No. 20-6050

IN THE
Supreme Court of the United States

JAMES ANTHONY MARTIN,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Everyone agrees that the Massachusetts Supreme Judicial Court ("SJC") fundamentally changed the elements of Mr. Martin's crime of conviction while his case was on direct review. *See* BIO 2-3. It abandoned the felony-murder presumption of intent to kill as unjust and unjustified.

In the federal system and in most states, any reinterpretation of the elements of a crime would apply to a defendant on direct appeal, like Mr. Martin. *See* pp. 5-8, *infra*. Due process does not permit such a defendant to stand convicted without proof of every element of the charged crime as correctly understood.

The SJC, however, does not consider itself bound by that constraint. Instead, it unabashedly holds itself out as "much like the Legislature" in its ability to decide whether to apply its decisions prospectively. Pet. App. 8a; *see* BIO 5. The SJC asserts that power whether it is "announcing a new common-law rule, a new interpretation of a State statute, or a new rule in the exercise of [its] superintendence power"; in all these circumstances, it declares itself "free to determine whether [its decisions] should be applied only prospectively." *Commonwealth v. Dagley*, 816 N.E.2d 527, 533 n.10 (Mass. 2004), *cited at* Pet. App. 8a-9a.

As then-Judge Gorsuch has noted, "[a]t common law there was no authority for the proposition that judicial decisions made law only for the future." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1170 (10th Cir. 2015) (citation omitted). "The true traditional view

is that prospective decisionmaking is quite incompatible with the judicial power, and that courts have no authority to engage in the practice." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 106 (Scalia, J., concurring) (emphasis omitted).

This Court should grant certiorari to confirm that, as other jurisdictions agree, due process requires evenhanded treatment of all defendants who were convicted of the same crime and whose convictions are not yet final. Massachusetts would refuse to apply the old felony-murder theory at trials held today. It cannot treat Mr. Martin differently.

I. This Court Has Previously Recognized The Critical Importance Of The Question Presented.

In *Fiore v. White*, 531 U.S. 225 (2001), this Court granted certiorari to resolve a form of the question presented here. *See* Pet. 9-11. Although the Court did not directly resolve that question, its subsequent decisions have heightened the need for a clear answer.

1. After decades of confusion in federal courts regarding the retroactive effect of judicial announcements of new law, this Court provided a clear rule: this Court's decisions—even where they represent a "clear break" from existing law—apply to all cases pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The rule of retroactive application applies even more forcefully to decisions reinterpreting "the scope of the underlying criminal proscription"; such *substantive* decisions can apply retroactively even *after* the end of direct review. *E.g.*, *Welch v. United States*, 136 S. Ct. 1257, 1266-1267

(2016). Thus, this Court has repeatedly granted relief to defendants who "stand[] convicted of an act that," as shown by a subsequent decision, "the law does not make criminal." *Id.* at 1266; *Bousley v. United States*, 523 U.S. 614, 620 (1998) (same).

2. The Commonwealth appears to suggest (at 5-6) that due process does not limit a *state* supreme court from construing the elements of a crime prospectively. The Commonwealth is mistaken.

This Court in *Fiore* initially granted certiorari to address one aspect of that question: "when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." *Fiore*, 531 U.S. at 226. In order to make that determination, the Court first asked the state's high court whether its articulation of the elements of Fiore's crime of conviction was the law "at the date [his] conviction became *final*." *Id.* at 228 (emphasis added). The unmistakable premise of the certified question was that Fiore was entitled to the benefit of any change in the law while direct review was still open, but possibly not after. The same was true in *Bunkley v. Florida*, 538 U.S. 835 (2003).[1]

Thus, the Commonwealth is wrong in asserting that "the distinction between the conviction date and finality date had no effect on the result in [*Fiore* and *Bunkley*]." BIO 17. The Commonwealth effectively

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[1] *Bunkley* framed the operative constitutional consideration as determining what the law was in "1989," when Bunkley's "conviction became *final*," 538 U.S. at 840 (emphasis added), and *not* at the earlier dates of his crime or trial, *see id.* at 836, 837, 840-841, 842.

suggests that this Court asked the wrong certified question. That is incorrect.

Both *Fiore* and *Bunkley* recognized that prospective decisionmaking implicates the Due Process Clause, which prohibits states from "convict[ing] a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Fiore*, 531 U.S. at 229; *Bunkley*, 538 U.S. at 840; *accord Jackson v. Virginia*, 443 U.S. 307, 315 (1979). The unresolved question in *Fiore* was whether considerations of repose could cut off that due-process principle at the time of finality. Under settled principles, finality means the time when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith*, 479 U.S. at 321 n.6 (collecting cases). The suggestion that this Court in *Fiore* may have used "finality" to mean some earlier time is simply wrong.

Fiore and *Bunkley* also rebut the Commonwealth's argument that "the federal constitution imposes no barriers on a state court's decision to apply a new state common law rule only prospectively." BIO 13. The Commonwealth relies heavily (at 6-7, 13, 18) on *Great Northern Railway. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), for this proposition. But *Sunburst* was a civil case—it did not address the due process requirement to prove every element of a crime. *See Danforth v. Minnesota*, 552 U.S. 264, 1045 n.23 (2008) (noting civil-criminal distinctions in the retroactivity context).

The Commonwealth's reliance on *Wainwright v. Stone*, 414 U.S. 21 (1973), and *Rogers v. Tennessee*, 532 U.S. 451 (2001), is similarly misplaced. In

Wainwright, the relevant state-court decision (finding the statute of conviction void for vagueness) occurred "after [the defendants'] convictions had become final." 414 U.S. at 23. And in *Rogers*, the state court did what the SJC did not do here: it applied its reinterpretation of state common law *retroactively* during Rogers's direct appeal. That was to defendants' detriment, because it eliminated a defense. But at least defendants on direct appeal were treated the same as defendants not yet tried.

Neither decision held that a criminal conviction can be sustained on direct review without applying the most recent articulation of the elements of the offense. And if they had, this Court would not have reviewed *Fiore* and *Bunkley*.

The Commonwealth is, however, correct about one thing: neither *Fiore* nor *Bunkley* ultimately reached the specific question presented here—whether a change in state law announced by a state's highest court must apply to all criminal cases on direct review. BIO 13-15. That question warrants resolution.

II. There Is A Split On The Question Presented That Warrants This Court's Review.

Because the Court did not squarely address the issue here, state and federal courts have been left to piece together *Griffith*, *Fiore*, and *Bunkley* to create retroactivity rules applicable to changes in state law. The result is a patchwork of different and, at times, conflicting approaches and standards.

1. Many states recognize "the principles of fairness and equal treatment underlying *Griffith*" and

apply the rule that "any decision of [a state's highest court] announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of [the] state in every case pending on direct review or not yet final." *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992).[2] Those courts often recognize that "the integrity of judicial review requires" the application of rule changes "to all similar cases pending on direct review" and that the "selective application of new rules violates the principle of treating similarly situated defendants the same." *Id.*

But the states are far from uniform on this score. A number of states have instead opted for a hodgepodge of variations on this Court's pre-*Griffith* retroactivity rules, often declining to apply all new decisions to cases on direct review.[3]

2. With respect to changes in state *substantive* law, state courts are now in direct conflict. *See* Pet.

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[2] *Accord Ex parte Ward*, 46 So. 3d 898, 902 (Ala. 2010); *Charles v. State*, 326 P.3d 978, 984 (Alaska 2014); *Taylor v. State*, 422 S.E.2d 430, 432-433 (Ga. 1992); *Pirnat v. State*, 600 N.E.2d 1342, 1342 (Ind. 1992); *State v. Ruiz*, 955 So. 2d 81, 85 (La. 2007); *State v. Tierney*, 839 A.2d 38, 43 (N.H. 2003); *Kersey v. Hatch*, 237 P.3d 683, 689 (N.M. 2010); *Pailin v. Vose*, 603 A.2d 738, 741-742 (R.I. 1992); *State v. Burdette*, 832 S.E.2d 575, 583 (S.C. 2019); *State v. Guard*, 371 P.3d 1, 17-19 (Utah 2015); *Herrera v. Commonwealth*, 483 S.E.2d 492, 494 (Va. 1997); *State ex rel. Schmelzer v. Murphy*, 548 N.W.2d 45, 49 (Wis. 1996).

[3] *See, e.g.*, *People v. Carrera*, 777 P.2d 121, 142-143 (Cal. 1989); *State v. Jess*, 184 P.3d 133, 152-155 (Haw. 2008); *State v. Earls*, 70 A.3d 630, 644-645 (N.J. 2013); *Rivers v. State*, 889 P.2d 288, 291-292 (Okla. 1994); *Colbert v. State*, 108 S.W.3d 316, 318-319 (Tex. Crim. App. 2003).

11-13. Several courts have held that the federal Due Process Clause, as construed in *Fiore* and *Bunkley*, requires them to apply such changes retroactively.

Indeed, the Commonwealth concedes that in *Nika v. State*, 198 P.3d 839 (Nev. 2008), the court determined that its "new interpretation" of Nevada's murder law "should have been applied to cases pending on direct appeal under *Bunkley*." BIO 8. While the Commonwealth notes that Nika's conviction had already become final, BIO 8, the court squarely held that "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." 198 P.3d at 850; *see also Clem v. State*, 81 P.3d 521, 529 (Nev. 2003) ("Where a change in decisional law has occurred, the only question under *Fiore* is: when did the change occur, before or after the defendant's conviction became final?").

Similarly, the Washington Supreme Court found "a fundamental due process violation" under facts similar to those presented here. In *In re Hinton*, 100 P.3d 801 (Wash. 2004), the Washington Supreme Court considered the retroactive application of its decision overruling decades of precedent interpreting the state's felony-murder statute to allow a conviction based on the predicate felony of assault. Citing *Fiore*, the court ultimately concluded that it would violate due process to refuse retroactive application—even on collateral review. *Id.* at 804.

Other courts have reached the same conclusion. For example, in *Fernandez v. Smith*, the New York Court of Appeals had changed the law of depraved indifference during the pendency of Fernandez's di-

rect appeal, overruling a prior decision. 558 F. Supp. 2d 480, 483 (S.D.N.Y. 2008). On habeas review, the court explained that "[u]nder *Bunkley* (as well as *Fiore*), [Fernandez] was entitled to the benefit of the changes." *Id.* at 504-505.

The Commonwealth's primary response is that "this issue [is] far from settled" in other federal district courts in New York. BIO 9 & n.4. But that lack of clarity in the lower courts counsels in favor of additional guidance from this Court, not against it.

III. The Commonwealth Cannot Dodge The Conflict By Characterizing Judicial Decisionmaking As Lawmaking.

The Commonwealth spends the bulk of its opposition trying to side-step this conflict by claiming that the SJC was making new common law, not reinterpreting a statute. *See* BIO 5-11, 13-18. The crux of the Commonwealth's argument is that announcing a new common-law rule during a direct appeal "is analogous to a legislature's amendment of a statute following [the defendant's] conduct, not to a state court's interpretation of a statute that governed at the time of the conduct." BIO 15. The Commonwealth's position is misguided for a number of reasons.

First, the SJC itself does not recognize this distinction in its retroactivity principles. In fact, the SJC has boldly stated that it is "free" to choose prospective-only application "[w]hen announcing a new common-law rule, a new interpretation of a State statute, or a new rule in the exercise of our superintendence power." *Dagley*, 816 N.E.2d at 533 n.10, *cited at* Pet. App. 8a-9a; *see Commonwealth v. Ash-*

ford, 159 N.E.3d 125, 132 (Mass. 2020) ("Where the statutory interpretation at issue is not constitutionally required, however, we retain some discretion to apply the rule only prospectively."). Nor is murder a fully common-law crime in Massachusetts; it has a statutory basis as well. *See Commonwealth v. Brown*, 81 N.E.3d 1173, 1192-1193 (Mass. 2017) (majority concurrence); Mass. Gen. Laws ch. 265, § 1.

Second, the Commonwealth's argument fundamentally mischaracterizes common-law decisionmaking. The SJC may view itself as engaged in lawmaking, Pet. App. 8a, but it is still a court. And "it was an undoubted point of principle, at the time the Due Process Clause was adopted, that courts could not 'change' the law." *Rogers*, 532 U.S. at 477 (Scalia, J., dissenting). "[T]he duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'" *Linkletter v. Walker*, 381 U.S. 618, 622-623 (1965) (quoting 1 Blackstone, Commentaries *69). Even when overruling a prior decision, "the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation." *Rogers*, 532 U.S. at 472 (Scalia, J., dissenting) (quoting 1 Blackstone, Commentaries *70). That is why at common law judges had "no authority" to "ma[k]e law only for the future." *De Niz Robles*, 803 F.3d at 1170 (quoting *Linkletter*, 381 U.S. at 622).

Indeed, in abolishing felony murder as a substitute for intent, the SJC expressly *went back to* the original understanding of the common law. *Brown*, 81 N.E.3d at 1192-1194 (majority concurrence). And it emphasized that the felony-murder rule conflicted with "the most fundamental principle of the criminal

law"—that intent must be proved, not presumed. *Id.* at 1195.

Third, the fact that this case involves a common-law crime should heighten, not diminish, this Court's skepticism. As Justice Scalia repeatedly explained, "the notion of a common-law crime is utterly anathema today, and for good reason." *Sorich v. United States*, 555 U.S. 1204 (2009) (Scalia, J., dissenting from denial of certiorari) (citation omitted). Common-law crimes, like the felony-murder rule here, create the serious concern that the public will not know the law because "judges and prosecutors themselves do not know, or must make it up as they go along[.]" *Id.*

Fourth, even characterizing the SJC's decision as a "change" does not eliminate the conflict. For instance, although *Nika* involved a statute, the Nevada Supreme Court explicitly explained that in *re*interpreting that statute, it had "announced a new rule—it changed the law." 198 P.3d at 849. It nevertheless held that due process required the "new rule" to be applied to cases on direct review, even where the crime or the trial predated the "change in the law." *Id.* at 850. Similarly, in *Fernandez*, the New York law had "changed" as a result of the overruling of prior decisions. 558 F. Supp. 2d at 495. The Commonwealth's purported distinction between clarifications and changes thus does not resolve the dispute.

IV. This Case Presents An Ideal Vehicle.

This case is an ideal vehicle to resolve an important question left unanswered in *Fiore* and *Bunkley*.

1. First, *Fiore* and *Bunkley* both implicated the

stronger finality considerations that arise on *collateral* review. This case avoids that complication, as it presents the simpler question of whether changes in state law must apply on *direct* review. *See* pp. 2-5, *supra*.

Further, this case does not present the pitfalls that prevented the Court from reaching the question initially presented in *Fiore* and *Bunkley*. Everyone agrees that the SJC announced a change in the law, as opposed to a clarification (*Fiore*) or some unclear evolution of the law (*Bunkley*), before Mr. Martin's conviction became final. *See* BIO 4.

2. The Commonwealth nonetheless calls this case a "poor vehicle," claiming that "application of the [new] felony-murder rule would be highly unlikely to change the result in this case." BIO 11. But the Commonwealth ignores the trial court's statement that "we don't have any evidence of an intentional killing" (T3:19), and the SJC's determination that under the "new common law," "*we would have been required to order a new trial in this case*" because the jury was not instructed on the malice element, Pet. App. 9a (emphasis added). Unsurprisingly, the Commonwealth does not even try to argue that the SJC's error "was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967); *Neder v. United States*, 527 U.S. 1, 15 (1999).

In any event, any proper harmless-error argument could be urged on remand, as is this Court's "normal[]" practice. *Hurst v. Florida*, 577 U.S. 92, 102 (2016).

3. This issue recurs frequently, as the SJC regularly acts on its misguided view that it is free to

change elements of crimes prospectively. For example, in several recent instances, the SJC altered "the factors bearing on extreme atrocity or cruelty" in defining the crime of murder. And, in each instance, it declared that it would apply its decision only prospectively. *Commonwealth v. Castillo*, 153 N.E.3d 1210, 1224 (Mass. 2020) (cataloguing these prospective changes).

* * * * *

The SJC's exalted view of its power to change the law prospectively conflicts with the decisions of other courts of last resort and with the principles of due process. This important and recurring issue warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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