No. _____

IN THE
Supreme Court of the United States

JAMES ANTHONY MARTIN,

Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent

Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

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Questions Presented for Review

1. Whether the Massachusetts Supreme Judicial Court misinterpreted federal law in not applying a new rule narrowing criminal liability to cases on direct appeal, and thus decided an important federal question of due process in a way that conflicts with the decisions of this Court?

2. Whether the Massachusetts Supreme Judicial Court, in not applying a new rule narrowing criminal liability to cases on direct appeal, has decided an important federal question of due process in a way that conflicts with another state supreme court and with a United States court of appeals?

List of Parties

The parties before the Court are James Anthony Martin and the Commonwealth of Massachusetts.

The parties before the Massachusetts Supreme Judicial Court were James Anthony Martin and the Commonwealth of Massachusetts.

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CONSTITUTIONAL PROVISIONS AND AUTHORITIES

Petition for Writ of Certiorari

Petitioner James Anthony Martin ("Mr. Martin") respectfully petitions for a writ of certiorari to the Massachusetts Supreme Judicial Court in this case.

Citations to the Opinions Below

The opinion of the Massachusetts Supreme Judicial Court (App. 1a-11a) is reported as *Commonwealth v. James Anthony Martin*, 484 Mass. 634, 144 N.E.3d 254 (2020).

Statement of Jurisdiction

The Massachusetts Supreme Judicial Court issued its opinion in this case on May 5, 2020. (App. 1a). Neither party petitioned that court for a rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Relevant Constitutional and Statutory Provisions

United States Constitution
Fourteenth Amendment

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Introduction

In *Commonwealth v. Brown*, 477 Mass. 805, 81 N.E.3d 1173 (2017) cert. denied, 139 S. Ct. 54 (2018), decided after the trial in this matter but during the pendency of Mr. Martin's direct appeal, the Massachusetts Supreme Judicial Court narrowed the scope of felony-murder liability to require proof that a defendant acted with one of the three prongs of malice. *Id.* at 807, 825, 81 N.E.3d at 1178-1179, 1191. Constructive malice, referencing the intent to commit the underlying felony, no longer supports a felony-murder conviction in Massachusetts for cases tried after the date of that opinion. *Id.* at 807-808, 825, 81 N.E.3d at 1178-1179, 1191 (Gants, J. concurring). However, the Massachusetts Supreme Judicial Court refused to apply the new rule in *Brown* to Mr. Martin's pending appeal from a conviction of constructive malice felony-murder. See *Commonwealth v. Martin*, 484 Mass. at 644, 144 N.E.3d at 264. (App. 8a-9a).

This Court should grant this petition because:

(1) The Massachusetts Supreme Judicial Court, in not applying a new rule narrowing criminal liability to cases on direct appeal, has decided an important federal question of due process in a way that conflicts with the decisions of this Court in *Griffith v. Kentucky*, 479 U.S. 314 (1987), *Fiore v. White*, 531 U.S. 225 (2001) and *Bunkley v. Florida*, 538 U.S. 835 (2003); and

(2) The Massachusetts Supreme Judicial Court, in not applying a new rule narrowing criminal liability to cases on direct appeal, has decided an important federal question of due process in a way that conflicts with another state supreme court and United States court of appeals. See *Moore v. Helling*, 763 F.3d 1011, 1021 (9th Cir. 2014)("*Bunkley* might have demonstrated that the logical next step from *Griffith* and *Fiore II* was to hold that changes in state law apply to cases pending on direct appeal when the law is changed"); *Nika v. State*, 198 P.3d 839, 850 (Nev. 2008) cert. den. 558 U.S. 955 (2009); see also *Riley v. McDaniel*, 786 F.3d 719, 723, n.7 (9th Cir. 2015)(noting that Nevada Supreme Court applies *Bunkley v. Florida* to give defendants the benefit of changes in state law narrowing the scope of a criminal statute that occur prior to their convictions becoming final).

Concise Statement of the Case

Mr. Martin was convicted by a jury on May 10, 2001 of felony-murder with the underlying felony being attempted armed robbery. (App. 4a).

Facts Material to Consideration of Questions Presented

Mr. Martin was indicted for the crime of murder as a result of the shooting death of Edward Paulsen on September 9, 1976. (App. 4a). The

shooting occurred at an apartment in Cambridge, which was occupied by Gordon Kent Brown, who was also charged. (App. 4a).

Edward Paulsen, and his brother Richard had made two previous purchases of drugs from Brown during the summer of 1976. (App. 4a). Arrangements were made with Brown to make a third drug purchase on September 9, 1976, this time for a kilo of hashish for $1600, which was to take place at Brown's apartment in Cambridge. (App. 4a). The brothers arrived at the apartment between 9:00 and 9:30 p.m. to find Brown there. (App. 4a). Brown told them that the supplier of the drugs had not yet arrived. (App. 4a). The brothers decided to leave and return at a later time. (App. 4a). As they left, the brothers passed a couple, a black man and a white woman, on the stairs. (T1:217-218)[1]. They returned to the apartment and asked Brown whether or not these were the people they were waiting for. (App. 4a). Brown said they were not, whereupon the brothers again left the apartment. (App. 4a).

Upon returning to the apartment about fifteen minutes later, Brown ushered them into a bedroom and then said that he had to leave to talk to the landlord. (App. 4a). Just after Brown left the apartment Richard testified that a man, that he later identified as the defendant, entered the bedroom with a gun and asked, "Where's the money." (T1:224-225). According to Richard, his brother immediately put his hands up and said,

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[1]The trial transcript will be cited as ("T [volume]:[page]").

"Wait a minute." (T1:225). Richard testified that then the defendant shot the brother from about five feet away. (T1:226). Thereafter, Mr. Martin left the apartment and went to the car, which was driven by his girlfriend, Meredith Weiss. Brown joined them, and they drove to their apartment in Somerville. (T2:56-58). Eventually, she drove Mr. Martin and Brown to the Port Authority Bus Terminal in New York. (App. 5a).

Weiss, Mr. Martin's former girlfriend, testified at trial. (App. 5a). She testified that Mr. Martin told her that he was going to Brown's apartment for a drug deal. (App. 5a). She was aware that Mr. Martin had a gun, although she never saw it. (T2:51, 53). She asked him why he needed a gun, and he responded that he needed it because he didn't know the people. (T2:50). Weiss accompanied Mr. Martin up the stairs to Brown's apartment, and she remembered passing two people on the stairs. (T2:52). Weiss testified that Brown and Mr. Martin went off together for a few moments to talk, and then Mr. Martin asked her to wait in the car. (T2:54). While in the car she heard a loud bang, and within five minutes, Brown came down to the car. (T2:55-56). Mr. Martin entered the car between one and five minutes after Brown did. (T2:56).

Mr. Martin's distant cousin, Douglas Nesbitt, testified that he saw him in Los Angeles several days after the shooting. (T2:224-226). Nesbitt testified that Mr. Martin told him that there was an accident in Cambridge where a drug deal was happening, someone pulled out a gun, a "tussle

ensued" and someone got shot. (T2:227, 235). Mr. Martin told Nesbitt that there were two white guys involved in the drug deal, and he and one of the white guys wrestled over a gun and the older white guy got shot. (App. 5a). Mr. Martin told Nesbitt that the white guy tried to stick them up during a drug deal "gone bad". (App. 5a).

Mr. Martin's defense at trial was this was a drug deal gone bad, not armed robbery and thus not a felony-murder. (App. 6a). In addition, the defense at trial was that there had been a struggle over the gun and the gun went off accidentally. (App. 6a).

Mr. Martin raised the federal question presented here in his briefs to the Massachusetts Supreme Judicial Court, and that court specifically ruled on the federal question in its opinion. See *Commonwealth v. James Anthony Martin*, 484 Mass. 634, 644-646, 144 N.E.3d 254, 263-265 (2020); (App. 8a-9a).

Reasons for Granting the Petition

1. Because this Court's decisions make clear that due process requires that when a new rule narrows the elements of a crime before a defendant's conviction becomes final the new rule must be applied to cases on direct appeal, this Court should correct the Massachusetts Supreme Judicial Court's error in this case.

The Massachusetts Supreme Judicial Court, in not applying a new rule narrowing criminal liability for felony-murder to cases on direct appeal, has decided an important federal question of due process in a way that conflicts with the decisions of this Court in *Griffith v. Kentucky*, 479

U.S. 314 (1987), *Fiore v. White*, 531 U.S. 225 (2001) and *Bunkley v. Florida*, 538 U.S. 835 (2003). This Court should correct the Massachusetts Supreme Judicial Court's erroneous interpretation of this Court's law on this issue. See *Commonwealth v. Martin*, 484 Mass. 634, 644-646, 144 N.E.3d 254, 263-265 (2020). (App. 8a-9a).

In *Commonwealth v. Brown*, 477 Mass. 805, 81 N.E.3d 1173 (2017) cert. denied, 139 S. Ct. 54 (2018), decided after the trial in this matter but during the pendency of Mr. Martin's direct appeal, the Massachusetts Supreme Judicial Court narrowed the scope of felony-murder liability to require proof that a defendant acted with one of the three prongs of malice. *Id.* at 807, 825, 81 N.E.3d at 1178-1179, 1191. Constructive malice, referencing the intent to commit the underlying felony, no longer supports a felony-murder conviction in Massachusetts for cases tried after the date of that opinion. *Id.* at 807-808, 825, 81 N.E.3d at 1178-1179, 1191 (Gants, J. concurring). However, the Massachusetts Supreme Judicial Court refused to apply the new rule in *Brown*, to Mr. Martin's pending appeal from a conviction of constructive malice felony-murder. See *Commonwealth v. Martin*, 484 Mass. at 644, 144 N.E.3d at 264. (App. 8a-9a).

Mr. Martin argued to the Massachusetts Supreme Judicial Court that this Court in *Bunkley v. Florida*, 538 U.S. 835, 840 (2003) and *Fiore v. White*, 531 U.S. 225, 228-229 (2001) required that the law applicable to

Mr. Martin's appeal was the law as it stood at the time his conviction became final, defined as the date upon which his direct appeal was decided not at the time of trial. (App. 8a-9a). See *Bunkley* at 840 ("at the time his conviction became final"); *Fiore* at 228 ("at the date Fiore's conviction became final"). Because Mr. Martin's case was on direct appeal at the time of the *Brown* decision, his conviction was not yet final at that time. In this case, the Massachusetts Supreme Judicial Court cited to this Court's opinion in *Bunkley* as "'the proper question under *Fiore* is not whether the law has changed,' but rather what law required at time of defendant's conviction" but appears to define "at time of defendant's conviction" as **the time of trial** not **when the conviction became final**. (App. 8a). See *Commonwealth v. Martin*, 484 Mass. at 645, 144 N.E.3d at 264. The Massachusetts Supreme Judicial Court misread both *Bunkley* and *Fiore* as applying only when the law had been clarified, and not changed. See *id.* What the Massachusetts Supreme Judicial Court failed to understand, is that under this Court's precedents it makes no difference whether the law was "clarified" or "changed"; the only relevant concern is what the law was at the time the defendant's conviction became final. See *Bunkley* at 840 ("at the time his conviction became final"); *Fiore* at 228 ("at the date Fiore's conviction became final"). Had the Massachusetts Supreme Judicial Court read *Bunkley* and *Fiore* correctly, then Mr. Martin should

have gotten the benefit of the *Brown* decision, and thus a new trial where the Commonwealth would have to prove that he acted with malice.

In abolishing felony-murder as an independent theory of criminal liability, *Brown* did not merely announce a new rule of common law as the Massachusetts Supreme Judicial Court claimed. See *Commonwealth v. Martin*, 484 Mass. at 644-645, 144 N.E.3d at 264. (App. 8a). Rather, in removing a means (i.e., proof of a felony) of proving an essential element (i.e., malice) of murder, *Brown* implicated fundamental constitutional rights. See *Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979)(Due Process requires that each element of a crime be proved beyond a reasonable doubt); *In re Winship*, 397 U.S. 358, 364 (1970) ("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."); United States Constitution, Amend. XIV.

A defendant is deprived of due process if a state supreme court narrows the elements of a crime during the pendency of a defendant's direct appeal, but doesn't apply the change to such defendant. In *Bunkley v. Florida*, this Court held that failing to apply a potentially exonerating change in the law to a conviction which was not final at the time of the change would have the same effect as failing to apply a clarification of the law; it would permit a state to convict a defendant without proving the elements of the crime in violation of the Due Process Clause of the United

States Constitution. See *Bunkley v. Florida*, 538 U.S. at 840-841. For purposes of due process, the relevant consideration "is not just *whether* the law changed" but "*when* the law changed." *Bunkley v. Florida*, 538 U.S. at 841-842 (emphasis in original). Thus, if the law changed to narrow the scope of a criminal statute before a defendant's conviction became final, then due process requires that the change be applied to that defendant. See *id.* at 840-842. In such cases retroactivity is not at issue, instead due process requires that the conviction be set aside if required by the change in the law. See *Bunkley v. Florida*, 538 U.S. at 840 (noting that "'retroactivity is not at issue' if the Florida Supreme Court's interpretation of the [law] is 'a correct statement of the law when [Bunkley's] conviction became final'" quoting *Fiore v. White*, 531 U.S. at 226).

In both *Bunkley* and *Fiore*, this Court considered situations where the definitions of elements of a crime were narrowed by state supreme courts effective prior to the date the defendants' convictions became final, defined as when the direct appeal was concluded. See *Bunkley*, 538 U.S. at 842; *Fiore*, 531 U.S. at 228-229. A decision narrowing the element of malice for first degree felony-murder that isn't applied to defendants whose direct appeals were pending at the time of the decision would permit a state to convict defendants of a crime of which they are not guilty under the law applicable at the time their convictions become final. See *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004)("New elements alter the range of

conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa.").

There can be no dispute that the Massachusetts Supreme Judicial Court in *Brown* "narrowed" the scope of felony-murder liability. *Commonwealth v. Brown*, 477 Mass. at 807, 81 N.E.3d at 1178 ("the scope of felony-murder liability should be prospectively narrowed"). Since the Massachusetts Supreme Judicial Court's interpretation of the malice element for felony-murder narrowed before Mr. Martin's conviction became final, the failure to apply felony-murder law as it existed at the time of his direct appeal to Mr. Martin's appeal violated his federal due process rights because it is possible that the Commonwealth would not be able to convict him of felony-murder under the now-prevailing law. See *Bunkley*, 538 U.S. at 840-841; *Fiore v. White*, 531 U.S. at 228-229. Under these circumstances, this Court should grant this petition to correct the error of the Massachusetts Supreme Judicial Court in misinterpreting *Bunkley* and *Fiore* and thus failing to recognize that due process requires the application of the felony-murder malice requirement announced in *Brown* to Mr. Martin's case on direct appeal.

2. This Court should grant this petition to resolve a situation where the decision of the Massachusetts Supreme Judicial Court in this case is in conflict with another state supreme court and United States Court of Appeals.

The Massachusetts Supreme Judicial Court, in not applying a new rule narrowing criminal liability to cases on direct appeal, has decided an

important federal question of due process in a way that conflicts with another state supreme court and United States court of appeals. The Nevada Supreme Court has held that when the law changes to narrow the scope of a criminal statute before a defendant's conviction becomes final, due process – independent of principles of retroactivity – requires that the change be applied to that defendant. See *Nika v. State*, 198 P.3d 839, 850 (Nev. 2008) cert. den. 558 U.S. 955 (2009); see also *Riley v. McDaniel*, 786 F.3d 719, 723, n.7 (9th Cir. 2015)(noting that Nevada Supreme Court applies *Bunkley v. Florida* to give defendants the benefit of changes in state law narrowing the scope of a criminal statute that occur prior to their convictions becoming final).

The decision of the Massachusetts Supreme Judicial Court is also in conflict with the Ninth Circuit. The Ninth Circuit has indicated that combination of this Court's holdings in *Griffith v. Kentucky*, *Fiore v. White* and *Bunkley v. Florida* would lead to the reasonable interpretation of this Court's jurisprudence that some changes in state law must be applied to convictions that are pending on appeal when the change is announced. See *Moore v. Helling*, 763 F.3d 1011, 1021 (9th Cir. 2014)("*Bunkley* might have demonstrated that the logical next step from *Griffith* and *Fiore II* was to hold that changes in state law apply to cases pending on direct appeal when the law is changed"); see also *Babb v. Lozowsky*, 719 F.3d 1019, 1032 (9th Cir. 2013), cert. denied sub nom. *Babb v. Gentry*, 134 S. Ct. 526 (2013),

overruled on other grounds by *Moore v. Helling*, 763 F.3d 1011 (9th Cir. 2014). Other federal courts have interpreted *Griffith*, in light of *Bunkley*, the same way. See *Fernandez v. Smith*, 558 F.Supp.2d 480, 501 (S.D.N.Y. 2008)(holding although the reasoning in *Griffith* "was expressed in the context of constitutional rules, it applies with equal force" to a state law criminal law change).

In addition, a circuit split exists on the even more fundamental question of whether *Griffth v. Kentucky* requires courts to retroactively apply **all** new federal rules of criminal procedure, or just constitutionally based rules, to cases pending on direct review. See *Griffith v. Kentucky*, 479 U.S. at 322-323. The language in *Griffith* encompasses all rules, not just constitutional rules:

> We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final". *Id.* at 328.

This Court extended its retroactivity holding to civil cases using expansive language about courts applying all new rules of "federal law" on direct review. See *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 90, 97 (1993). But this Court has not directly answered the question of whether *Griffith* retroactivity principles apply to all new federal rules, or just to federal constitutional rules.

The First Circuit has consistently interpreted *Griffith* to mandate retroactivity of all new federal rules, not just new federal constitutional

rules, to defendants on direct appeal. See *United States. v. Melvin*, 27 F.3d 703, 706 n.4 (1st Cir. 1993)("Although *Griffith* involved a constitutional rule of procedure, a criminal defendant whose case is still pending on direct appeal is also entitled to claim the protection of important statutory rights and procedural rules, when the notion of trial accuracy is at issue."); see also *United States v. Huete-Sandoval*, 668 F.3d 1, 5 n.7 (1st Cir. 2011)(applying change to interpretation of the Speedy Trial Act retroactively under *Griffith*); *United States v. Lopez-Pena*, 912 F.2d 1542, 1545 (1st Cir. 1989)("We cannot think, however, that criminal defendants whose cases are still pending on direct appeal should be any less entitled to claim the protection of important substantive statutes than of rights found in the Constitution.").

Two other circuits have held the opposite, resulting in a circuit split on this point that should be resolved by this Court. See *Diggs v. Owens*, 833 F.2d 439, 442 (3rd Cir. 1987) (habeas case confining *Griffith* to constitutionally grounded rules of criminal procedure); *Mason v. Duckworth*, 74 F.3d 815, 818-819 (7th Cir. 1996) (habeas case holding that *Griffith* only applies to new rules of federal constitutional magnitude). This Court should grant this petition to resolve these conflicts.

Conclusion

For the reasons set forth above, this Court should grant this petition for writ of certiorari.

Respectfully submitted,

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