No.

IN THE

Supreme Court of the United States

MELISSA PFEIFFER,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition For A Writ Of Certiorari To
The Supreme Judicial Court of Massachusetts

PETITION FOR WRIT OF CERTIORARI

REBECCA JACOBSTEIN
Counsel of Record
COMMITTEE FOR PUBLIC
COUNSEL SERVICES
44 Bromfield Street
Boston MA 02108
(617) 910-5726
rjacobstein@publiccounsel.net

Attorney for Petitioner

QUESTION PRESENTED

At the time of the offense, Massachusetts' common-law crime of second degree felony murder had three elements: 1) the commission or attempted commission of a non-life felony; 2) a death occurring during the commission of the underlying felony; and 3) an underlying felony that was either inherently dangerous or committed with a conscious disregard for the risk to human life. *See Commonwealth v. Fantauzzi*, 73 N.E.3d 324, 331 n.10 (Mass. App. Ct. 2017). *See also Commonwealth v. Garcia*, 18 N.E.3d 654, 667 (Mass. 2014) (third element of second-degree felony murder requires felony that is either inherently dangerous or committed with conscious disregard for the risk to human life); Model Jury Instructions on Homicide 60 (2013). Although the intent for homicide is usually malice aforethought, in felony-murder cases such as this one, malice is conclusively presumed from the intent to commit the underlying felony if the underlying felony is inherently dangerous. *See Commonwealth v. Brown,* 81 N.E.3d 1173, 1195 (Mass. 2017) (where killing occurs during commission of inherently dangerous felony, no proof of actual malice required). This case is about whether the judge or the jury decides this issue of intent.

Under Massachusetts common law, some felonies are inherently dangerous as a matter of law. See *Commonwealth v. Wadlington*, 4 N.E.3d 296, 309 (Mass. 2014) (decisional law has defined certain felonies inherently dangerous as a matter of law). A felony is inherently dangerous as a matter of law if the judge finds a conscious disregard for the risk to human life is implicit in the intent required to

commit the felony. *See Commonwealth v. Scott*, 701 N.E.2d 629, 632 (Mass. 1998), quoting *Commonwealth v. Cook*, 644 N.E.2d 203 (Mass. 1994). This determination is made by the judge "on a case-by-case basis, and sometimes by reference to specific facts." *Commonwealth v. Claudio*, 634 N.E.2d 902, 906 (Mass. 1994), overruled on other grounds by *Commonwealth v. Britt*, 987 N.E.2d 558 (Mass. 2013).

If the judge finds the felony inherently dangerous, malice is conclusively presumed and the third element does not go to the jury. If, on the other hand, a conscious disregard for the risk to human life is not implicit as a matter of law in the intent required to commit the felony, then the jury is permitted to decide the question of malice, specifically, whether the defendant acted in conscious disregard for the risk to human life. *See Commonwealth v. Tevenal*, 515 N.E.2d 1191, 1194 (Mass. 1987).

In this case, and over objection, the judge withdrew the third element from the jurors' consideration, instructing them that arson is inherently dangerous as a matter of law. T7:224-225; T8:24, 108, 124.[1] As a result of the judge's instructions in this case, the only elements that the jurors were required to find beyond a reasonable doubt were 1) Ms. Pfeiffer committed arson; and 2) a death occurred during the commission of the arson. The maximum penalty for an arson conviction, even one that causes death, is twenty years. *See* Mass. Gen. L. c. 266, § 1. What permitted the life sentence Ms. Pfeiffer ultimately received for felony murder was the finding of fact made by the judge – that arson is inherently dangerous. *See*

[1] The record appendix before the SJC is cited as R:, the trial transcript is cited by Volume Number:Page Number.

Commonwealth v. Matchett, 436 N.E.2d 400, 409 (Mass. 1982) (felony-murder rule only applies to inherently dangerous felonies).

The question presented is:

> Is it unconstitutional for the courts, as a matter of common law, to withdraw the third element of felony murder from the jury's consideration by labeling it a "question of law," where the judge's determination of that question requires a factual analysis, increases the authorized penalty above that permitted by the jury's verdict alone in violation of the Sixth Amendment, and imposes a conclusive presumption of intent in violation of the Fourteenth Amendment's due process clause?

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

PETITION FOR A WRIT OF CERTIORARI

Melissa Pfeiffer respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts in this case.

OPINION AND ORDER BELOW

The opinion of the Supreme Judicial Court of Massachusetts (SJC) is published at 482 Mass. 110, 121 N.E.3d 1130 (2019), and is attached as Appendix A. Ms. Pfeiffer requested and received an extension of time to file a motion for reconsideration; the motion for reconsideration was filed within the time permitted and is attached as Appendix B. The motion for reconsideration was denied by the SJC, and the docket entry denying the petition is in the certified docket sheet attached as Appendix C.

JURISDICTION

The judgment of the SJC was entered on May 1, 2019. Ms. Pfeiffer requested and received an extension of time to file the petition for rehearing to May 22, 2019. The petition for rehearing was filed on that date, and denied on June 7, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed..."

The Fourteenth Amendment provides, in pertinent part: "No State shall ... deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

I. Factual Background

Melissa Pfeiffer was sexually abused by both of her biological parents starting when she was two years old. T7:121, 125. She had her first psychiatric hospitalization at age three. T7:121. She was then removed from her home and she entered the foster care system. T7:125.

While in foster care, Ms. Pfeiffer went through a number of placements. T7:127. Unfortunately, her excessively sexualized and self-injurious behaviors intensified during this time. T7:127-128. She was adopted at one point, but by the age of twelve, she was abandoned by her adoptive parents and became a ward of the state. T7:129. Between the ages of twelve and eighteen, Ms. Pfeiffer was bounced around between foster homes, group homes, and hospital programs. T7:129-130.

At eighteen, she was released from foster care and became homeless. T7:130. At this time, Ms. Pfeiffer took up with various transient men who were physically and sexually abusive. T7:131. Although she was in therapy, it was inadequate; Ms. Pfeiffer was unprepared to function independently. T7:130-131.

As a result of her years of trauma, Ms. Pfeiffer suffers from post-traumatic stress disorder (PTSD). T7:146, 154. People who have experienced severe trauma have a tenuous hold on reality. T7:144.

Ms. Pfeiffer has also been diagnosed with borderline intellectual functioning. T7:154. Her IQ is seventy-one, which is two standard deviations below average and is in the third percentile. T7:133. Ninety-seven percent of all adults have a higher

IQ than Ms. Pfeiffer. T7:133. Below seventy is considered intellectually disabled. T7:133-134.

It was the opinion of defense expert Dr. Frank DiCataldo that Ms. Pfeiffer's cognitive deficits and mental disorder impaired her ability to fully appreciate and understand the circumstances of her acts. T7:155. He testified that she was "not able to fully appreciate or think through the consequences of her acts, make links between cause and effect, understand what risks and consequences could flow from her acts." T7:156.

Given her limited capabilities, on December 24, 2010, when Ms. Pfeiffer lit a piece of paper and used that paper to set a bag of her boyfriend's clothes on fire in their apartment, she was unable, in the expert's opinion, to anticipate the consequences of these actions. T5:35; T7:160. She had set his clothes on fire before, but it had never gone that far. T4:99; T5:213.

When the fire got out of control, Ms. Pfeiffer fled the building. T4:193-194. One person died in the resulting fire and three others, including two firefighters, were injured. A jury convicted Ms. Pfeiffer of arson of a dwelling house, Mass. Gen. L. c. 266, § 1; felony-murder in the second degree, Mass. Gen. L. c. 265, § 1; and two counts of injuring a firefighter, Mass. Gen. L. c. 265, § 13D1/2.

Ms. Pfeiffer was sentenced to life in prison with the possibility of parole after fifteen years on the conviction for second degree murder, with concurrent three to five year sentences for the injuring a firefighter convictions. R:22-23. The arson count was dismissed as duplicative. R:23. Only the felony-murder conviction is at issue here.

II. Trial Proceedings

The court held a pre-charge conference to discuss the jury instructions. As to the charge of felony murder, the parties agreed that the jurors should be instructed that they had to find Ms. Pfeiffer guilty of arson (first element) and that the victim died during the commission of the arson (second element). T7:222-223. As to the third element, defense counsel argued that whether arson was an inherently dangerous felony was a jury question and that the jurors should be instructed that they had to find that Ms. Pfeiffer consciously disregarded a risk to human life. T7:223-225; R:173 (defendant's requested jury instructions on conscious disregard). The court disagreed, found that arson is inherently dangerous, and instructed the jurors on the third element as follows:

> Third, the Commonwealth must prove that the underlying felony was inherently dangerous or, alternatively, the defendant acted with a conscious disregard for the risk to human life ... And, finally, the third element, I instruct you that under the law, arson is a crime that is inherently dangerous to human life.

T8:107-108.

III. The Supreme Judicial Court's Opinion

On appeal, as to the issue as to whether the jury was properly instructed, the SJC ruled as follows:

> In *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that the right to due process under the Fifth Amendment to the United States Constitution and the right to notice and a jury trial guaranteed by the due process clause and the Sixth Amendment to the United States Constitution, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a

> reasonable doubt." *Id.* at 476 & 490, 120 S.Ct. 2348. Here, the defendant argues that the use of arson as the predicate felony for the conviction of murder in the second degree had the effect for her of increasing the penalty for arson from its maximum of twenty years in State prison, see G. L. c. 266, § 1, to one of imprisonment in State prison for life, with eligibility for parole after fifteen years, see G. L. c. 265, § 2, and G. L. c. 127, § 133A, based on the determination whether she acted with a conscious disregard the risk to human life. Therefore, she argues that, under *Apprendi*, the jury must determine if she acted with a conscious disregard for the risk to human life.
>
> The argument fails because it is well settled that the question whether a felony is inherently dangerous to human life is one of law. *See Commonwealth v. Wadlington,* 467 Mass. 192, 208, 4 N.E.3d 296 (2014). Moreover, arson has been identified by this court on numerous occasions as inherently dangerous as a matter of law. *See Commonwealth v. Holley*, 478 Mass. 508, 528, 87 N.E.3d 77 (2017). ... Contrast *Commonwealth v. Tevenal*, 401 Mass. 225, 230, 515 N.E.2d 1191 (1987) (only where judge determines that felony is not inherently dangerous does it become factual question whether defendant acted in conscious disregard for risk to human life).

Commonwealth v. Pfeiffer, 121 N.E.3d 1130, 1148-1149 (Mass. 2019).

REASONS FOR GRANTING THE PETITION

This Court has stated multiple times in multiple contexts that a State may not deny defendants their jury trial rights through the use of innovative nomenclature. *See United States v. Haymond,* 139 S.Ct. 2369, 2379 (2019) (jury trial rights denied when increased punishment defined as "sentence modification" at "postjudgment administration proceeding"); *Apprendi v. New Jersey,* 530 U.S. 466, 476 (2000) (jury trial rights denied when increased punishment called "sentencing enhancement"); *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975) (jury trial rights denied by redefining murder to permit judge to determine question of intent). Yet this is exactly what the SJC has done here. By labeling the third element of felony murder a "question of law," the SJC has denied felony-murder defendants their

constitutional rights to a jury trial and to due process of law. *See Apprendi*, 530 U.S. at 490; *Mullaney*, 421 U.S. at 698 (1975); U.S. Const. amend. VI, XIV.

Massachusetts is not the only state that removes this element from the jury's consideration under the guise that it is a legal rather than factual question.[2] *See, e.g., Turner v. State*, 640 S.E.2d 25, 27 (Ga. 2007) (in determining whether felony dangerous per se, the Supreme Court does not considers elements of the felony and circumstances under which the felony was committed); *People v. Schaefer*, 118 Cal. App. 4th 893, 900 (2004) (court looks at elements in abstract to determine if felony is inherently dangerous); *State v. Anderson*, 666 N.W.2d 696, 700 (Minn. 2003) (courts look to elements and totality of circumstances to determine if predicate felony is "special danger"). As such, many states are flouting well-established constitutional mandates by allowing judges in felony-murder cases to assess whether the underlying felony had the requisite intent for felony murder, and if so, taking the issue of intent away from the jury and permitting an enhanced sentence based on that judicial fact-finding. *See Apprendi, supra; Mullaney, supra.* Because the SJC's approach is not aberrational, and state courts are not following *Apprendi* in this area, a ruling on this issue is needed.

---

[2] After this case went to trial, the Supreme Judicial Court prospectively abolished the concept of constructive malice, thereby "entirely eliminat[ing] the concept of 'felony-murder in the second degree.'" *Commonwealth v. Brown*, 81 N.E.3d at 1196 & n.4.

THIS COURT SHOULD GRANT CERTIORARI TO MAKE CLEAR THAT IT IS UNCONSTITUTIONAL FOR COURTS TO WITHDRAW AN ELEMENT FROM THE JURY'S CONSIDERATION BY LABELING IT A "QUESTION OF LAW," WHERE THE ELEMENT REQUIRES THE JUDGE TO CONDUCT A FACTUAL ANALYSIS, INCREASES THE AUTHORIZED PENALTY ABOVE THAT PERMITTED BY THE JURY'S VERDICT ALONE IN VIOLATION OF THE SIXTH AMENDMENT, AND IMPOSES A CONCLUSIVE PRESUMPTION OF INTENT IN VIOLATION OF THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE.

A. Whether a felony is inherently dangerous, and demonstrates a conscious disregard for the risk to human life is a question of fact not a question of law.

Felony-murder liability is a common-law creation and the judiciary is responsible for the content of that common law. *See Commonwealth v. Brown*, 81 N.E.3d at 1199. As such, there is no statutorily-defined list of felony murder predicates in Massachusetts, as in some jurisdictions.[3] Instead, whether a particular felony may be the basis for a felony-murder conviction is determined by a judge who decides, on a case-by-case basis and with reference to specific facts, whether the felony is inherently dangerous as a matter of law. *Claudio*, 634 N.E.2d at 906.

There is also no comprehensive judicially-defined list of inherently dangerous felonies. *Pfeiffer*, 121 N.E.3d at 1148 n.21. Instead, judges decide on a case-by-case basis whether a particular felony is inherently dangerous by looking at whether a conscious disregard for the risk to human life is implicit in the intent required to prove the felony. *See Scott*, 701 N.E.2d. at 632. Massachusetts courts have recognized that this decision, whether a felony is inherently dangerous or reflects a

---

[3] *See* 2 W.R. LaFave , Substantive Criminal Law § 14.5(b), at 611 n.25 (3d ed. 2018) for a listing of states with statutorily defined list of predicate felonies.

conscious disregard, is a largely fact-dependent inquiry resting "upon a case-by-case analysis of the nucleus of facts in which that felony is embedded." *Commonwealth v. Garner*, 795 N.E.2d 1202, 1209-1210 (Mass. App. Ct. 2003), citing *Claudio*, 634 N.E.2d at 906. A felony may be inherently dangerous or reflect a conscious disregard in one factual context, but not in a different factual context. *Id.* Indeed, the SJC "has never automatically applied the felony-murder rule without viewing the facts of the case." *Matchett*, 436 N.E.2d at 408.

Only if the judge does not find that the felony is inherently dangerous does the jury get to weigh in on the third element. *See Tevenal*, 515 N.E.2d at 1194. At that point, the jury conducts a comparable factual analysis and determines whether the felony was committed with a conscious disregard for the risk to human life. *Id.* Therefore, as a practical matter, whether the third element is resolved by the jury or resolved by the judge, it essentially requires a determination of fact.

The common law/statutory distinction mentioned above is important because "common-law judges d[o] not act as legislators. ... Instead, ... common-law judges [a]re tasked with identifying and applying objective principles of law—discerned from natural reason, custom, and other external sources—to particular cases." *Gamble v. United States*, 139 S. Ct. 1960, 1983 (2019) (Thomas, J., concurring). In other words, judges are determining whether a felony is inherently dangerous by applying the law to the facts of a particular case based on common sense and reason.

But this is the jury's job under the Sixth Amendment. To start, intent is a question of fact that must be found by a jury. *See Morissette v. United States*, 342 U.S. 246, 274 (1952). Moreover, applying the law to the facts of a particular case based on common sense and the determination of community and reasonable person standards is the jury's core function. *See United States v. Gaudin*, 515 U.S. 506, 514 (1995) (jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts); *Hana Financial, Inc. v. Hana Bank*, 135 S.Ct. 907, 911 (2015) (when relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer); *Williams v. Florida*, 399 U.S. 78, 100 (1970) (essential feature of jury lies in the group's commonsense judgment). In fact, many other states already recognize this and put the question of inherent dangerousness to the jury in every case.[4]

B. Permitting the judge to decide if a felony is inherently dangerous violates *Apprendi* and the Sixth Amendment.

It is not just better practice for states to submit the question of inherent dangerousness to the jury, it is constitutionally required. It is axiomatic that any fact, other than a prior conviction, that increases the maximum or mandatory minimum penalty must be submitted to a jury and proven beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 476; *Alleyne v. United States*, 570 U.S. 99, 102 (2013). "If a State makes an increase in a defendant's authorized punishment

---

[4] *See, e.g., State v. Patino*, 188 A.3d 646, 658 (R.I. 2018); *Ramirez v. State*, 235 P.3d 619, 622 n.2 (Nev. 2010); *Ex Parte Mitchell*, 936 So.2d 1094, 1099 (Ala. Crim. App. 2006); *State v. Mora*, 950 P.2d 789, 797 (N.M. 1997).

contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 602 (2002).

Notwithstanding the SJC's labelling of the third element of felony murder as a question of law, whether a felony is inherently dangerous is a question of fact that increases the defendant's authorized punishment. If it is unconstitutional for a legislature to "remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed," *Apprendi*, 530 U.S. at 490, quoting *Jones v. United States*, 526 U.S. 227, 252-253 (1999), it is also unconstitutional for the judiciary to do so.

Whether the felony was committed with a conscious disregard for the risk to human life is a critical element of felony murder. However, as stated above, the only elements that the jurors found beyond a reasonable doubt were 1) Ms. Pfeiffer committed arson; and 2) a death occurred during the commission of the arson. The maximum penalty that could have been imposed upon Ms. Pfeiffer based on the facts reflected in the jury's verdict alone was twenty years. *See* Mass. Gen. L. c. 266, § 1. Nevertheless, Ms. Pfeiffer received a life sentence based on a judge's factual finding that arson is inherently dangerous. This violated the jury trial guarantees of the Sixth Amendment. *See Apprendi*, 530 U.S. at 476, citing *Jones,* 526 U.S. at 243 n.6.

Moreover, by instructing the jurors that the third element was met as a matter of law, the court "directly foreclosed independent jury consideration" of the

facts necessary to prove the third element beyond a reasonable doubt. *Carella v. California*, 491 U.S. 263, 266 (1989). Instead, it substituted the opinion of the judge for that of the jury. Not only did this judicial determination of inherent dangerousness deprive Ms. Pfeiffer of her Sixth Amendment right to a jury trial, it also deprived her of her due process rights under the Fourteenth Amendment. Convictions based upon proof less than beyond a reasonable doubt are unconstitutional. *See id.* at 265 (jury instruction relieving prosecution of burden of proof beyond a reasonable doubt denial of due process); U.S. Const. amend. XIV.

C. The court's determination that a felony is inherently dangerous is a conclusive presumption of intent in violation of the Fourteenth Amendment's due process clause.

Although the intent for homicide is judicially defined as malice aforethought, *see Commonwealth v. Boyajian*, 181 N.E.2d 577, 580 (Mass. 1962), felony-murder is an "unusual" species of homicide, because the Commonwealth need not prove malice. *Commonwealth v. Tejada*, 41 N.E.3d 721, 728 (Mass. 2015). Instead, malice is conclusively presumed (or transferred) from the intent to commit the underlying felony. *Brown*, 81 N.E.3d at 1194.

Significantly, malice is not conclusively presumed from the intent to commit all felonies, or even just statutorily-defined felonies; it is presumed only from the commission of felonies that are judicially determined to be inherently dangerous. *See Matchett*, 436 N.E.2d at 409-410. If a felony is not found inherently dangerous by a judge, the Commonwealth must prove, and the jury must find, beyond a reasonable doubt, that the defendant committed the felony with a conscious

disregard for the risk to human life. *See Scott*, 701 N.E.2d. at 632 (since unarmed robbery not inherently dangerous, jury must find crime committed with conscious disregard for human life). In other words, in some cases, the Commonwealth must prove malice independently of the transferred intent, but in other cases, the Commonwealth need not prove malice because a judge found that malice was presumed from the commission of the offense.

This is an improper delegation of fact-finding authority to the judge on the issue of intent. In *Mullaney*, this Court held that states cannot define the elements of murder so as to take the question of intent away from the jury and place it with the judge. *Id.* at 698. Yet, by granting the judge the authority to determine whether an offense is inherently dangerous, Massachusetts defined the elements of second-degree felony murder to permit the judge to determine the question of intent. This is a conclusive presumption of intent that violates due process. *See Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (conclusive presumptions conflict with presumption of innocence); U.S. Const. amend. XIV.

D. Ms. Pfeiffer presented substantial evidence that she did not consciously disregard a known risk and was, therefore, prejudiced by the court's removal of the third element from the jury's consideration.

Ms. Pfeiffer was prejudiced by the court's refusal to let the jury consider the third element. Assuming Ms. Pfeiffer was guilty of arson, her only defense to the felony-murder conviction was that she did not consciously disregard the risk to human life. And she offered substantial evidence on this issue.

Ms. Pfeiffer presented extensive evidence of her significant mental impairments which were relevant to whether she, personally, consciously disregarded a known risk even if, in these circumstances, one could presume a conscious disregard by a regular person. Ms. Pfeiffer has only borderline intellectual functioning and suffers from PTSD as a result of the horrible trauma she has endured throughout her life. T7:154. Her cognitive impairment and mental disorder combine to deprive her of the facilities needed to make links between cause and effect and to understand what risks or consequences flow from her acts. T7:155-156. Dr. DiCataldo testified that when Ms. Pfeiffer ignited the clothing, she did not fully appreciate what could reasonably follow. T7:160. If she did not or could not know the risks of her actions, she could not disregard them.

In sum, whether an issue is a question of law or a question of fact may not always be clear-cut. *See Miller v. Fenton*, 474 U.S. 104, 113 (1985) (methodology to distinguish questions of law from questions of fact has been elusive). Oftentimes, issues are defined as either factual or legal based on the determination that "one judicial actor is better positioned than another to decide the issue in question." *Id.* at 114. But where the question posed is one of intent and the answer increases the penalty the defendant is facing, the jury is not just the better choice; it is the only choice. *See Apprendi*, 530 U.S. at 490; *Mullaney*, 421 U.S. at 698; U.S. Const. amend. VI, XIV. Certiorari is warranted.

CONCLUSION

For the foregoing reasons, this Court should grant this petition.

Respectfully submitted,

Rebecca Jacobstein
- *Counsel of Record for Petitioner*
Committee for Public Counsel Services
44 Bromfield Street
Boston, MA 02108
(617) 910-5726
rjacobstein@publiccounsel.net