No. 18-8739

In the
Supreme Court of the United States

ARMANDO LOPEZ,
Petitioner,
v.
MASSACHUSETTS,
Respondent.

On Petition For Writ Of Certiorari To The Massachusetts Appeals Court

BRIEF IN OPPOSITION

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September 9, 2019

QUESTION PRESENTED

In a prosecution for unlawfully possessing a firearm and ammunition, may a State place on the defendant an initial burden to produce some evidence in support of the affirmative defense of authorization, where, once that initial burden of production is met, the burden shifts back to the State to prove beyond a reasonable doubt that the possession was unauthorized, consistent with due process?

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The opinion of the Massachusetts Appeals Court is not published but is available at 2018 WL 3651860, and it is reproduced in Petitioner's Appendix. (Pet. App. 1a-2a). The order of the Massachusetts Supreme Judicial Court (SJC) denying review is available at 480 Mass. 1111, 113 N.E.3d 838 (2018), and is also reproduced in Petitioner's Appendix. (Pet. App. 3a).

STATEMENT

1. In the course of an investigation of a homicide in the city of Chelsea, Massachusetts, investigators received information that the murder weapon, a revolver, and other items associated with the murder were delivered to Petitioner to avoid their discovery by law enforcement. (Pet. App. 19a-20a). Consequently, Massachusetts State Police executed a search warrant for Petitioner's residence in Revere, Massachusetts. (Pet. App. 20a). While executing that search warrant, the police discovered a revolver and ammunition that were not connected to the murder under investigation but formed the basis of the firearm and ammunition charges for which Petitioner was tried. (Pet. App. 4a-5a).

On June 23, 2015, in the Superior Court for Suffolk County, Massachusetts, a jury found Petitioner guilty of one count of unlawful possession of a firearm and one count of unlawful possession of ammunition, both in violation of Mass. Gen. Laws ch. 269, § 10(h). (Pet. App. 17a-18a). Petitioner was sentenced to two years in jail, followed by a two-year probationary term. (Pet. App. 17a-18a).

On appeal to the Massachusetts Appeals Court, as pertinent here, Petitioner argued that the lack of a license is an element of the crime of unlawful possession of a firearm under Massachusetts law, that the Commonwealth had not proven that element beyond a reasonable doubt, and that his convictions therefore rested on insufficient evidence in violation of the Due Process Clause. (Pet. App. 1a-2a, 21a-25a).

The Appeals Court rejected the argument in an unpublished decision issued on August 2, 2018. (Pet. App. 1a-2a).[1] On the issue referenced above, the Appeals Court concluded that Petitioner's convictions were supported by sufficient evidence. (Pet. App. 1a). The court held that this result was "controlled in all material respects," Pet. App. 1a, by *Commonwealth v. Jones*, 372 Mass. 403, 361 N.E.2d 1308 (1977), and its progeny, which held that proof of licensure was not an element of the crime of unlawful possession of a firearm under Massachusetts law. Rather, licensure was an affirmative defense for which the defendant bears the initial burden of production; if that is met, the government then bears the ultimate burden of persuasion beyond a reasonable doubt. *See id.* at 406, 361 N.E.2d at 1311. Thus, requiring Petitioner to produce some evidence that he had a valid license—as relevant here, what is known in Massachusetts as a "firearm identification" or "FID" card—did not create an unconstitutional presumption of guilt or shift the

[1] Decisions released pursuant to the Massachusetts Appeals Court's Rule 1:28, such as the decision below, *see* Pet. App. 1a, "may be cited for [their] persuasive value but … not as binding precedent." *Chace v. Curran*, 71 Mass. App. Ct. 258, 260 n.4, 881 N.E.2d 792, 794 n.4 (2008).

burden of proof on an essential element of the crime, the court reasoned. (Pet. App. 1a).[2] The SJC denied discretionary review on November 8, 2018. (Pet. App. 3a). Petitioner filed a petition for writ of certiorari in this Court on April 8, 2019.

2. The statute under which Petitioner was convicted provides in pertinent part that "[w]hoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition *without complying with the provisions of section 129C of chapter 140* shall be punished by imprisonment … or by a fine…." Mass. Gen. Laws ch. 269, § 10(h) (emphasis added). As pertinent here, section 129C of chapter 140 in turn states that "[n]o person … shall own or possess any firearm, rifle, shotgun or ammunition unless he has been issued a firearm identification ["FID"] card by the licensing authority pursuant to the provisions of section one hundred and twenty-nine B." *Id.* ch. 140, § 129C.[3] Finally, section 129B of chapter 140 provides that the appropriate local licensing authority (generally, the police chief) "shall issue" an FID card to an applicant "if it appears that the applicant is not a prohibited person." *Id.* § 129B(1).[4] Thus, in general, any resident of Massachusetts who is not a "prohibited person" may apply for and obtain an FID card.

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[2] The Appeals Court also rejected Petitioner's other claim on appeal—one of ineffective assistance of counsel based on a failure to move to suppress evidence discovered during an allegedly inappropriately executed search. (Pet. App. 1a-2a).

[3] Section 129C also includes a lengthy list of special cases to which "[t]he provisions of this section shall not apply"—that is, for which an FID card is not necessary. Mass. Gen. Laws ch. 140, § 129C(a)-(u). These exemptions include, *inter alia*, transportation of firearms by common carrier, *id.* § 129C(d); possession of rifles by nonresidents at a firing range, *id.* § 129C(f); and possession of firearms by members of a veterans' organization on "official parade duty," *id.* § 129C(r).

[4] "Prohibited persons" include, *inter alia*, persons convicted of certain crimes, persons with certain indicators of mental illness or substance abuse, and underage persons. *See* Mass. Gen. Laws

3. The Massachusetts courts have adhered to the rule to which Petitioner objects since 1977. Construing a different subsection of chapter 269, section 10—subsection 10(a), which prohibits unlawful carriage—the SJC held in *Jones* that "[i]n the absence of evidence with respect to a license, no issue is presented with respect to licensing. In other words, the burden is on the defendant to come forward with evidence of the defense. If such evidence is presented, however, *the burden is on the prosecution to persuade the trier of facts beyond a reasonable doubt* that the defense does not exist." 372 Mass. at 406, 361 N.E.2d at 1311 (emphasis added).[5] The SJC further concluded that placing an initial burden of production on the defendant in this manner did not violate due process, looking to this Court's decisions in *In re Winship*, 397 U.S. 358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975). *See Jones*, 372 Mass. at 407-09, 361 N.E.2d at 1311-13.

Thirty years later, the identical issue arose with respect to subsection 10(h) of chapter 269, the same unlawful possession statute at issue in this case. In *Commonwealth v. Colon*, 449 Mass. 207, 866 N.E.2d 412 (2007), the defendant raised the exact argument that Petitioner raises here: that by not introducing

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ch. 140, § 129B(1)(i)-(xi). In addition, if a licensing authority has "reliable, articulable, and credible information" that an applicant may present "a risk to public safety," it may petition a court for permission to deny an FID card to a non-prohibited person. *See id.* § 129B(1½)(a), (d).

[5] The SJC relied in part on a general and long-standing statutory presumption in Massachusetts, set forth at Mass. Gen. Laws ch. 278, § 7 (and dating at least to 1859, see 1859 Mass. St. ch. 160), stating that "[a] defendant in a criminal prosecution, relying for his justification upon a license, appointment, admission to practice as an attorney at law, or authority, shall prove the same; and, until so proved, the presumption shall be that he is not so authorized." Notably, however, despite the statute's apparent indication that a defendant may be required to carry the burden of persuasion on the affirmative defense of licensure, the SJC has retained the ultimate burden of persuasion on the prosecution in the context of firearms cases, as explained in the text.

evidence regarding his lack of an FID card, the Commonwealth had failed to carry its burden to prove all essential elements of a violation of subsection 10(h). *Id.* at 225, 866 N.E.2d at 428. The SJC rejected the argument, relying on *Jones* to conclude that the conviction under subsection 10(h) was constitutional. *Id.* at 226, 866 N.E.2d at 429. This Court denied *certiorari*. *Colon v. Massachusetts*, 552 U.S. 1079 (2007).

Four years after *Colon*, the SJC again considered whether a conviction under subsection 10(h) of chapter 269 could stand absent proof that the defendant lacked an FID card. *Commonwealth v. Powell*, 459 Mass. 572, 573, 946 N.E.2d 114, 118 (2011). And, again, the SJC declined to change its view, noting instead that "[w]e repeatedly have held that in prosecutions under G.L. c. 269, § 10(a) and (h), the Commonwealth does not need to present evidence to show that the defendant did not have a license or FID card because the burden is on the defendant, under G.L. c. 278, § 7, to come forward with such evidence. . . . We have declined to revisit these conclusions, and find no reason to do so now." *Id.* at 582, 946 N.E.2d at 124 (citation and footnote omitted). As in *Colon*, this Court denied *certiorari*. *Powell v. Massachusetts*, 565 U.S. 1262 (2012).

The defendant in *Powell* then sought *habeas* relief in federal court, urging once again that treating licensure as an affirmative defense to unlawful possession of a firearm under subsection 10(h) violated due process. The First Circuit affirmed the district court's denial of relief. *Powell v. Tompkins*, 783 F.3d 332 (1st Cir. 2015).

The First Circuit first rejected the argument that the SJC had, in effect, misread the statute by not requiring proof that an FID card was lacking, holding instead that "[t]he SJC's exposition represents the very meaning of the statute intended by the state legislature, and we are duty bound, in no uncertain terms, to follow that state precedent." *Id.* at 340. The First Circuit then looked to this Court's "precedent . . . in the field of state law affirmative defenses that fully satisfy the *Winship* baseline demand," and held that precedent "provides ready support for concluding that the SJC's due process ruling in Powell's direct appeal is not objectively unreasonable." *Id.* at 342.

Once again, this Court denied *certiorari*. *Powell v. Tompkins*, 136 S. Ct. 1448 (2016).

REASONS FOR DENYING THE PETITION

As set forth above, since 2007 this Court has denied *certiorari* three times in various contexts on the precise issue presented by this petition. Nothing has changed. This petition, like the earlier ones, depends on Massachusetts case law stretching back over 40 years, and indeed, most of the cases which Petitioner claims demonstrate a split in authority are from the 1970s and 1980s—with some dating from much earlier. *See* Pet. for Cert. 6-9 (citing, *inter alia*, *People v. Grass*, 79 Misc. 457, 141 N.Y.S. 204 (Co. Ct. N.Y. 1913)). As part of his claimed split, Petitioner does not cite to a single case decided since this Court denied *certiorari* three years ago in *Powell v. Tompkins*.

In any event, as explained below, no split in authority exists on the due process question presented by this petition. Though some state courts long ago construed their state statutes as establishing the lack of a license as an element of the crime of unlawful possession while others, like the Massachusetts courts, determined otherwise, that is an issue of state-law statutory interpretation and presents no federal question. And the few decades-old cases that have found a due process problem in this context have done so precisely because the state laws at issue shifted the burden of proof on licensure entirely to the defendant. *See United States v. Garcia*, 555 F.2d 708, 711 & n.3 (9th Cir. 1977) (noting that under California law, "the burden is on the defendant to show that he had a license to carry the pistol" (citing *People v. Williams*, 184 Cal. App. 2d 673, 675, 7 Cal. Rptr. 604 (1960)); *Johnson v. Wright*, 509 F.2d 828, 832 (5th Cir. 1975) (noting that Georgia statute "impermissibly shifts the burden of proof to the defendant"). But unlike in those states, Massachusetts, as explained above, has long held that once the defendant satisfies an initial burden of production with respect to an FID card, the burden returns to the prosecution to establish, beyond a reasonable doubt, that possession of the firearm in question was not authorized. *See Jones*, 372 Mass. at 406, 361 N.E.2d at 1311. On the question whether *that* arrangement satisfies due process, there is no split whatsoever—indeed, we are not aware of any case from any jurisdiction outside of Massachusetts that has even considered it.[6]

[6] Two cases of which we are aware—*State v. Paige*, 256 N.W.2d 298 (Minn. 1977), and *People v. Henderson*, 218 N.W.2d 2 (Mich. 1974)—have construed their state unlawful possession laws

The petition should therefore be denied.

I. There Is No Split of Authority on the Federal Question Presented by Petitioner.

Petitioner has not identified any actual split among the federal courts of appeals or state courts of last resort regarding the federal constitutional question of whether the rule of *In re Winship* is violated where a state chooses to treat the existence of a license as an affirmative defense in criminal gun possession cases.[7] Indeed, no such split exists. Most of the cases he cites simply reflect differing results in statutory interpretation, not constitutional analysis. And the remaining cases are readily distinguishable.

Specifically, Petitioner claims a 40-year-old split between the SJC's 1977 *Jones* decision and cases from Pennsylvania, Georgia, Connecticut, and the Fifth Circuit. Pet. for Cert. 6. But there is no disagreement among these cases on any federal question. The Pennsylvania case looked to "[t]he structure of the statute and the nature of the prohibition"—both issues that go to a state court's interpretation of state law—to conclude "that the absence of a license is an essential

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similarly to Massachusetts' by holding that a defendant bears a burden of production on the defense of licensure, and once that burden is met, the prosecution must prove the contrary beyond a reasonable doubt. *See Henderson*, 218 N.W.2d at 4 ("[T]he defendant has the burden of injecting the issue of license by offering some proof—not necessarily by official record—that he has been so licensed. The people thereupon are obliged to establish the contrary beyond a reasonable doubt."); *Paige*, 256 N.W.2d at 303-04 (same, citing *Henderson*). Neither case considered any federal due process issue arising out of that statutory construction.

[7] *See In re Winship*, 397 U.S. 358, 364 (1970) (criminal defendant may not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

element of the crime." *Commonwealth v. McNeil*, 337 A.2d 840, 843 (Pa. 1975).[8] Similarly, the Connecticut case interpreted the statute before it to mean "that the lack of a proper permit is an essential element of the crime charged." *State v. Beauton*, 365 A.2d 1105, 1107 (Conn. 1976). Indeed, *Beauton* looked for guidance to *McNeil*'s "construc[tion of] the provisions of a Pennsylvania statute similar to" the Connecticut law under consideration, further demonstrating that the basis of the Connecticut decision was statutory construction, not any federal constitutional question. *Id.* at 1107-08. The Fifth Circuit, as noted above, found a due process violation where Georgia law assigned the burden of proof on licensure to the defendant, *see Johnson*, 509 F.2d at 832, but again, that is readily distinguishable from the Massachusetts regime where, once an initial burden of production is satisfied, the prosecution must prove lack of authorization beyond a reasonable doubt.[9] And Georgia, following the *Johnson* decision (but with virtually no discussion), revised its own interpretation of state law to hold that lack of a license is an element of the offense. *Head v. State*, 221 S.E.2d 435, 437 (Ga. 1975) (overruling previous cases construing the statute differently). Thus, the state courts of Georgia, like those of Connecticut and Pennsylvania, have simply

[8] Having so concluded, the court naturally held that due process required the state to prove absence of a license—but that is as a consequence of having first held that, as a matter of statutory interpretation, absence of a license was an element of the crime. *See McNeil*, 337 A.2d at 843 ("[I]t is clear that the burden of proving an essential element of the crime may not be shifted to the defendant.").

[9] Thus, *Johnson* and the First Circuit's decision in *Powell* are not in disagreement, because they considered different state law regimes in their due process analyses.

interpreted their unlawful possession statutes differently than have the courts of Massachusetts. Such variance among state courts on questions of state law presents no issue for this Court's review.

Petitioner also urges that cases from Oregon, Florida, Alabama, West Virginia, and the Ninth Circuit support his claim of a split. Pet. for Cert. 7-8. But, again, these cases present no split with the Massachusetts courts on any federal question. As noted above, the Ninth Circuit case hinged on California law placing the burden of persuasion of licensure on the defendant—something that Massachusetts does not do. *See United States v. Garcia*, 555 F.2d 708, 711 & n.3 (9th Cir. 1977).[10] The Oregon case held that the question whether licensure was an element of the offense must be "determined by examining the language of the statute in its context and, if necessary, by resort to legislative history and relevant rules of construction." *State v. Brust*, 974 P.2d 734, 737 (Or. App. 1999). Applying those standard tools of statutory construction, the Oregon court concluded that lack of a license was an element of the offense under Oregon law. The Alabama, Florida, and West Virginia cases are similar: they simply hold, as a matter of statutory interpretation of state law, that licensure is an element of the offense. *See Sellers v.*

[10] As Petitioner correctly and forthrightly observes, however, the Ninth Circuit has since "seemed to walk back its due process concern over this California presumption[.]" (Pet. for Cert. 8 n.5). *See United States v. Mackie*, 720 F. App'x 872 (9th Cir. 2018) (mem.). Although *Mackie* is an unpublished decision, its approval in passing of California's burden shifting structure renders Petitioner's reliance on *Garcia* an even weaker reed on which to rest any purported split.

State, 507 So.2d 540, 543 (Ala. Crim. App. 1985); *State v. Robarge*, 450 So.2d 855, 856 (Fla. 1984); *State v. Hodges*, 305 S.E.2d 278, 284 (W. Va. 1983).

In sum, courts are not "intractably split" on any constitutional issue. Pet. for Cert. 5; *cf.* this Court's Rule 10. Rather, some jurisdictions have chosen to define lack of a license as an element of the offense, while other jurisdictions—like Massachusetts—define authorization (the existence of a license) as an affirmative defense. And, even if a due process issue could be raised by an "affirmative defense" jurisdiction placing the ultimate burden of persuasion of authorization on a defendant, *see, e.g., Harris v. State*, 716 N.E.2d 406, 411-12 (Ind. 1999) ("We reaffirm that once the State has established that the defendant carried a handgun on or about his person, away from his residence or place of business, the burden then shifts to the defendant to demonstrate that he possessed a valid license."); *cf. Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975) (finding due process violation "where the defendant is required to prove the critical fact in dispute"), that issue is not presented here. In Massachusetts, a defendant has only a burden of *production* on the affirmative defense of authorization; once that is met, the burden shifts back to the State, which has the ultimate burden of *persuasion* to show unauthorized possession beyond a reasonable doubt. *See Jones*, 372 Mass. at 406, 361 N.E.2d at 1311; *cf. supra* at 8 n.5 (noting cases from Michigan and Minnesota adopting a similar construct). We know of no federal court of appeals or state court of last resort to have found a due process violation in those circumstances—and Petitioner

identifies none. The split on a constitutional question that Petitioner posits is therefore nonexistent.

Petitioner argues that a decision in his favor on the putative federal question would be of national importance, given the number of states that currently define possession of a license as an affirmative defense. Pet. for Cert. 11. Those states, however, are simply exercising their prerogative to define their own crimes, with their own respective elements. This Court historically does not—and should not in this case—intrude on such an essential aspect of state sovereignty, where (as here) there is no disagreement among the lower courts on any federal question. Petitioner's argument therefore supplies no basis for this Court to grant review.

II. The Massachusetts Appeals Court's Decision Was Correct.

Certiorari should also be denied in this case because the Massachusetts Appeals Court's decision was correct. "[T]he SJC has long held" that a firearm offense under Mass. Gen. Laws ch. 269, § 10 "is a public welfare offense that imposes a general prohibition against carrying a firearm for which both exceptions and exemptions may apply in any given case." *Powell*, 783 F.3d at 339. One of these exceptions, possession of an FID card, has been defined as an affirmative defense, for which a defendant has an initial burden of production, as explained *supra*, Part I. Thus, the SJC has long held that absence of a license is not an element of the unlawful possession offense, but that, once a defendant comes forward with some evidence of a license, the burden returns to the prosecution to

persuade the trier of fact beyond a reasonable doubt that the defendant is not licensed to possess or carry a firearm and thus has no defense at law. *See Jones*, 372 Mass. at 406, 361 N.E.2d at 1311.

The Appeals Court's application of this long-established Massachusetts law resulted in a proper rejection of Petitioner's due process claim because this Court has afforded the States considerable latitude to define the elements and affirmative defenses of state criminal offenses, and for affirmative defenses, to shift the burden of production (or proof, though that is not at issue here) to the defendant. *See Smith v. United States*, 568 U.S. 106, 110 (2013) (although "the Government must prove beyond a reasonable doubt 'every fact necessary to constitute the crime with which [the defendant] is charged,' '[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required'") (alterations in original) (citations omitted); *Parker v. Matthews*, 567 U.S. 37, 42 n.1 (2012) (characterizing as a "truism" the principle that "when the burden of production is assigned to the defendant, the jury may find the prosecution's burden of proof satisfied without introduction of negating evidence, unless the defendant's evidence is so probative as to establish reasonable doubt as a matter of law"); *Gilmore v. Taylor*, 508 U.S. 333, 341 (1993) ("states must prove guilt beyond a reasonable doubt with respect to every element of the offense charged, but they may place on defendants the burden

of proving affirmative defenses"); *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986) (states may identify the elements of the offenses they wish to punish).

This Court has continually noted "the preeminent role of the States in preventing and dealing with crime and the reluctance of th[is] Court to disturb a State's decision with respect to the definition of criminal conduct and the procedures by which the criminal laws are to be enforced in the courts, including the burden of producing evidence and allocating the burden of persuasion." *Martin v. Ohio*, 480 U.S. 228, 232 (1987) (citing *Patterson v. New York*, 432 U.S. 197, 201-202 (1977)); *see also Patterson*, 432 U.S. at 201 (Court "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States"). Accordingly, in "assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process," this Court has declined to apply the balancing test of *Mathews v. Eldridge*, 424 U. S. 319 (1976), instead holding that a state's decision does not violate the Due Process Clause in this regard unless "'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina v. California*, 505 U.S. 437, 443, 445-46 (1992) (quoting *Patterson*, 432 U.S. at 201-02 (citations omitted)).

Medina explained that "[h]istorical practice is probative of whether a procedural rule can be characterized as fundamental." 505 U.S. at 446. The history of the rule at issue here readily shows that it does not run afoul of the principles set forth in *Medina* and *Patterson*. The general rule in Massachusetts that a defendant

relying on a license to justify otherwise prohibited conduct must meet at least an initial burden of production, now codified at Mass. Gen. Laws ch. 278, § 7, has been codified since 1859. *See* 1859 Mass. St. ch. 160 ("In all criminal prosecutions, in which the defendant shall rely for his justification upon any written license, appointment or certificate of authority, he shall prove the same; and until such proof, the presumption shall be that he is not so authorized."); *see also Jones*, 372 Mass. at 405, 361 N.E.2d at 1310 (explaining that the history extends back even further with respect to prosecutions for selling liquor without a license). As noted *supra*, Part I, some states have taken this approach to their laws governing unlawful possession of firearms, and others have not. Thus, given Massachusetts' long and consistent history and the divergence of approaches among the states, there can be no argument that historical practice supports Petitioner's view that an initial allocation of a burden of production to a defendant regarding licensure violates due process. *See Medina*, 505 U.S. at 447-48 (noting that "[a] number of state courts have said that the burden of proof may be placed on the defendant to prove incompetence [and s]till other state courts have said that the burden rests with the prosecution," and thus "[d]iscerning no historical basis for concluding that the allocation of the burden of proving incompetence to the defendant violates due process") (citations omitted).

Nor does "the rule transgress[] any recognized principle of 'fundamental fairness' in operation." *Id.* at 448 (quoting *Dowling v. United States*, 493 U.S. 342,

352 (1990)). To the contrary, this Court's extensive case law on the latitude of States to allocate burdens with respect to affirmative defenses demonstrates that the rule at issue here poses no issue of "fundamental fairness." As the First Circuit observed in 2015 in rejecting a federal habeas petitioner's identical due process challenge to the same statute that is raised here, "between the time of *Jones* and [the direct appeal at issue here], the Supreme Court's precedent has developed significantly in the field of state law affirmative defenses that fully satisfy the *Winship* baseline demand." *Powell*, 783 F.3d at 342 (citing cases). For the reasons explained earlier, *supra*, at 13-15, that precedent, including this Court's decisions in cases such as *Martin*, *Smith*, and *Gilmore*, compels the conclusion that the Appeals Court's decision here was correct. Indeed, just as in *Powell,* here Petitioner has not "addresse[d] this clear . . . precedent governing affirmative defenses, nor cite[d] even a single roughly comparable federal case in which a state conviction secured under a statutory construct that is analogous to Massachusetts law was set aside as violating the *Winship* due process demands." *Powell*, 783 F.3d at 343.

Petitioner attempts to create uncertainty about the SJC's treatment of licensure in the context of firearms convictions by relying upon language that the SJC used in quite different contexts. Pet. for Cert. 13 (citing, for example, *Commonwealth v. Alvarado*, 423 Mass. 266, 269, 667 N.E.2d 856, 859 (1996), for the proposition that "[c]arrying a gun is not a crime. Carrying a firearm without a

license (or other authorization) is.").[11] But the SJC in *Alvarado* was not asked to define the elements of, and affirmative defenses to, a charge of unlawful firearm possession under state law. Rather, *Alvarado* addressed the very different question of whether the presence of a firearm, without more, furnished probable cause or reasonable suspicion sufficient to justify a police officer's seizure of an individual under Article 14 of Massachusetts Declaration of Rights. *Id.* The SJC has since clarified that its negative answer to the question presented in *Alvarado* "does not diminish [its longstanding] conclusion with regard to the essential elements of the crime [of unlawful firearm possession]," and "has no bearing on the allocations of burdens at trial." *Commonwealth v. Gouse*, 461 Mass. 787, 802 n.17, 965 N.E.2d 774, 787 n.17 (2012). The SJC, thus, has itself confronted the purported "inconsistency" in its own cases, definitively resolved any confusion, and unambiguously adhered to its views as to the elements of, and affirmative defenses to, the unlawful gun possession offense. *Id.*

Petitioner presents another argument that has been considered and reconsidered, and always rejected, by courts since the SJC's decision in *Jones*. Petitioner faults the Appeals Court, based on its citation of *Jones*, for relying on a test, articulated in *Morrison v. California*, 291 U.S. 82 (1934), which provides that, for a state to require an accused to meet a burden of production regarding an

[11] The First Circuit correctly rejected this exact argument in the context of a habeas claim arising under AEDPA in *Powell*, *see* 783 F.3d at 340-41, a case on which this Court denied *certiorari*, as noted *supra*, at 6.

exculpatory fact, "there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge as, for instance, where a general prohibition is applicable to everyone who is unable to bring himself within the range of an exception." *Morrison*, 291 U.S. at 90-91. *Morrison* remains good law; indeed, it was relatively recently described as "the historical cornerstone of this Court's decisions in the area of due process and allocation of the burden of proof." *Medina*, 505 U.S. at 460 (Blackmun, J., dissenting). The SJC therefore correctly relied on *Morrison* because it is directly applicable to the issue the court resolved, whereas *Tot v. United States*, 319 U.S. 463 (1943), cited by Petitioner (Pet. for Cert. 16-18), is not.[12] As the First Circuit has explained, *Tot* "is ill-fitted to the due process question for the Massachusetts firearms crime" because *Tot* involved a "state statutory scheme[] that relieved the prosecutor from proving an element of the crime" and did not involve a statutory affirmative defense. *Powell*, 783 F.3d at 343 n.5 (rejecting argument that SJC should have followed "the 'rational connection' test" under *Tot*).[13]

Finally, Petitioner's attempt to buttress his claim by adverting to Second Amendment concerns, *see* Pet. for Cert. 10-11, 14-15, should be disregarded. No

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[12] Under the test announced in *Tot*, "a statutory presumption cannot be sustained if there can be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Tot*, 319 U.S. at 467.

[13] Petitioner's vague references to modern technological advances, Pet. for Cert. 17, are not a basis to challenge *Jones*, as the First Circuit found in rejecting a similar challenge in *Powell*. *See Powell*, 783 F.3d at 343. Moreover, there is no reason to doubt that convenience considerations still

Second Amendment issue is stated or "fairly included" within the petition's question presented, which states only a claim under the Due Process Clause. *See* Pet. for Cert. i; this Court's Rule 14.1(a).[14] Nor was any Second Amendment issue adequately raised below (*see* Pet. App. 24a), or ruled on by the lower court (*see* Pet. App. 1a-2a). Any Second Amendment claim with respect to Petitioner's conviction is therefore waived.

CONCLUSION

The petition for a writ of certiorari should be denied.

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favor production by the defendant, as it is presumably still the case that "[p]roof of a license by the defendant . . . would be a very simple task." *Jones*, 372 Mass. at 408, 361 N.E.2d at 1312.

[14] In contrast, in the *Powell* litigation, which as noted *supra*, at 5-6, arose out of the same statute and presented the same due process issue as this case, both the SJC on direct appeal and the First Circuit on habeas review discussed at length and rejected a Second Amendment claim. *See* 459 Mass. at 583-90, 946 N.E.2d at 125-30; 783 F.3d at 343-49. And the question presented in Powell's petition for *certiorari* to the First Circuit (which this Court denied) was: "May a state, in keeping with the Second and Fourteenth Amendments, punish a person for possessing or carrying a firearm without proving beyond a reasonable doubt that such possession is unlawful?" Pet. for Cert. in *Powell v. Tompkins*, No. 15-6063, at ii.

Respectfully Submitted,

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September 9, 2019