NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

PHAP BUTH

Petitioner,

vs.

COMMONWEALTH OF MASSACHUSETTS

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment allows reliance on an inference that is at best more likely than not, but not beyond a reasonable doubt, to prove one of the elements of a crime?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those appearing in the caption to this petition.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Petitioner Phap Buth petitions this Court to issue a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts ("SJC") upholding his conviction of first-degree felony murder, notwithstanding the government's failure to properly prove all the elements of the predicate offense, in contradiction to *In Re Winship*, 397 U.S. 358 (1970). The SJC did so by relying on a common law inference which, at best, establishes an element by a preponderance of the evidence. The question of when such inferences can be relied on was explicitly left open in *Barnes v. United States*, 412 U.S. 837 (1973), and must now be resolved.

OPINION BELOW

The opinion of the SJC, *Commonwealth v. Buth*, 480 Mass. 113 (2018) is attached as Appendix A. No rehearing was sought. Transcript pages from the trial in the Essex Superior Court showing the denial of the defendants motions for directed verdict and the entry of judgment are attached as Appendix B.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. The SJC had appellate jurisdiction pursuant to Massachusetts General Laws c. 278, §§ 28, 33E, after a timely notice of appeal, and entered judgment on July 17, 2018. The Essex County Superior Court had jurisdiction pursuant to Massachusetts General Laws c. 212, § 6.

RELEVANT CONSTITUTIONAL PROVISION: 14th AMENDMENT DUE PROCESS CLAUSE

The Fourteenth Amendment to the Constitution of the United States provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of

law."

STATEMENT OF THE CASE

I. INTRODUCTION

This case presents an important question of Federal constitutional law, specifically regarding the Fourteenth Amendment's due process requirement that all elements of a criminal charge must be proven beyond a reasonable doubt, the heart of every criminal case. In *In re Winship*, 397 U.S. 358 (1970), this Court established that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary* to constitute the crime with which he is charged." *Id.* at 364 (emphasis added). In *Barnes v. United States*, 412 U.S. 837 (1973), this Court noted, but did not resolve, a question as to whether a judicially created inference that was more likely than not, but did not constitute proof beyond a reasonable doubt, was sufficient to allow a jury to find guilt. *Id.* at 841-842, *citing, e.g. Leary v. United States*, 365 U.S. 6 (1969).[1] The SJC's decision, relying on an inference that is at best more likely than not, resolved that important question incorrectly. This Court must grant certiorari to settle this important question itself. Rules of the Supreme Court, Rule 10(c).

II. THE ALLEGED CRIME[2]

On May 16, 2005, two men, Pytou Heang and Chon Son, forced their way into the apartment of Judith Finnerty ("Judith"), Robert Finnerty ("Robert"), and their daughter, Amy

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[1] Although these cases deal with inferences contained in jury instructions, that distinction does not alter consideration of the constitutionality of the inference. Indeed, the fact that the Massachusetts courts' inference is not presented to the jury for them to accept or reject, but retroactively applied by the Massachusetts courts as a rule of law, is a more serious infringement on the Due Process clause than if such an instruction was given.

[2] These facts are taken from the recitation in the opinion of the SJC.

Dumas, and shot and killed Robert and Dumas in the course of a few minutes, at most.[3] These facts were largely undisputed at trial.[4] The principal question presented to the jury was whether Mr. Buth, who acknowledged being present, was a joint venturer in the armed home invasion and thereby criminally responsible for the deaths on a theory of felony-murder.

On the night of May 16, 2005, sometime around eleven p.m., Judith heard a knock on the back door, which opened into a common hallway. Looking through a peephole, she saw Petitioner, whom she recognized as a prior marijuana customer. She had never had any problem with him. Judith let Petitioner in, sold him a bag of marijuana, and he then left.

There was another knock on the door, Petitioner returning to buy a second bag of marijuana. Judith opened the door partway, and he swung the door open. He stepped out of the way, and two other individuals dressed in black, including gloves and ski masks, entered the apartment. Judith fell and hit her knee; when she looked up, she saw the two men standing behind a couch with guns in hand. She began screaming. The invaders confronted Robert, fatally shooting him. Dumas ran from her bedroom to help her father, and was fatally shot. Judith ran to the front door, yelling for help. While standing in front doorway, saw Mr. Buth at the end of the driveway looking back and forth. She said he looked at her with a smirk on his face. Shortly thereafter, police began arriving.

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[3] Because Judith Finnerty and Robert Finnerty share a last name, they are referred to by their first names.

[4] Heang and Son were tried separately from Mr. Buth. The facts against them are recited in detail in *Commonwealth v. Heang*, 458 Mass. 827 (2011), but are substantially the same as those herein.

III. THE STATE TRIAL COURT PROCEEDINGS

On September 7, 2005, indictments were returned in the Essex County Superior Court for the Commonwealth of Massachusetts, charging the petitioner, Phap Buth, with two counts of murder in violation of M.G.L. c. 265, § 1, and one count of armed home invasion in violation of M.G.L. c. 265, § 18C. Mr. Buth was arraigned on November 11, 2005. After various pre-trial matters, trial commenced June 18, 2008. A motion for directed verdict was denied at the close of the government's evidence, and denied again at the close of all the evidence. The jury returned verdicts of guilty on all three charges on June 30, 2008. Mr. Buth was sentenced the same day to consecutive life sentences on the two murder counts; the armed home invasion conviction was filed.[5] A timely notice of appeal was filed on July 7, 2008.

IV. THE SJC DECISION

After additional post-trial motions not relevant to this petition were heard and resolved in the trial court, defendant's direct appeal was heard by the SJC on March 9, 2018, and decided on July 17, 2018. An amended decision was issued on August 3, 2018. Petitioner argued to the SJC, *inter alia*, that the conviction was invalid for failure to prove all the elements of the predicate offense of armed home invasion, specifically, that the Commonwealth failed to prove beyond a reasonable doubt that Petitioner knew his co-defendants were armed. Relying on prior state case law, the SJC held that the jury could infer from the fact defendant knew there was going to be a robbery of drug dealers that the co-defendants would be armed.[6] *Commonwealth v.*

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[5] A filed charge means that no sentence was imposed, although sentence may later be imposed on a filed charge.

[6] The SJC noted other factors that contributed to the conclusion the jury could determine beyond a reasonable doubt that petitioner knew the co-defendants were armed, but stated that

Buth, 480 Mass. 113, 117 (2018), *citing Commonwealth v. Quinones*, 78 Mass. App. Ct. 215, 219[-220] (2010) (finding jurors could infer the defendant knew co-defendants were armed during a robbery in order to overcome a victim's conceivably potential resistance, despite lack of other substantial evidence) and *Commonwealth v. Rakes*, 478 Mass. 22, 33 (2017) (despite lack of any evidence of knowledge that co-defendants were armed prior to the robbery, the jury could assume defendant knew the co-defendants would be armed based on the need to over come victim's conceivably potential resistance to a robbery). The Massachusetts courts have *never* identified victims who would not be presumed to resist sufficiently to justify inference the defendants were armed. In the case herein, for instance, the supposed victims were a crippled old man who used a walker and a sixteen year old girl, but the SJC nonetheless found that an inference was appropriate that weapons would be needed, and therefore no actual evidence of knowledge was required. *Buth*, 480 Mass. at 117 n.7.

CERTIORARI IS APPROPRIATE AND NECESSARY WHERE THE SJC IMPROPERLY SUSTAINED THE CONVICTION BASED ON AN INFERENCE THAT WAS AT BEST MORE LIKELY THAN NOT

A. The Inference Was At Best More Likely Than Not

The petitioner herein was convicted of murder in the first degree on a theory of felony murder as a joint venturer. Under Massachusetts law, the predicate offense, armed home invasion, requires that the petitioner knew that at least one coventurer was armed. The SJC properly acknowledged that element in its opinion. *Buth*, 480 Mass. at 116. However, it allowed the Commonwealth to meet its burden by relying on a common law inference that Petitioner must have known the co-defendants were armed based on his knowledge there was a plan to rob the

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they were not sufficient on their own.

drug dealers targeted herein. *Id.* at 117.

Such an inference is constitutionally infirm. As noted *supra*, p. 2, this Court has not resolved the question of whether a conviction can be sustained based on a legally created permissive inference which is more likely than not, but not sufficiently strong to constitute the beyond a reasonable doubt standard. *Barnes*, 412 U.S. at 841-842. However, the Due Process Clause is violated where an element of the crime is not proven beyond a reasonable doubt, the fact that the element is supported by a legally created presumption notwithstanding. Any other conclusion would constitute a blatant violation of *Winship*. The inference relied upon by the SJC cannot meet that standard.

To determine the likelihood of the premise underlying the SJC's inference, one must look to the frequency with which robberies are armed versus unarmed. The Federal Bureau of Investigation's Uniform Crime Reporting (UCR) Program gathers statistics on crimes from across the nation. The UCR statistics divide robberies into four categories, "Firearm," "Knife or cutting instrument" (hereafter "knife"), "Other weapon," and "Strong-arm" (unarmed). *See, e.g.* https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the- u.s.-2017/topic-pages/robbery (last checked October 11, 2018). For purposes of the Massachusetts armed home invasion statute, the government must prove the defendant was armed with "a dangerous weapon." Mass. Gen. L. c. 265, § 18C. By definition, a firearm is a dangerous weapon in Massachusetts jurisprudence. In 2017, the most recent year for which national statistics are available, there were 40.5 robberies with a firearm, 8.1 robberies with a knife, 9.7 robberies in the "Other weapon" category, 41.3 robberies in the Strongarm category per 100,000 people. https://ucr.fbi.gov/ crime-in-the-u.s/2017/crime-in-the-u.s.-2017/ topic-pages/robbery (Table 19, last checked

October 11, 2018). In 2005, the numbers were 58.0 for firearms, 12.1 for knives, 12.9 for other weapons, and 54.6 for strongarm robberies per 100,000 people. https://ucr.fbi.gov/crime-in-the-u.s/2005 (Subpage Robbery, table 19; last checked October 11, 2018). The statistics in the years in between follow the same general pattern, with firearm robberies and strongarm robberies the most common and proximate to each other in number, while use of knives and other weapons in robberies is only a fraction of the other two, and also close to each other.

In light of national statistics, the Massachusetts common law's purported inference, that a jury can infer a robber would be armed when a robbery is planned due to the expected resistance of the victims, is not even more likely than not true. The inference certainly does not meet the criterion for proving that a defendant was armed beyond a reasonable doubt. Rather, the odds of a robber being armed is somewhere in the 40-60% range, depending on precisely how many of the knife and other weapon robberies may fit the definition of "dangerous weapon." Thus, the important question raised, whether an inference can be used to sustain a conviction if it is at *best* more likely than not, is squarely presented, and should be resolved.

B. In the Absence of the Inference, There Was Insufficient Evidence to Convict

Albeit even when employing the unconstitutional inference in lieu of actual evidence, the SJC correctly identified this as "a close case," *Buth*, 480 Mass. at 118, which required the improper inference to cross the sufficiency-of-evidence line. *Id.* There was no evidence presented that Petitioner ever saw or was told the co-defendants had a gun prior to the robbery. In fact, Petitioner directly testified that he never saw Heang with a gun in the five years he had known him. No one else testified to Mr. Buth ever having seen a gun.

The other evidence the SJC purported to rely on for support for the proposition that Petitioner knew the co-defendants were armed was clearly insufficient. One witness testified that the weekend before, a co-defendant gestured in a way that made the witness think he may have had a gun. *Id.* at 116. The witness said petitioner may or may not have been in the room at the time, he was inconsistent, and although the witness responded to the gesture with the statement "If you've got a gun, get out of my house" the co-defendant did not leave. The only other evidence cited was that a survivor of the robbery, Judith, on leaving the apartment, testified that she saw Petitioner still standing there, looking around, and that he "smirked," *id.* at 117, hardly evidencing in any way awareness that the co-defendants were armed either before the robbery or after, let alone constituting proof beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, this case presents "an important question of federal law that has not been, but should be, settled by this Court." Rule 10, Rules of the Supreme Court of the United States. The requested writ of certiorari should be allowed, and this case should be scheduled for merit briefing and argument.

Respectfully Submitted,
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