry*, 768 P.2d at 1238.

B. Self–Defense

With respect to crimes requiring intent, knowledge, or willfulness, such as second-degree murder, self-defense is an affirmative defense. *See People v. Toler*, 9 P.3d 341, 345-46 n.5 (Colo. 2000). For example, it is possible for a person to knowingly cause the death of another, thus satisfying the basic elements of second-degree murder under section 18-3-103(1), but to nevertheless do so in self-defense as defined under section 18-1-704, and therefore not be guilty of second-degree murder. Accordingly, if a defendant charged with such a crime raises credible evidence that he acted in self-defense, or if the prosecution presents evidence raising the issue of self-defense, the prosecution bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense, and the trial court must instruct the jury accordingly.

With respect to crimes requiring recklessness, criminal negligence, or extreme indifference, such as reckless manslaughter, self-defense is not an affirmative defense, but rather an element-negating traverse. *See Case v. People*, 774 P.2d 866, 869-71 (Colo. 1989); *People v. Fink*, 194 Colo. 516, 518-19, 574 P.2d 81, 83 (1978); *People v. Fernandez*, 883 P.2d 491, 493 (Colo. App. 1994) (citing *Case*, 774 P.2d 866; *Fink*, 194 Colo. 516, 574 P.2d 81). Essentially, acts committed recklessly or with extreme indifference or criminal negligence are "totally inconsistent" with self-defense. *See Fink*, 194 Colo. at 518, 574 P.2d at 83. For example, it is impossible for a person to act both

recklessly and in self-defense, because self-defense requires one to act justifiably, section 18-1-704(1), while recklessness requires one to act with conscious disregard of an unjustifiable risk, section 18-1-501(8), C.R.S. (2010). In *Fink*, this Court held that it was sufficient for trial courts presiding over such charges simply to allow defendants to present evidence of self-defense, properly instruct juries on the definitions of recklessness or criminal negligence, and not give any specific instructions on self-defense, all under the assumption that juries would understand the relationship between self-defense and the elemental requirements of recklessness, criminal negligence, and extreme indifference. *See* 194 Colo. at 518-19, 574 P.2d at 83.

The General Assembly addressed the issues raised in *Fink* by enacting section 18-1-704(4).[4] The first clause of section 18-1-704(4) codifies *Fink* in part, requiring trial courts, in accordance with the United

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[4] The statute reads:

> 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.

§ 18-1-704(4).

States Supreme Court's holding in *Martin v. Ohio*, 480 U.S. 228, 233-34 (1987), to permit defendants accused of crimes to which self-defense is not an affirmative defense — i.e., those involving recklessness, extreme indifference, or criminal negligence — to nevertheless present evidence of self-defense. The second and third clauses abrogate *Fink* to a limited extent by requiring trial courts to instruct the jury in such cases regarding the law of self-defense and to explain to the jury that it may consider evidence of self-defense in determining whether a defendant acted recklessly or with extreme indifference or with criminal negligence. Finally, the fourth clause, at issue here, clarifies that the self-defense law instruction required in such cases is not an affirmative defense instruction and that the prosecution does not bear the burden of disproving self-defense.[5]

In *Lara*, a case involving a charge of first-degree murder and a charge of extreme indifference murder, the trial court instructed the jury, tracking the language of the fourth clause of section 18-1-704(4), that the prosecution did not bear the burden of disproving self-defense. 224 P.3d at 392, 394. The court of appeals held that, by proving extreme indifference, the prosecution necessarily disproves self-defense because of the mutually exclusive nature of extreme indifference and self-defense. The court of appeals then reasoned that instructing the jury, pursuant to the fourth clause of section 18-1-704(4), that the prosecution did not bear the burden of disproving self-defense might imply that the

[5] The statute's fifth clause regarding strict liability crimes is not relevant here.

prosecution did not bear the burden of proving extreme indifference, an essential element of the charged crime. *See id.* at 394-95. Accordingly, the court of appeals concluded that the instruction unconstitutionally shifted the prosecution's burden of proving extreme indifference to the defendant. *Id.* at 395.[6] In *Taylor*, the court of appeals affirmed and extended *Lara*, concluding that instructing the jury that the prosecution does not bear the burden of disproving self-defense unconstitutionally shifts the prosecution's burden to prove that a defendant acted recklessly in crimes requiring recklessness as an element. 230 P.3d at 1231-32.

We find the reasoning of *Lara* and *Taylor* unpersuasive. While it may be true that evidence of self-defense tends to disprove recklessness, extreme indifference, and criminal negligence, the prosecution's sole constitutional burden in cases implicating self-defense and either recklessness, extreme indifference, or criminal negligence is simply to prove recklessness, extreme indifference, or criminal negligence along with the other elements of the charged crime. *See Martin*, 480 U.S. at 234. Once the prosecution has made a prima facie case proving all the elements of the charged crime beyond a reasonable doubt, the prosecution need not do anything else to convict the defendant. *Id.* The defendant, of course, may introduce evidence of self-defense to raise reasonable doubt about the prosecution's proof of the requisite element of recklessness, extreme indifference, or criminal negligence, but the prosecution bears no

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[6] The court of appeals declined to address whether the statute itself was unconstitutional. *Id.* at 394.

burden to disprove self-defense. *See* § 18-1-704(4); *Martin*, 480 U.S. at 234.

Accordingly, instructing the jury, pursuant to the fourth clause of section 18-1-704(4), that the prosecution bears no burden of disproving self-defense with respect to crimes to which self-defense is not an affirmative defense is an accurate statement of Colorado law and does not improperly shift the prosecution's burden to prove recklessness, extreme indifference, or criminal negligence. So long as the trial court properly instructs the jury regarding the elements of the charged crime, a carrying instruction using the language of section 18-1-704(4) is not constitutionally erroneous. Thus, we overrule *Lara* and *Taylor* to the extent that they hold to the contrary.

III. Conclusion

Here, it is undisputed that the trial court's elemental instruction properly set forth the elements of reckless manslaughter. Thus, there was no constitutional error in the trial court's carrying instruction stating that the People did not bear the burden of disproving that Pickering acted in self-defense.[7] Accordingly, we reverse the judgment of the court of appeals and reinstate Pickering's conviction for reckless manslaughter.

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[7] The trial court's carrying instruction essentially tracked the language of section 18-1-704(4). We note, however, as did the court of appeals, that the trial court failed to explain to the jury, pursuant to the third clause of section 18-1-704(4), that it could consider evidence of self-defense in determining whether Pickering acted recklessly. That issue is not within our grant of certiorari and we therefore decline to address it.

Justice MARTINEZ dissents, and Chief Justice BENDER and Justice HOBBS join in the dissent.

Justice MARTINEZ, dissenting.

Where a defendant is charged with reckless manslaughter, the majority holds that a jury instruction stating that "the prosecution bears no burden of disproving self-defense with respect to which it is not an affirmative defense is an accurate statement of Colorado law," claiming such an instruction does not improperly shift the burden of proof to the defendant. To the contrary, such a jury instruction does not accurately state the law in this case, and does shift the burden of proof to the defendant. Further, it is inconsistent with another jury instruction stating that the prosecution has the burden to prove every element of reckless manslaughter beyond a reasonable doubt, and is therefore highly misleading; thus, it should not be given.

The majority's holding assumes that when self-defense evidence is not presented as an affirmative defense, such evidence has only one constitutionally-relevant effect: it "tends" to disprove the elements of the crime. Accordingly, if such evidence only "tends" to disprove the elements of the crime, the prosecution must "simply" prove the elements of the crime and "need not do anything else to convict the defendant." *See* maj. op. at 10. Thus, if the jury is properly instructed that the prosecution must prove all the elements of the crime, and self-defense is not an affirmative defense that would create an additional element, then there is no constitutional error to also

instruct the jury that the prosecution need not disprove self-defense. *See* maj. op. at 10-11.

To justify this approach, the majority relies heavily on how the Supreme Court assessed self-defense jury instructions in *Martin v. Ohio*, 480 U.S. 228 (1987), essentially equating the circumstances in *Martin* with the circumstances here. *See* maj. op. at 10-11. But the majority's reliance on *Martin* is misplaced, as it is critically distinguishable: in *Martin*, the affirmative defense, once established, did not necessarily negate any one of the elements of the crime. That is not the case here. Unlike other element-negating defenses, evidence of self-defense in this case does more than just "tend" to disprove an element of the crime: it necessarily negates the element of recklessness. The constitutionality of the jury instruction at issue therefore cannot be resolved by just equating it with any other element-negating defense, as the majority implicitly assumes.

In *Martin*, the Court held that the state could permissibly require the defendant to prove self-defense and that no due process violation occurred by instructing the jury that the defendant had the burden to prove self-defense by a preponderance of the evidence. 480 U.S. at 233-36. Such an instruction passed constitutional muster in part because of other instructions given to the jury. The other instructions provided that the prosecution had the burden — never shifting — to prove every element of aggravated murder beyond a reasonable doubt, and that to find the defendant guilty, none of the evidence presented by either party could raise a reasonable doubt as to any of the elements of aggravated murder. *Id.* at 233.

Without compromising the due-process sanctity of these other jury instructions, the Court acknowledged that evidence of self-defense may "tend to negate" the element of aggravated murder requiring the defendant to "purposely, and with prior calculation" take another's life.[1] *Id.* at 234. But because the jury was properly informed of the prosecution's burden regarding the charged offense, the jury could fairly assess whether any of the self-defense evidence raised "a reasonable doubt about the sufficiency of the State's proof of the elements of the crime." *Id.*

The majority treats the element-negating defense here just as the Court treated element-negating evidence of self-defense in *Martin*, ignoring the critical difference between the two. In *Martin*, 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. Indeed, the Court contemplated this scenario, observing that even if the jury was convinced beyond a reasonable doubt that the defendant committed aggravated murder, "the killing will still be excused if the elements of the defense are satisfactorily established." *Id.* In short, for the Court, certain elements of self-defense and aggravated murder would "often" overlap, but not always; no necessary relationship existed between the prosecution

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[1] The Court in *Martin* noted that evidence of self-defense could negate the "purposeful killing by prior calculation" element of aggravated murder because "[i]t may be that most encounters in which self-defense is claimed arise suddenly and involve no prior plan or specific purpose to take life. In those cases, evidence offered to support the defense may negate a purposeful killing by prior calculation and design. . . ." *Id.* at 234.

proving its case and disproving the defendant's self-defense evidence — evidence that could have the tendency to, but did not have to, negate the elements of the charged offense.

In contrast, here, by proving reckless manslaughter, the prosecution has to, as a matter of logical necessity, disprove any evidence of self-defense raised by the defendant. The majority, before inexplicably retreating behind *Martin*, appears to admit this. *See* maj. op. at 7 ("[I]t is impossible for a person to act both recklessly and in self-defense, because self-defense requires one to act justifiably, while recklessness requires one to act with conscious disregard of an unjustifiable risk." (citations omitted)).

Our precedent certainly supports this. We have noted that criminal negligence requiring a jury finding that the defendant "failed to perceive an unjustified risk that a reasonable person would have perceived in the situation," is "totally inconsistent" with a theory of self-defense. *People v. Fink*, 194 Colo. 516, 518, 574 P.2d 81, 83 (1978). This reasoning underscored our holding in *Fink* that a trial court need not give any specific instructions to jurors on self-defense where criminal negligence is charged: as a matter of logical necessity, jurors would understand that if it found the defendant acted recklessly, "they have already precluded any finding of affirmative defense." *Id.* (quoting Notes on the Use of the Colorado Jury Instructions (Criminal) § 9:7 (Manslaughter-Reckless)); *see also Case v. People*, 774 P.2d 866, 870 (Colo. 1989) ("By finding [the defendant] guilty of reckless manslaughter, the jury has found that she consciously disregarded a substantial and unjustifiable

risk that [the victim] would be killed. The jury therefore rejected the contention that [the defendant] was acting in self-defense. Had the jury believed [the defendant's] testimony that she was acting in self-defense, it would not have found her to have acted recklessly." (citations omitted)).

Once this necessary, inverse relationship between a defense and the elements of the offense is established — once the prosecution must, by virtue of proving its own case, necessarily disprove self-defense evidence raised by the defendant — it has constitutional consequences. In *Patterson v. New York*, the Supreme Court held a statute that shifted to the defendant the burden to prove the affirmative defense of extreme emotional disturbance did not violate due process partly because the elements of the charged offense were separate from the affirmative defense: the affirmative defense "does not serve to negative any facts of the crime which the State is to prove in order to convict of murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion . . . ." 432 U.S. 197, 206-07 (1977). The implication arising from *Patterson* is obvious: where an affirmative defense *does* negative the elements of the crime the prosecution must prove, the prosecution must carry the burden to disprove that defense. And although the Court in *Patterson* referred to affirmative defenses, under *In re Winship*'s broad mandate that the prosecution must prove beyond a reasonable doubt "every fact necessary to constitute" the charged crime, 397 U.S. 358, 364 (1970), the same logic would apply to any defense.

Justice Powell, placing *Martin v. Ohio*'s holding in the context of *Patterson*, explained the constitutional justification for why the prosecution should have the burden to disprove a defense that negates an element of the charged offense:

> If the jury is told that the prosecution has the burden of proving all the elements of a crime, but then also is instructed that the defendant has the burden of *dis*proving 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. For example, the jury might reasonably believe that by raising the defense, the accused has assumed the ultimate burden of proving that particular element. Or, it might reconcile the instructions simply by balancing the evidence that supports the prosecutor's case against the evidence supporting the affirmative defense, and conclude that the state has satisfied its burden if the prosecution's version is more persuasive. In either case, the jury is given the unmistakable but erroneous impression that the defendant shares the risk of nonpersuasion as to a fact necessary for conviction.

Martin, 480 U.S. at 237-38 (Powell, J., dissenting).

Although Justice Powell disagreed with the majority over whether the specific defense in *Martin* sufficiently negated an element of the charged offense so as to invoke the implication in *Patterson*, *see id.* at 239-40, neither he nor the *Martin* majority undermined the implication in *Patterson* that the prosecution must carry the burden to disprove any

defense that necessarily negates an element of the charged offense.[2] And the great weight of federal authority supports this proposition. *See United States v. Leahy*, 473 F.3d 401, 403 (1st Cir. 2007) ("[W]e hold that where . . . proof of the justification defense does not negate an element of the charged crime, the burden of proof in connection with that defense rests with the defendant."); *United States v. Leal-Cruz*, 431 F.3d 667, 671 (9th Cir. 2005) ("[W]e conclude that the Due Process Clause forbids shifting the burden of proof to the defendant on an issue only where establishing the defense would necessarily negate an element that the prosecution must prove beyond a reasonable doubt under *Winship*."); *United States v. Brown*, 367 F.3d 549, 556 (6th Cir. 2004) ("[I]f an affirmative defense bears a necessary relationship to an element of the charged offense, the burden of proof does not shift to defendant."); *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000) ("Although the Due Process Clause requires the government to prove all elements of the charged offense beyond a reasonable doubt, and therefore requires the government to disprove beyond a reasonable doubt any defenses that negate an element of the charged offense, there is no constitutional bar to the defendant's bearing the burden of persuasion on defenses that do not negate an element of the offense." (citations omitted)); *United States v. Deleveaux*, 205 F.3d 1292, 1298 (11th Cir. 2000) ("The burden to prove or disprove an element of the offense may not be shifted to the defendant. Thus,

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[2] For a good discussion of how *Patterson* and other Supreme Court precedent support this proposition, *see United States v. Leal-Cruz,* 431 F.3d 667, 670-72 (9th Cir. 2005).

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." (citations omitted)); *United States v. Unser*, 165 F.3d 755, 764 (10th Cir. 1999) ("[W]hen evidence has been produced of a defense which, if accepted by the trier of fact, would negate an element of the offense, the government must bear the ultimate burden of persuasion on that element, including disproving the defense."); *United States v. Johnson*, 968 F.2d 208, 213-14 (2d Cir. 1992) ("To be valid, an affirmative defense may not, in operation, negate an element of the crime which the government is required to prove; otherwise, there would be too great a risk that a jury, by placing undue emphasis on the affirmative defense, might presume that the government had already met its burden of proof. Such a presumption would, without question, violate due process."); *Wynn v. Mahoney*, 600 F.2d 448, 450-51 (4th Cir. 1979) (finding constitutional error in instructing the jury that the defendant had the burden to prove self-defense, because the absence of self-defense was an element of murder that had to be proved by the prosecution).

Based on this authority, it was constitutional error for the trial court in this case to instruct the jury that the prosecution had no burden to disprove evidence of self-defense. As established above, self-defense evidence, once appropriately raised — as it was in this case[3] — necessarily negates the element of

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[3] In line with section 18-1-704(4), C.R.S. (2010), the defendant presented evidence of self-defense and was thus entitled to a self-defense instruction. Of course, if the defendant had not presented

recklessness; the prosecution cannot prove recklessness without, in effect, disproving the self-defense evidence. The trial court's contrary instruction thus violated the constitutional requirements of *Patterson* and *Winship*.

Nor is the instruction saved by the trial court's general instruction that the prosecution has the burden to prove all the elements of reckless manslaughter. "[T]he giving of incompatible instructions on the burden of proof is fatal error." *Young v. Colo. Nat'l Bank of Denver*, 148 Colo. 104, 125, 365 P.2d 701, 713 (1961); *see also Barr v. Colo. Springs & Interurban Ry. Co.*, 63 Colo. 556, 560, 168 P. 263, 265 (1917) ("Conflicting or contradictory instructions furnish no correct guide to the jury, and the giving thereof is erroneous . . . ." (quotation omitted)). And this is because "[a] reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Francis v. Franklin*, 471 U.S. 307, 322 (1985). While the jury may have followed the general instruction and placed the burden to disprove self-defense evidence on the prosecution, it is entirely possible — and more likely — that the jury followed the opposite and more specific instruction that the prosecution did not have any burden to disprove the evidence of self-defense. In line with Justice Powell's reasoning, the jury might have harmonized these conflicting instructions by balancing the evidence supporting both sides and rendering its verdict based

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any evidence of self-defense, he would not have been entitled to a self-defense instruction at all, and none of the constitutional issues at issue in this case would have been implicated.

on whichever side's evidence was simply more persuasive, instead of holding the prosecution to its more rigorous burden of proof. This would be impermissible. *See Jolly v. People*, 742 P.2d 891, 898 (Colo. 1987) ("The critical consideration in determining the validity of [a jury instruction] is whether a reasonable jury could have understood the instruction as relieving the state of its burden of persuasion on an essential element of the crime."). Hence, the jury instruction the majority claims is an accurate statement of the law is, in fact, unconstitutional.

Although the majority holds that no reversible error occurs where a jury is given an instruction tracking the language of section 18-1-704(4), *see* maj. op. at 11, cautious trial court judges should still decline to give such an instruction. The majority does not require that trial courts give this instruction, and neither does the statute. Section 18-1-704(4) requires trial courts to: (1) allow defendants to present evidence of self-defense; (2) give a "self-defense law instruction" where evidence of self-defense is presented; and (3) inform the jury that it may consider self-defense evidence "in determining whether the defendant acted recklessly, with extreme indifference, or in a criminally negligent manner." In contrast, although the statute states the prosecution has no burden to disprove self-defense, it does not require that juries be so informed: "[T]he self-defense law instruction shall not be an affirmative defense instruction and the prosecution attorney shall not have the burden of disproving self-defense." *Id.*

Further, trial court judges should decline to give this instruction because it is highly misleading.

Courts should not give instructions if they embody "an incorrect or misleading statement of the law." *People v. Bossert*, 722 P.2d 998, 1009 (Colo. 1986). Jury instructions should not be used if their language creates "a reasonable possibility that the jury could have been misled relative to reaching a verdict." *People v. Williams*, 23 P.3d 1229, 1232 (Colo. App. 2000); *see also People v. DeHerrera*, 697 P.2d 734, 740 (Colo. 1985) (concluding that the "unduly confusing" jury instruction should not have been given).

By giving the jury instruction the majority declares creates no reversible error, a "reasonable possibility" certainly exists that a jury will be misled by instructions that on one hand require the prosecution to prove every element of reckless manslaughter beyond a reasonable doubt, but on the other hand state that the prosecution has no burden to disprove any self-defense evidence, even though logically, it is impossible for the prosecution to prove reckless manslaughter without in effect disproving such self-defense evidence. If, in *Fink* and *Case*, we observed that juries were capable of recognizing the necessary, inverse relationship between self-defense and recklessness or criminal negligence, there is no reason to suppose that the jury here was not capable of recognizing the same relationship. And once recognized this relationship renders the instructions inconsistent: one instruction places the burden to prove recklessness on the prosecution, but the other, by stating that the prosecution has no burden to disprove evidence necessarily negating the element of recklessness, has the effect of placing on the defendant the burden to disprove he acted recklessly. We do not know how juries will resolve this inconsistency, and we

– and cautious trial court judges – should not hazard a guess.

Because the jury instruction in this case violates due process and misleads juries on the critical issue of the prosecution's burden to prove every element of the charged offense beyond a reasonable doubt, it should not have been given. I respectfully dissent.

I am authorized to state that Chief Justice BENDER and Justice HOBBS join in this dissent.

APPENDIX B

COLORADO COURT OF APPEALS

Court of Appeals No. 07CA2322
Adams County District Court No. 06CR3243
Honorable Edward C. Moss, Judge

The People of the State of Colorado,
Plaintiff-Appellee,

v.

Jerad Allen Pickering,
Defendant-Appellant.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, SENTENCE VACATED, AND CASE REMANDED WITH DIRECTIONS

Division V

Opinion by JUDGE GRAHAM

Ney* and Kapelke*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced March 25, 2010

John W. Suthers, Attorney General, John J. Fuerst, III, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Ryann Hardman, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2009.

Defendant, Jerad Allen Pickering, appeals the convictions entered on jury verdicts finding him guilty of reckless manslaughter and second degree assault performed upon a sudden heat of passion. He also appeals the sentence imposed on the second degree assault charge. We conclude that the trial court erred in instructing the jury on self-defense as it applied to reckless manslaughter and imposed an illegal sentence on the second degree assault charge. We reverse his conviction for reckless manslaughter and remand for a new trial on that charge. We also remand for resentencing on the second degree assault conviction and issuance of an amended mittimus reflecting the new sentence and the correct felony classification for the offense.

I. Background

Defendant was originally charged with second degree murder and second degree assault based on allegations that he stabbed a man in the chest and buttocks, causing his death. At trial, defendant asserted self-defense.

The jury convicted defendant of reckless manslaughter and second degree assault performed upon a sudden heat of passion, specifically finding that the prosecution had not proved that defendant was not acting upon a sudden heat of passion.

The trial court sentenced defendant to concurrent terms of twelve years in the Department of Corrections (DOC) for reckless manslaughter and thirteen years

for second degree assault, plus three years of mandatory parole.

II. Self-Defense Instruction

A. Reckless Manslaughter

Defendant first contends that the trial court erred by improperly instructing the jury on the law of self-defense as it applied to reckless manslaughter. Specifically, he contends that the instruction (1) improperly included language from section 18-1-704(4), C.R.S. 2009, which violated defendant's due process rights by impermissibly shifting the burden of proof to the defense and (2) was confusing. We agree.

At the close of evidence, defendant tendered jury instructions on self-defense that were rejected by the court in favor of an instruction that tracked the language of section 18-1-704(4). Specifically, the trial court instructed the jury that "self-defense is not an affirmative defense" to reckless manslaughter and 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 that charge. We agree with defendant that by doing so, the trial court committed constitutional error.

In *People v. Lara*, 224 P.3d 388, 395 (Colo. App. 2009), a division of this court examined a similar instruction and concluded that it violated the defendant's right to due process because it affirmatively misled the jury about the prosecutor's burden of proof. Distinguishing between defenses that negate an element of the crime charged and those that confess the crime but seek to avoid culpability, the division in *Lara* reasoned that where self-defense

negates an element of the crime, the prosecutor bears the burden of disproving that defense beyond a reasonable doubt. *Lara*, 224 P.3d at 394. Specifically, because the prosecution must prove all the elements of an offense beyond a reasonable doubt, "[i]t necessarily follows that the prosecution must also '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)). Thus, the division concluded that "[i]t is constitutional error to tell jurors that the prosecution 'shall not have the burden of disproving self-defense.'" *Id.* at 395.

Similarly, in *People v. Taylor*, ___ P.3d ___, ___ (Colo. App. No. 08CA1435, Nov. 12, 2009), a division of this court concluded that an instruction that the prosecution need not disprove self-defense would risk shifting the burden to the defendant to prove that he did not act recklessly and would also risk confusing the jurors as to the use of the evidence as it pertains to the defendant's mental state.

We agree with the analysis in *Lara* and *Taylor*. Applying that analysis here, we first note that defendant preserved his contention by asking the court to give jury instructions which indicated that he did not bear the burden of proving self-defense or defense of others. *See Lara*, 244 P.3d at 394 n.3.

Second, we note that the jury here, on the evidence presented, could have found that defendant acted in self-defense. For example, there was testimony from which the jury could have found that the victim ran at defendant and tackled him as he was attempting the leave the apartment. Thus, by altering the burden of

proof on the issue, the instruction undermined the reliability of the jury's finding on the element of recklessness and "thus undermines our confidence in the reliability of the verdict." *Id.* at 395. As such, the error is not harmless beyond a reasonable doubt. *See id.*

Accordingly, we conclude that defendant's conviction for reckless manslaughter must be reversed and the case remanded for a new trial on that charge.

B. Omitted Language

Defendant also asserts, for the first time on appeal, that the self-defense instruction given by the court erroneously omitted mandatory language to the effect that the jury should consider evidence of self-defense in determining whether defendant acted recklessly. Because the issue may arise on remand, we note defendant is correct that, when the evidence tends to establish the defense of self-defense, the court's instruction should inform the jury that it may consider any evidence that defendant acted in self-defense in determining whether he acted recklessly. *See* § 18-1-704(4); *Taylor*, ___ P.3d at ___; *People v. Roberts*, 983 P.2d 11, 14 (Colo. App. 1998) (jury should have been instructed to consider whether the defendant reasonably believed that it was necessary for him to act in self-defense in determining whether the defendant committed the crime of reckless manslaughter).

III. Additional Instructions

Defendant contends, for the first time on appeal, that there was no evidence to support the provocation limitation and initial aggressor limitations to self-

defense. We address this issue because it is likely to arise on remand, although we note that the defendant failed to object to the trial court's instructions on provocation and initial aggressor limitations. We conclude there was no reversible error.

A. Provocation

Defendant maintains that there was no evidence to support the court's instruction on provocation. Specifically, he argues that there was no evidence that defendant's conduct or words were intended to cause the victim to attack him as a pretext to injuring him.

Here, there was evidence that suggested the victim had been lying down quietly until defendant arrived, that defendant was angry at the victim and argued with him, that the victim became upset after defendant confronted him, that defendant knew the victim was intoxicated or under the influence of illegal drugs, and that defendant was flicking a knife open and shut during his argument with the victim. Viewing this evidence in the light most favorable to the giving of this instruction, we conclude a jury could reasonably have found that defendant intended to provoke the victim to attack him. *See Lara*, 224 P.3d 397; *People v. Silva*, 987 P.2d 909, 914-15 (Colo. App. 1999).

B. Initial Aggressor

Defendant next maintains that the evidence was insufficient to support an initial aggressor instruction and that the trial court erred in failing to define the phrase "initial aggressor" for the jury.

An initial aggressor instruction is warranted "if the evidence will support a reasonable inference that

the defendant initiated the physical conflict by using or threatening the imminent use of unlawful physical force." *People v. Griffin*, 224 P.3d 292, 300 (Colo. App. 2009).

First, we conclude that defendant does not show how the court's failure to define the phrase "initial aggressor" was obvious error. As noted above, defendant did not request the instruction. He points to no statutory or other requirement establishing a duty to give the instruction and does not otherwise demonstrate how the error was obvious. *See id.* at 299 (if error was not obvious, it does not matter whether events were prejudicial); *People v. O'Connell*, 134 P.3d 460, 465 (Colo. App. 2005) (error is plain only if it is obvious).

Second, defendant maintains that the jury could have found that the victim's actions and threats toward him gave him a reasonable belief that the victim would use physical force against him. Defendant thus asserts that the court committed plain error in giving the initial aggressor instruction because the jury could have mistakenly characterized him as the initial aggressor even though the victim or one of the other men started the fight. And he points to evidence that suggested he was simply walking out the door with the knife in his hand when the victim rushed at him and attacked him.

Here, however, there was also evidence that suggested one of the men at the apartment grabbed the victim, who was unarmed, and restrained him while defendant stabbed him. The witness who so testified indicated that defendant's knife cut his hand. Under these circumstances, the court did not err in

instructing the jury on the initial aggressor limitation to self-defense.

IV. Second Degree Assault Sentence

As the People concede, the trial court was without jurisdiction to enter a judgment of conviction on second degree assault as a class four felony, because the jury found defendant guilty of second degree assault performed upon a sudden heat of passion, a class six felony. *See* § 18-3-203(2)(a), C.R.S. 2009. Thus, the trial court must resentence defendant in the appropriate statutory range and issue an amended mittimus to correctly reflect the conviction and sentence.

The judgment of conviction for reckless manslaughter is reversed, and the case is remanded for a new trial on that charge. The case is also remanded for resentencing on the second degree assault conviction and issuance of an amended mittimus reflecting the new sentence and the correct felony classification for the offense. The judgment is otherwise affirmed.

JUDGE NEY and JUDGE KAPELKE concur.

APPENDIX C

07CA2322 Peo v Pickering 08-11-2016

COLORADO COURT OF APPEALS

DATE FILED: August 11, 2016
CASE NUMBER: 2007CA2322

Court of Appeals No. 07CA2322 Adams County
District Court No. 06CR3243
Honorable Edward C. Moss, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Jerad Allen Pickering,

Defendant-Appellant.

JUDGMENT AFFIRMED
Division II
Opinion by JUDGE WEBB
Ashby and Harris, JJ., concur
NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced August 11, 2016

Cynthia H. Coffman, Attorney General, John J. Fuerst III, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Ryann S. Hardman, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

Defendant, Jerad Allen Pickering, requests a new trial on his reckless manslaughter conviction following remand from the supreme court's decision in his direct appeal. We agree with his instructional error contention but conclude that the error was not plain. Therefore, we affirm his conviction.

I. Background

Defendant was charged with second degree murder and second degree assault based on allegations that he had stabbed a man in the chest and buttocks, with the chest wound having caused his death. At trial, defendant asserted self-defense.

The jury found defendant guilty of reckless manslaughter as a lesser included offense of second degree murder (chest wound), and of second degree assault acting upon a sudden heat of passion (buttocks wound).

A division of this court reversed the reckless manslaughter conviction, concluding that the self-defense instruction (Instruction 19) misled the jury about the prosecution's burden of proof on that count. *People v. Pickering*, (Colo. App. No. 07CA2322, Mar. 25, 2010) (not published pursuant to C.A.R. 35(f)) (*Pickering I*). The division also held that Instruction 19 omitted language required by section 18-1-704(4), C.R.S. 2015, to the effect that the jury may consider evidence of self-defense in determining whether defendant acted recklessly. But because of its resolution on the first issue, the division did not address whether this additional error would independently require reversal.

On the Attorney General's certiorari petition, the supreme court reinstated the reckless manslaughter conviction. *People v. Pickering*, 276 P.3d 553 (Colo. 2011) (*Pickering II*). The court concluded that Instruction 19 did not impermissibly shift the burden of proof on the reckless manslaughter count to defendant. *Id.* at 555-56. Specifically, the court held that self-defense is not an affirmative defense to crimes requiring recklessness, but only an element-negating traverse. *Id.* Then the court concluded that instructing the jury that "the prosecution bears no burden of disproving self-defense with respect to crimes to which self-defense is not an affirmative defense is an accurate statement of Colorado law[.]" *Id.* at 557.

As relevant here, the supreme court noted:

> The trial court's carrying instruction essentially tracked the language of section 18-1-704(4). We note, however, as did the court of appeals, that the trial court failed to explain to the jury, pursuant to the third clause of section 18-1-704(4), that it could consider evidence of self-defense in determining whether [defendant] acted recklessly. That issue is not within our grant of certiorari and we therefore decline to address it.

Id. at 557 n.7. Based on this statement, the parties agreed that on remand to this court, the following issue remained to be resolved concerning defendant's reckless manslaughter conviction:

> Whether reversal is required because Instruction 19 omitted the mandatory

> language of [the third clause of] section 18-1-704(4), C.R.S. 2015, informing the jury that they [may] consider evidence of self-defense in determining whether defendant acted recklessly.

The parties submitted briefs on this issue.

II. Discussion

As relevant here, the trial court instructed the jury that, with respect to the reckless manslaughter charge, "self-defense is also a defense." Defendant contends that the court reversibly erred by omitting the language set forth in 18-1-704(4) (that the jury "may consider the evidence of self-defense in determining whether the defendant acted recklessly").

To begin, we briefly examine the supreme court's holding in *Pickering II* and the third clause of section 18-1-704(4), and on that basis conclude that instructional error occurred. Then we consider whether defendant preserved this argument. After further concluding that he failed to do so, we review only for plain error. We discern no such error, and therefore affirm.

A. *Pickering II*

Due process requires that a trial court properly instruct the jury on every element of a substantive offense. The supreme court held that the trial court met that obligation here by properly instructing the jury on each element of reckless manslaughter. *Pickering II*, 276 P.3d at 557.

In *Pickering II*, the court distinguished between two types of defenses in criminal cases: affirmative

defenses and traverses. *Id.* at 555. When a defendant presents evidence that raises an affirmative defense, the affirmative defense effectively becomes an additional element, and the trial court must instruct the jury that the prosecution bears the burden of disproving the affirmative defense beyond a reasonable doubt. *Id.* But when a defendant presents evidence that raises the issue of an elemental traverse, no such instruction is required. *Id.*

Importantly for our analysis, the supreme court held that self-defense is an element-negating traverse, rather than an affirmative defense, to reckless manslaughter. 276 P.3d at 556. Thus, while a defendant "may introduce evidence of self-defense to raise reasonable doubt about the prosecution's proof of the requisite element of recklessness," the prosecution need not disprove self-defense. *Id.* at 557. Instead, "the prosecution's sole constitutional burden . . . is simply to prove . . . the . . . elements of the charged crime." *Id.*

Recently, the United States Supreme Court has reiterated that the prosecution bears the burden of proof, beyond a reasonable doubt, when an *affirmative defense* negates an element of a crime. *Smith v. United States*, 568 U.S. ___, 133 S.Ct. 714 (2013). But the Court has never imposed this burden on the prosecution where the evidence involves only an element negating traverse. *See People v. Lane*, 2014 COA 48, ¶¶ 15-19 (concluding that *Smith* did not overrule *Pickering II* because they address different issues). Thus, because self-defense was not an affirmative defense to reckless manslaughter, the prosecutor needed only to prove beyond a reasonable

doubt that the defendant acted recklessly. *Pickering II*, 276 P.3d at 557.

B. Section 18-1-704(4)

In *Pickering II*, the supreme court also explained that before the enactment of section 18-1-704(4), no instruction on self-defense was required as to crimes involving recklessness. *Pickering II*, 276 P.3d at 556. This is so because a defendant cannot act both recklessly and in self-defense. *Id.*

Following the enactment of section 18-1-704(4), however, the trial court has a statutory obligation to instruct the jury on self-defense as to crimes involving reckless conduct. *Pickering II*, 276 P.3d at 556. And as relevant here, under the third clause of section 18-1-704(4), "[t]he court shall instruct the jury that it may consider the evidence of self-defense in determining whether the defendant acted recklessly[.]"

C. Preservation and Standard of Review

Defense counsel did not raise the third clause of section 18-1-704(4) before the trial court. Rather, counsel tendered a self-defense instruction that stated,

> Self-defense is [a] defense to the charges of reckless manslaughter and criminally negligent homicide. . . . a person who acts in self-defense does not act recklessly or with criminal negligence.

The court rejected this instruction.

This instruction did not alert the court to defendant's current contention on appeal. *See Pickering I*, slip op. at 5 (concluding defendant failed to preserve this specific issue). A general objection will

not suffice to preserve an error for appeal. *Martinez v. People*, 2015 CO 16, ¶ 14 (objection must be specific enough to draw the court's attention to the instructional error).

The Attorney General contends that by incorporating the language defendant now complains of in his tendered instruction on self-defense, defendant invited or waived the error recognized in *Pickering I*. We decline to address this contention because the Attorney General failed to raise it in *Pickering I*. To the contrary, according to the answer brief, "[w]ith regard to Defendant's claim that the instruction failed to inform the jury it could consider evidence of self-defense with regard to manslaughter, Defendant failed to object. Accordingly, review must be under the plain error standard."

For these reasons, we conclude that defendant's argument is unpreserved and subject to only plain error review. *See People v. McClelland*, 2015 COA 1, ¶ 15 (reviewing unpreserved argument regarding section 18-1-704(4) for plain error).

"Plain error is error that is obvious and substantial, and that so undermined the fundamental fairness of the trial as to raise serious doubts about the reliability of the outcome." *People v. Douglas*, 2015 COA 155, ¶ 41. And reversal for plain error "is to be applied sparingly[.]" *People v. Ujaama*, 2012 COA 36, ¶ 46 n.7.

D. Application

1. Error

In light of the holding in *Pickering I*, which was not undercut by the supreme court's footnote in *Pickering II*, 276 at 557 n.7, we will assume the instruction was erroneous.

2. Obviousness

An error is "obvious" if it contravenes a clear statutory command, a well-settled legal principle, Colorado case law, or a Colorado statute. *McClelland*, ¶ 16.

Here, defendant maintains that the error was obvious because the omitted language comes from a statute. The Attorney General responds that the instruction given (that "self-defense is also a defense") substantially complied with the statutory requirement. *See id.* at ¶ 32 (appearing to acknowledge some ambiguity in the exact scope of the self-defense instruction required by section 18-1-704(4)).

While we acknowledge the Attorney General's argument, we resolve this factor in defendant's favor because the error in question derives from a statutory requirement. *See People v. Mosley*, 167 P.3d 157, 161 (by departing from statutory requirements, trial court committed obvious error).

[3]. Serious Doubt

In considering whether the error substantially undermined the reliability of the judgment of conviction, we begin with three factors.

a. Minimal Self-Defense Evidence

Failure to instruct a jury properly does not constitute plain error where evidence of guilt is overwhelming. *People v. Miller*, 113 P.3d 743, 751

(Colo. 2005). The Attorney General asks us to conclude that the evidence supporting self-defense was so minimal that the jury could not have found defendant acted in self-defense. But because the evidence on self-defense came from multiple witnesses, whose testimony was conflicting and sometimes contradictory, we decline to resolve the issue on this basis.

b. Conviction on Second Degree Assault

The record showed that defendant was convicted of second degree assault, which necessarily established that the jury had rejected his self-defense theory on that count. But because this count arose from the stab wound to the victim's buttocks, whether the jury's rejection of self-defense on that count had any significance for the applicability of self-defense on the reckless manslaughter count was unclear. *See id.* at ¶¶ 18-20. Hence, sua sponte, this court requested that the parties submit supplemental briefs addressing *People v. Gross*, 2012 CO 60, in which a similar situation had been addressed.

In his supplemental brief, defendant argued that the second degree assault-heat of passion conviction had arisen from different facts than the reckless manslaughter conviction. And the Attorney General conceded this point, saying, "[h]ere, unlike *Gross*, it appears that the evidence supporting the jury's guilty verdict on second degree assault was different from its manslaughter verdict." Thus, unlike in *Gross*, we do not further consider whether the jury's rejection of self-defense on the second degree assault count indicates that the jury also rejected self-defense as to the reckless manslaughter count.

c. Acquittal on Second Degree Murder

We agree with the Attorney General that *Gross* cannot be read to establish that a jury's acquittal of an intentional crime necessarily means that the jury found the existence of self-defense. Thus, we conclude that the jury's acquittal on the second degree murder count does not necessarily establish that the jury accepted defendant's self-defense theory on that count. *Cf. McClelland*, ¶ 28.

[4]. Fundamental Fairness

Undaunted by *Pickering II*, defendant persists in arguing that because the court failed to explain the element-negating relationship between self-defense and recklessness, the jury was hindered in its ability to assess self-defense. Accordingly, he further argues that the instructional error undermined the fundamental fairness of the trial. These arguments fall short.

In determining whether the jury has been adequately informed of a defendant's theory of defense, a reviewing court may consider "whether defense counsel's closing argument fairly represented defendant's theory to the jury." *People v. Dore*, 997 P.2d 1214, 1222 (Colo. App. 1999); *see People v. Castillo,* 2014 COA 140M, ¶ 45 (defense counsel's closing argument, in conjunction with instructions given, sufficiently informed jury of burden of proof on self-defense exception), (*cert. granted on other grounds*, Nov. 23, 2015); *People v. Smith*, 77 P.3d 751, 757 (Colo. App. 2003) (defendant's closing argument, in conjunction with the instructions given, adequately

instructed the jury as to defendant's theory of the case).

Here, during closing argument, defense counsel explained to the jury the relationship between self-defense and reckless manslaughter:

> Instruction 19 [says] that self-defense is also a defense to reckless manslaughter. . . . And here's why. 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.

In rebuttal closing, the prosecutor did not dispute this statement, instead arguing — much as the Attorney General does on appeal — that the self-defense evidence was very weak. And because the jury was instructed that self-defense was a defense to reckless manslaughter, albeit in a defective form, the jury could have considered the self-defense evidence in connection with defense counsel's argument.

Given all this, we conclude that the flawed self-defense instruction did not create a reasonable possibility of contributing to defendant's conviction.

III. Conclusion

The judgment is affirmed.

JUDGE ASHBY and JUDGE HARRIS concur.

APPENDIX D

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: March 2, 2016 CASE NUMBER: 2007CA2322
Adams County 2006CR3243	Court of Appeals Case Number: 2007CA2322
Plaintiff-Appellee: The People of the State of Colorado, v. **Defendant-Appellant:** Jerad Allen Pickering.	
ORDER to resolve all pending motions	

The Court enters the following ORDER to resolve all pending motions:

Background

On March 25, 2010, a division of this Court issued its opinion in this case. The division concluded that the trial court had erred because the self-defense instruction (Instruction 19) affirmatively misled the jury about the prosecutor's burden of proof, and that the error warranted a new trial. The division also agreed with appellant's assertion, raised for the first time on appeal, that Instruction 19 omitted mandatory language to the effect that the jury should consider evidence of self-defense in determining whether

defendant acted recklessly. The division did not address whether this error also warranted a new trial because of its holding that the jury instruction was misleading, but ordered correction of the instruction on retrial.

The supreme court granted appellee's petition for writ of certiorari (appellant also filed a petition for writ of certiorari that was denied), and on September 12, 2011, issued an opinion reversing the Court of Appeals and reinstating appellant's convictions. A petition for review to the U.S. Supreme Court was denied.

The matter was then mandated from the supreme court back to this court on May 31, 2012. Although the mandate does not contain any instructional language to this court, on June 4, 2012, appellant filed a *Notice Regarding Supreme Court Remand and Motion to Stay Issuance of the Mandate*. In that notice, appellant asserted that the opinion of March 25, 2010, did not address whether reversal is required because Instruction 19 was confusing and whether reversal is required because Instruction 19 omitted the mandatory language on recklessness. On June 29, 2012, the mandate was issued by this court without addressing appellant's June 4, 2012 notice or ruling on the motion to stay the mandate. On July 16, 2012, appellant filed a motion to recall the mandate based on the June 4, 2012, notice and argued that this court "did not resolve the outstanding issues, as directed by the supreme court."

The Court notes that the supreme court's opinion and mandate do not expressly instruct this court to resolve any outstanding issues. However, the parties

do not seem to dispute, and we agree, that the following issue became unresolved when the supreme court issued its opinion:

> Whether reversal is required because Instruction 19 omitted the mandatory language of section 18-1-704(4), C.R.S. 2011, that the jury should consider evidence of self-defense in determining whether Mr. Pickering acted recklessly.

Appellant also contends that the issue of whether reversal is required because Instruction 19 was confusing. We conclude that it is not unresolved.

Since the mandate was recalled on July 18, 2012, this case was remanded twice to the trial court for further proceedings (first on February 20, 2014, and again on December 14, 2014). It was recertified to this Court on June 6, 2015. The appeal has otherwise remained unresolved in this Court since the recall was issued.

Motion to Vacate Convictions for Violation of Right to Speedy Trial

Appellant filed a motion to vacate his conviction on March 4, 2016, arguing that his Sixth Amendment due process rights to a "speedy appeal" have been violated by the delay that has occurred since the recall of the mandate on July 18, 2012. A response was filed by the People on March 7, 2016.

Constitutional due process requires fairness on appeal, but does not guarantee a "speedy appeal" per se. Where such a claim is raised on direct appeal, as opposed to collateral attack, the critical factor for the court to consider is whether the defendant has been

prejudiced because he is unable to present an adequate appeal or defense if the conviction is reversed and retrial ordered. *Hoang v. People*, 2014 CO 27, ¶ 48, *cert. denied sub nom. Hoang v. Colorado*, 135 S. Ct. 233, 190 L. Ed. 2d 175 (2014).

In this case, the division will issue an opinion on the remaining Instruction 19-mand[ato]ry language issue in this case. Appellant does not explain, nor can we discern, how his position in this court has suffered from the passage of time. However, if appellant's conviction is reversed and a new trial is ordered, given the delays in the issuance of the mandate from this court, he may raise his Sixth Amendment due process issues to the trial court. The Motion to Vacate is DENIED, with leave to raise those issues in the trial court in the event a new trial is ordered.

Motion to Reconsider Prior Opinion in Light of Dispositive United State Supreme Court Authority

On January 10, 2013, appellant filed a motion asking this Court to reconsider the holding in the supreme court's opinion of September 12, 2011, in light of *Smith v. United States*, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013). We DENY this motion, as reconsideration would be solely the province of the supreme court.

Supplemental Briefing

Appellant has repeatedly sought additional briefing, and has also filed numerous citations of supplemental authority. We GRANT the motion for supplemental briefing as follows:

The opinion of March 25, 2010 found, and we do not revisit, that the omission of the mandatory

language of section 18-1-704(4), C.R.S. 2011, in Instruction 19 was error. Remaining is only the question whether that error rises to the level of plain error requiring reversal and a new trial. Appellant shall file a supplemental brief on this issue, not to exceed 3150 words, within 21 days of the date of this order. Appellee shall file a response also not to exceed 3150 words with 21 days of appellant's supplemental brief. Appellant may file a supplemental reply brief not to exceed 1900 words within 14 days of the appellee's supplemental brief.

Oral Arguments

Appellant's motions for oral argument are GRANTED. Oral arguments will be set on an expedited basis to this division once supplemental briefing has been completed.

By the Court

Webb, J.
Ashby, J.
Harris, J.

APPENDIX E

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: June 26, 2017 CASE NUMBER: 2007CA2322
Certiorari to the Court of Appeals, 2007CA2322 District Court, Adams County, 2006CR3243	Supreme Court Case Number: 2016SC743
Petitioner: Jerad Allen Pickering, **v.** **Respondent:** The People of the State of Colorado.	
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 26, 2017.