No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2021

DANIEL ROSA
Petitioner

-vs-

BRUCE GELB, Superintendent,
Souza Baranowski Correctional Center
Respondent

On Petition for Writ of Certiorari to the
COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A prisoner whose Petition for a Writ of Habeas Corpus was denied, has no absolute right to an appeal, but must obtain a Certificate of Appealability (COA) from a Circuit Court or Judge pursuant to 28 U.S.C. U.S.C. §2253 (c) (2), based on a substantial showing of the denial of a Constitutional right. This restrictive statutory regimen is dependent upon those courts' adherence to the statutory standards and the precedents of this Court, in order to retain the justice in our justice system, and to guarantee the Constitutional promise of equal justice under law. When the reasons for denial of a COA are undisclosed, there is no assurance that the laws established by 28 U.S.C. §2253 (c) (2), and this Court, were followed and that a just and fair decision was reached. That is particularly the case where a petitioner makes a substantial showing of the denial of a Constitutional right in his or her Application for a COA. Those considerations pose the question presented

The question presented is:

Whether a Court of Appeal's decision that failed to provide a reasoned justification for denying a Certificate of Appealability, but rather stated only a conclusion that a district court's denial of a habeas petition was neither debatable nor wrong, violated the standards established by 28 U.S.C. §2253 (c) (2), and the requirements established by this Court for implementing that statute, where a petitioner makes a substantial showing that the retroactive application to his case of an alteration in a state's criminal law that eliminated an element of the crime charged and lowered the prosecution's burden of proof, violated Due Process.

RELATED PROCEEDINGS

Federal

Rosa v. Gelb, Dkt. No. 20–1686, Court of Appeals for the First Circuit, (2021). Petitioner's Application for a Certificate of Appealability.

Rosa v. Gelb, Dkt. No. 3:15–cv–30073–ADB, District Court for the District of Massachusetts, (2020). Petitioner's Petition for a Writ of Habeas Corpus.

Commonwealth of Masssachusetts

Rosa v. Gelb, Dkt. No. SJ–2017–0119, (2017). Supreme Judicial Court of Massachusetts, Single Justice, Petitioner's Petition for Leave to Appeal denial of New Trial Motion.

Commonwealth v. Rosa, Dkt. No. 1179CR00221, (2017). Superior Court, Hampden County Massachusetts, Petitioner's Motion for a New Trial.

Commonwealth v. Rosa, 468 Mass. 231 (2014), Supreme Judicial Court of Massachusetts, 468 Mass. 231, 9 N.E.3d 832 (Mass. 2014). Petitioner's direct appeal of his conviction.

Commonwealth v. Rosa, Dkt. No. 1179CR00221, (2011), Superior Court, Hampden County, Massachusetts. Criminal jury trial verdict (2012)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Daniel Rosa respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit denying Petitioner's Application for a COA is unpublished and is attached as Appendix 1 The opinion of the district court denying the Petition for a Writ of Habeas Corpus is reported at ____ F.Supp. ____ (Mass. 2020), and is attached as Appendix 2. The decision of the district Court allowing Petitioner's motion for a stay and abeyance of its order of December 25, 2015, is unpublished and is attached as Appendix 3. The decision of the district court ordering voluntary dismissal of Count 1 of the habeas petition issued December 24, 2015, is reported at 152 F. Supp.3d 26 (D.Mass. 2015), and is attached as Appendix 4. The opinion of the Single Justice of the Supreme Judicial Court of Massachusetts denying leave to appeal the denial of Petitioner's Motion for a New Trial is unpublished and is attached as Appendix 5. The opinion of the Superior Court denying Petitioner's Motion for a new trial is unpublished and is attached as Appendix 6. The opinion of the Massachusetts Supreme Judicial Court denying Petitioner's direct appeal is reported at 468 Mass. 231, 9 N.E.3d 832 (Mass. 2014), and is attached as Appendix 7.

JURISDICTION

The Court of Appeals for the First Circuit entered its judgment and decision on September 2, 2021. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254, Petitioner having asserted below and asserting in this Petition the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "[n]o person ... shall be ... deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law."

STATUTORY PROVISIONS

Federal

28 U.S.C. §2253 (c)(1) provides in pertinent part: (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from— (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; ...

28 U.S.C. §2253 (c)(2) provides in pertinent part: "A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

State

M.G.L ch. 278, §33E**,** provides in pertinent part, "[i]n a capital case ... [i]f any motion [for a new trial] is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the Supreme Judicial Court on the ground that it presents a new and substantial question which ought to be determined by the full court.

STATEMENT OF THE CASE

This case presents an important and recurring issue as to whether the lower courts will provide a meaningful opportunity for appeals in habeas cases as

required by 28 U.S.C. §2253(c), and the decisional law of this Court. A habeas petitioner has no absolute right to appeal a denial of his habeas petition by a district court; he must rely on a circuit court or judge to grant a Certificate of Appealability (hereinafter COA) in order to appeal. *Id*. The jurisprudence of this Court reveals two facts. One: this Court has clearly established the law to be followed in ruling on a COA; and two; the lower courts often fail to follow that law. *See, e.g., Miller El v. Cockrell*, 537 U.S. 322, 336-337 (2003); *Buck v. Davis*, ___U.S. ___137 S.Ct. 759, 773 (2017).

Such is the case here, where the court of appeals issued its denial in one sentence, stating that "after careful review of Petitioner's submissions and the record below, the district court's disposition of the petition was neither debatable or wrong ..." (App. 1a) Such language is that of a decision on the merits, in violation of the statute and the clearly established law of this Court. *Id*. Even if not a merits decision, the court stated no basis for the decision, thereby preventing any review to determine whether a proper threshold inquiry was conducted to decide whether Petitioner established in his Application for a COA that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck*, 137 S.Ct. at 773. A reprise of that argument, set forth in the Argument section of this Petition, *infra* at 11, makes manifest the conclusion that the district court's decision on Ground I of the habeas petition is not just debatable, but is legally and factually wrong, and contrary to clearly established law of this Court. . Therefore, a COA should have issue.

FACTUAL SUMMARY OF THE CASE

Petitioner **a** Mr. Dixon and Mr. Brunson were arrested for deliberately premeditated murder in the shooting death of David Acevedo, on January 26, 2011. Mr. Rosa was tried separately and was convicted of one count of deliberately premeditated murder and one count of illegal possession of a firearm on July 2, 2012. (App. 51a) Briefly the facts are as follows. Petitioner and the victim David Acevedo met on the corner of Denver and Riverton Streets in Springfield, Massachusetts on the morning of January 26, 2011. It was disputed whether they met earlier in the house of Mr. Caraballo and subsequently met on the corner following a physical dispute earlier outside Caraballo's house, as Caraballo testified, or whether they only met at the corner to conclude a drug deal as Petitioner testified. (App, 52a–53a) Petitioner testified that he had arranged to purchase cocaine for Mr. Dixon from Mr. Acevedo. *Id*. It was undisputed that while they were on the corner, Mr. Dixon and Mr. Brunson walked down Denver Street and shot at them. (App, 52a–53a), (S.A.[1] at 683–685)

Petitioner testified that when the shooting began he and Acevedo ducked down, but then Acevedo got up and ran toward an apartment complex up Riverton Street. (SA 1501–1504) Caraballo, who had remained in his driveway, testified that after the shooting started he saw Acevedo run past his driveway, and that he, Caraballo, "threw" himself down onto the driveway behind a snow bank. (S.A. at 691–692) Police photographs of the scene show snow banks extending down Caraballo's driveway and down Riverton Street to the corner and then up Denver Street. (Tr. Exs. 9, 12, 15–16) Caraballo testified the snow bank at the corner was so high that, when standing, he could see only Petitioner's hat. (S.A. at 639). Caraballo

[1] S.A. refers to the Supplemental Appendix filed by the Respondent in the habeas proceeding in the district court. It contains the transcript of the trial, among other documents. The record is not yet before this Court.

then testified that, while lying on his stomach in his driveway below the snow bank, he saw Petitioner standing near the corner on Riverton Road, behind a higher snow bank. He testified he saw the Petitioner shoot Mr. Acevedo from a distance of about ten feet (S.A. 639, 691, 858) The diagram Caraballo drew of the scene, (Tr. Ex. 19), and the police photographs, (Tr. Exs. 9, 12, 15–16), confirm that he had no line of sight to the corner or even down from it, while lying on his driveway. The victim fell in the parking lot of the apartment complex well over ten feet from the corner. (S.A. 602–603, and Tr. Ex. 9). The medical examiner testified that he would have collapsed instantaneously upon being hit. (S.A 1160) Caraballo also testified that he had to get up to see where the victim fell. (S.A. 695) His account of the incident was impeached with his statement to the police, in which he did not say he saw Petitioner with a gun. (S.A. 697–698)

TRIAL PROCEEDINGS

In Petitioner's trial, the Commonwealth proceeded on alternative theories of principal or joint–venturer deliberately premeditated murder. (App. 53a) Petitioner moved for a Required Finding of Not Guilty on the joint venture theory at the close of the Commonwealth's case asserting there was insufficient evidence he knew a co–venturer was armed. (App. 57a–58a, App. 61a, nt. 23) That motion was denied. *Id*. The controlling law in Massachusetts at the time of the incident and trial required, in cases charging joint venture deliberately premeditated murder, that the Commonwealth prove beyond a reasonable doubt the defendant knew a co–venturer was armed, and that the jury must be so instructed. *Commonwealth v. Green*, 652 N.E.2d 572, 578 (Mass. 1995); *Commonwealth v. Zanetti*, 910 N.E.2d 869, 875 (Mass. 2009); *Commonwealth v. Phillips*, 897 N.E.2d 31, 44 (Mass. 2008); *Commonwealth v. Norris*, 967 N.E.2d 113, 120 nt. 6, (Mass. 2012); *see*, *Commonwealth v. Bolling*, 969 N.E.2d 640, 649–650 (Mass. 2012).

The trial judge did not instruct the jury according to the then controlling law

set out above, (S.A. 1755–1758), and trial counsel objected. (S.A. 1777) During deliberations the jury asked to be re-instructed on joint venture liability, (S.A. 1806), and the court gave the same instruction, again omitting the knowledge requirement. (S.A. 1806–1811) The jury returned a general verdict of guilty on both counts. (App. 58a)

POST–CONVICTION PROCEEDINGS

Direct Appeal

Petitioner appealed to the Massachusetts Supreme Judicial Court (hereinafter SJC), which affirmed. (App. 51a) The court recognized that at the time of the incident and Petitioner's trial, Massachusetts law required the Commonwealth to prove the defendant knew a co–venturer was armed in order to convict of joint-venture deliberately premeditated murder. (App. 57a) However, the court affirmed, based on *Commonwealth v. Britt*, 987 N.E.3d 558 (Mass. 2013), decided after Petitioner's 2012, trial. *Britt* overruled the case law requiring such knowledge. *Id*. at 567. Although the SJC had explicitly made *Britt* prospective only, *id*., it applied *Britt* to Petitioner's case without discussion of the issue of retroactivity. (App 57a–58a)

Petition for Writ of Habeas Corpus

Petitioner filed for a Writ of *Habeas Corpus* in federal court for the District of Massachusetts, pursuant to 28 U.S.C. §2254. (App. 3a) He raised three claims. (App. 3a) Only Count One of his Petition is the subject of the instant Petition for Certiorari. In Count I Petitioner asserted that the SJC's retroactive application of a substantive change in the criminal law effected in *Britt*, 987 N.E. 2d 568, 567–569 (Mass. 2013), to his case in resolving his direct appeal, violated the Due Process Clause. The district court ruled that claim to be unexhausted and ordered dismissal. (App. 29a) Petitioner argued, to no avail, that since the Due Process claim arose only in the SJC's decision, it could not have been raised earlier and

presented to the SJC for resolution. Furthermore, Petitioner could not have presented that claim for exhaustion purposes after the decision. There is no procedural avenue for doing so, since raising a claim in a petition for rehearing "is not fair presentation for purposes of exhaustion." *Gunter v. Malony*, 291 F.3d 74, 81 (1st Cir. 2002); citing *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

Motion for a New Trial

Following the district court's order of dismissal, Petitioner moved for a stay and abeyance to allow him to return to state court to exhaust that issue, which was allowed. (App. 25a–29a) Petitioner then filed a motion for a new trial in the superior court. That court agreed that the jury in Petitioner's trial should have been instructed per the controlling law at that time, that the Commonwealth had to prove the defendant knew a co–venturer was armed, in order to convict of joint-venture deliberately premeditated murder. (App. 48a) However, the court ruled the retroactive application of *Britt* did not violate due process, despite its lowering the prosecution's burden of proof, since *Britt* did not change the definition of the crime. (App. 44a) That holding is directly contrary to clearly established law of this Court. *Marks v. United States*, 430 U.S. 188, 189 (1977). *Marks* held that the lowering of the burden of proof establishes a Due Process violation. *Id.;* see discussion *infra* at pgs 17–20. The superior court, having held there was no constitutional violation, then ruled there was no risk of a miscarriage of justice. (App. 48a–49a)

Single Justice Proceedings

Petitioner sought leave to appeal the denial of his motion as required by M.G.L ch. 278, §33E. Leave to appeal denial of motion for a new trial in a first degree murder case is granted only where a Single Justice of the SJC allows it "on the grounds that it presents a new and substantial question which ought to be determined by the full court." (App. 34a) The Single Justice denied the petition, holding that Petitioner had raised the issue of *Britt's* application to his case in his

reply brief in his direct appeal "and therefore, the argument was not new...." *Id*. The Single Justice did not hold the issue to be procedurally barred, as the district court later asserted, (App. 10a–11a), but held the opposite: that it had been raised in his direct appeal. (App. 34a) Previously having raised an issue in a direct appeal is not a procedural bar; waiver is a procedural bar, as explained in *Hart v. Superintendent*, 36 F.Supp.3d 186 (D. Mass. 2014), construing M.G.L ch. 278, §33E. See a fuller discussion *infra*, at pgs. 11–13.

District Court

Petitioner returned to the district court, which denied the Petition and refused to grant a COA. (App. 24a) Petitioner filed an Application for a COA with the Court of Appeals for the First Circuit on Grounds I and III of his *habeas* petition, which was denied. (App. 1a) The denial of that COA for Ground 1 only, is the subject of this Petition.

REASONS FOR GRANTING THE WRIT

RESOLUTION OF THE QUESTION PRESENTED IS NECESSARY TO INSURE THAT THE COURTS OF APPEAL ARE PROPERLY APPLYING THE REQUIREMENTS OF 28 U.S.C. §2253 AND THIS COURT'S ESTABLISHED LAW, THEREBY PROVIDING HABEAS PETITIONERS A MEANINGFUL OPPORTUNITY TO HAVE THE DENIAL OF THEIR PETITIONS BY DISTRICT COURTS REVIEWED ON APPEAL

The issue of whether a court of appeals, in denying a COA, failed to adhere to the requirements of 28 U.S.C. 2253(c) and the explication of that statute by this Court, have occupied this Court's attention on a number of occasions, highlighting the fact that the courts of appeals are not, in many cases, following those requirements. *See, e.g.*, *Buck v. Davis*, -- U.S. -- 137 S.Ct. 759 (2017); *Miller–El v. Cockrell*, 537 U.S. 322, 338 (2003); *Slack v. McDaniel*, 529 U.S. 473 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

The standards for determining whether a COA should be granted have been established for decades. In *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983), the Court held that for a COA to issue, a Petitioner must make "a substantial showing of the denial of a constitutional right." A petitioner need not demonstrate that he will prevail on the merits, only that the issues "are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.' *Id*. at 893 n. 4. Congress codified that standard in 28 U.S.C. §2253(c), and it has been repeatedly articulated and applied by this Court. *E.g., Slack*, 529 U.S. at 483; *Miller–El*, 537 U.S. at 326; *Buck*, 137 S.Ct. at 773–774.

In *Miller–El*, the Court held the correct procedure to be a "threshold" inquiry" in which a court of appeals should review "the district court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason." 537 U.S. at 336. The statute "forbids" giving full consideration to the "factual or legal bases adduced in support of the claims." *Id*. "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id*., at 342. If a court of appeals first decides the merits of an appeal, and then justifies its denial of a COA based on that adjudication, "it is in essence deciding an appeal without jurisdiction." *Id*. at 336–337.

When a district court wrongly denies a *habeas* petition, the petitioner is dependent on a court of appeals to grant a COA in accordance with the statute and this Court's decisional law, in order to obtain review of that decision. 28 U.S.C. §2253(c). When a COA is denied without an explanation for the basis of the decision, review of the legal propriety of the decision is prevented, justice may not be done, the intent of the statute may be frustrated and the petitioner is left

without a remedy to correct a wrongful denial of his *habeas* petition.

Where a court of appeals fails to state the basis for its decision denying a COA, there is no assurance that it conducted a proper threshold inquiry as required both by this Court and the governing statute, especially given the jurisprudential history cited above. There can be no confidence that the nation's statutory *habeas* procedures are being followed and that the courts are providing a just and fair review of prisoners' claims. That is the situation here, where the Court of Appeals ruled in one sentence that, after review of Petitioner's Application and the record,

> we conclude that the district court's disposition of the petition was neither debatable nor wrong, and that petitioner has therefore failed to make 'a substantial showing of the denial of a constitutional right.'

(App. 1a) The clear import of that language is that the court made a ruling on the merits and then decided to deny the COA.

In addition to its failure to explain its conclusion, the court failed properly to apply the statutory provisions and precedent of this Court, since Petitioner made a substantial showing of the denial of a constitutional right in his Application for a COA, by demonstrating that "jurists of reason could find debatable or wrong the district court's resolution of his constitutional claim that the retroactive application of a substantive change in the criminal law to Petitioner's case violated Due Process, or could conclude that issue is "adequate to deserve encouragement to proceed further." *Barefoot*, 463 U.S. at 893 nt. 4; *Miller–El*, 537 U.S. at 326; *Buck*, 137 S.Ct. at 773. That showing is reprised in the Argument section of this Petition, *infra* at 11.

The issue presented is important to insure the proper functioning of the AEDPA. More broadly, resolution is important to protect the Constitutional rights of all criminal defendants, and to insure fair and just conduct of criminal trials.

Jurists of reason would find the question presented not just debatable, but "adequate to deserve encouragement to proceed further." *Barefoot*, 463 U.S. at 893, nt. 4. Therefore, the retroactivity issue presents an important federal question "worthy of this Court's attention." *See,* Sup.Ct.R. 10(a), (c).

Since there is no way for this Court to review the basis for the First Circuit's ruling, as it was not stated, the Court should grant the Writ and, after conducting a threshold inquiry to insure the integrity of the COA process, to insure that the lower courts adhere both to this Court's established law and the requirements of relevant statutory law, and to insure that just, fair and legally sound decisions are made regarding *habeas* petitioners' applications for a COA, order the Court of Appeals to issue a COA. Petitioner will establish in the Argument below that he met the requirements for a COA.

ARGUMENT

I. JURISTS OF REASON COULD FIND THE DISTRICT COURT'S DECISION, THAT RETROACTIVE APPLICATION OF A SUBSTANTIVE ALTERATION OF THE CRIMINAL LAW TO PETITIONER'S CASE DID NOT VIOLATE DUE PROCESS, TO BE DEBATABLE OR WRONG OR THAT PETITIONER'S CLAIM IS ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER.

A. The District Court's Ruling that Petitioner's claim was held to be procedurally barred by the SJC Single Justice was based on a misstatement, mischaracterization and misunderstanding of the Single Justice's decision

In *Slack v. McDaniel*, 529 U.S. 473, 478 (2000)**,** this Court held that when a district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the

denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

As set out in the Statement of the Case, Petitioner returned to State court to exhaust the claim in Ground 1 of his *habeas* petition. Following the superior court's denial of his Motion for a New Trial, Petitioner sought leave to appeal, from a single justice of the SJC, as required by M.G.L ch. 278, §33E. (App. 34a–35a) Leave will be granted only where the issues raised "present a new and substantial question which ought to be determined by the full court. *Id*. The Single Justice's decision was short and explicit: "[t]he defendant specifically argued the issue of the retroactivity of the holding in *Britt* in his reply brief. Therefore, the defendant's argument is not new under G.L. ch. 278, §33E, and his gatekeeper petition is denied." *Id*.

The district court's restatement of the Single Justice's decision distorts that decision. The district court held,

> [t]he single Justice found that, because Petitioner had challenged the application of Britt in his initial appellate reply brief,... his Due Process claim "could have been addressed" through his initial appeal and was therefore not new despite the fact that Petitioner had not raised it earlier. See, SJ-2017–0119, at 2–3. The claim is now exhausted based on the finding of the single Justice that the claim had been procedurally defaulted.

(App. 11a) To the contrary, the Single Justice made no finding that Petitioner's Due Process claim was "procedurally defaulted." (App. 34a–35a) The Single Justice did not state what "could have been addressed," just what had been addressed. *Id*. The decision was contained in two sentences: (1) Petitioner "specifically argued the issue of the retroactivity of the holding in *Britt* in his reply brief;" (2) "[t]herefore, ... [his] argument is not new under G.L. ch. 278, §33E." *Id*. That decision could not be clearer. As the retroactive application of *Britt* was the basis of Petitioner's Due Process claim in his New Trial Motion, the reasonable inference is that the Single

Justice held that raising the issue of *Britt's* retroactivity in Petitioner's reply brief, presented the entire issue of its retroactive application, including due process, to the SJC; *i.e.* the issue was "exhausted."

The law on this issue was explicated clearly in *Hart v. Superintendent*, 36 F.Supp.3d 186 (D. Mass. 2014), which construed the "gatekeeper" standard for purposes of determining a claim of procedural default in a habeas proceeding. The court relied on *Commonwealth v. Gunter*, 945 N.E.2d 386 (Mass. 2011), and *Commonwealth v. Pisa*, 425 N.E.2d 290, 292–294 (Mass. 1981), on both of which the Single Justice relied in her decision. (App. 34a) *Hart*, *id*. at 197, held:

> [u]nder Massachusetts law, a claim is not "new" within the meaning of §33E "where it has already been addressed, or where it could have been addressed had the defendant properly raised it at trial or on direct review." Commonwealth v. Gunter, 459 Mass. 480, 487, 945 N.E.2d 386 (2011) (quoting Commonwealth v. Pisa, 384 Mass. 362, 365–66, 425 N.E.2d 290 (1981)). In other words, an issue raised in a gatekeeper petition might not be "new" because (1) the petitioner raised it on direct appeal (and therefore the gatekeeper justice would deny the petition because the SJC had already decided the issue) or (2) the petitioner could have raised it on direct appeal, but failed to do so (and therefore the gatekeeper justice would deny the petition because the petitioner had procedurally defaulted). The second circumstance is a procedural default; the first is not.

The district court's ruling that the Single Justice held Petitioner's Due Process claim to be procedurally barred is directly contradicted by what the Single Justice actually did and said, and the law upon which she acted. "Any jurist of reason ... would find it debatable whether the district court was correct in its procedural ruling." *See, Slack*, 529 U.S. at 478. Petitioner will establish the second part of that test, that "the petition states a valid claim of the denial of a constitutional right," *id*., in Point 1B, immediately below.

B. Jurists of reason could find the district court's decision, that retroactive application of a substantive change in the criminal law did not violate due process, was contrary to or an unreasonable application of clearly established Supreme Court law and was debatable or wrong

Massachusetts law for two decades prior to Petitioner's trial required the Commonwealth to prove beyond a reasonable doubt that a defendant charged with joint venture deliberately premeditated murder knew another of his alleged co–venturers was armed. *See, e.g.*, *Commonwealth v. Lydon*, 597 N.E.2d 36, 39 nt. 2 (Mass. 1992); *Commonwealth v. Green*, 652 N.E.2d 572, 578 (Mass. 1995); *Commonwealth v. Phillips*, 897 N.E.2d 31, 44 (Mass. 2008); *Commonwealth v. Zanetti*, 910 N.E.2d 869, 875 (Mass. 2009); *Commonwealth v. Norris*, 462 N.E.2d 113, 120 nt. 6 (Mass. 2012). The Commonwealth proceeded against Petitioner on both principal and joint venture theories. (App. 53a). Between Petitioner's trial and his direct appeal, the SJC decided *Britt*, which it overruled the decisional law requiring such knowledge. 987 N.E. 2d at 568-569. The court held "in cases tried hereafter, juries should not be instructed that the Commonwealth must prove that a joint venturer knew that the principal was armed to return a conviction of murder based on deliberate premeditation." *Id*. The court thereby eliminated what had been an element of the crime, lowering the prosecution's burden of proof.

In Petitioner's case, the SJC acknowledged that at the time of the incident and Petitioner's trial, Massachusetts law required the Commonwealth to prove such knowledge. (App. 57a–58a) The court then stated that in *Britt* it had overruled that law, and in a rather puzzling statement said it declined to overrule *Britt*, and therefore applied that substantive change in the criminal law to Petitioner's case. *Id*. Even the superior court judge, ruling on Petitioner's Motion for a New Trial, was puzzled by the SJC's statement about not overruling *Britt*. The judge wrote, (App. 46a), that Petitioner

> was tried before *Britt* was decided. The *Britt* decision makes clear that at the time of defendant's trial, case law had held that proof of knowledge of a coventurer's possession of a weapon was an element that needed to be proven beyond a reasonable doubt, and that the clarification of the law made in *Britt* was to be applied prospectively. *Britt*, 465 Mass. at 100. Acknowledging the merits of defendant's arguments as to the Commonwealth's burden, and the necessity of an instruction regarding same, could not have constituted an overruling of *Britt*.

A judicial alteration of a common law doctrine of criminal law must not be given retroactive effect where it is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001), citing *Bouie* v. *City of Columbia,* 378 U.S. 347, 354 (1964); *Marks v. United States*, 430 U.S. 188, 189 (1977). The "unexpected" requirement is a test of foreseeability. *Rogers*, 532 U.S. at 459. That determination, however, must be made on the basis of the statute itself and the other pertinent law, not on the subjective expectations of particular defendants. *Bouie*, 378 U.S. at 355, nt. 5. The "indefensible" requirement refers to the consequences of the retroactive application. *Id*. at 353, citing Hall, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960), at 58–59. It is the prejudice prong of the test. *Marks,* 530 U.S. at 188–189.

The law in Massachusetts requiring the Commonwealth to prove beyond a reasonable doubt that a defendant charged with joint venture deliberately premeditated murder knew another of the jointventurers was armed, had been clearly established in Massachusetts for at least two decades before Petitioner's trial, being followed in numerous cases. *See, e.g.*, *Lydon*, 597 N.E.2d at 39 nt. 2; *Green*, 652 N.E.2d at 578 (1995); *Phillips*, 897 N.E.2d at 44; *Zanetti*, 910 N.E.2d at 875; *Norris*, 967 N.E.2d at 120 nt. 6. That principle of law had never been questioned prior to being overruled in *Britt*. Even the superior court judge when ruling on Petitioner's Motion for a New Trial held that principle was the established law in Massachusetts at the time of Petitioner's trial, and that he was entitled to an instruction charging the jury on that principle. (App. 44a–45a, 48a–49a) As

explicatory of state law, the court's decision is binding in a habeas proceeding. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *accord*, *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). The district court did not reference the superior court's decision.

The standards to be applied in determining when the retroactive application of an alteration in the substantive criminal law violated Due Process are clearly established by this Court. The standards are clear. Any retroactive alteration that: (1) punishes conduct that was not criminal at the time a defendant acted, *Bouie*, 378 U.S. at 354–355; *Rogers*, 532 U.S. at 462; (2) expands the scope of a criminal law, decreases the prosecution's burden of proof or otherwise works "to the potential detriment of a defendant in a criminal case," *Marks,* 430 U.S. at 189; violates Due Process. *Id*. Any jurist of reason applying those principles to Petitioner's case would be compelled to conclude that the district court's resolution of this issue, finding no Due Process violation is not just debatable, but clearly wrong.

1. The unexpected requirement for a due process violation

The "unexpected" requirement is one of foreseeability, and is made on the basis of the statute itself and the other pertinent law, not on the subjective expectations of particular defendants. *Bouie*, 378 U.S. at 355, nt. 5. *Rogers,* 532 U.S. at 463–464, explained that test in the context of the Tennessee court's eliminating the "year and a day" rule for murder cases, and applying it retroactively to the defendant's case. The Court held that the elimination of the year and a day rule did not offend Due Process. The reasons were three: (1) medical advances had undermined the usefulness of the rule and rendered it "obsolete." (2) "a vast number of jurisdictions had abolished the rule...."; and (3) in the Court's terminology "most importantly ... the rule had never once served as a ground of decision in any prosecution for murder in the State." *Id.* Based on those factors, the Court, at 532 U.S. at 467, found no Due Process violation, stating:

> the court's decision was a routine exercise of common law decision making in which the court brought the law into conformity with reason and common sense. It did so by laying to rest an archaic and outdated rule that had never been relied upon as a ground of decision in any reported Tennessee case.

The district court in Petitioner's case based its finding of no Due Process violation on the first sentence of *Roger's* holding. It stated that the SJC's decision in *Britt* was "a routine exercise of common law decision making in which the court brought the law into conformity with reason and common sense." (App. 16a) By eliminating the second sentence, the district court only stated *Roger's* conclusion and omitted its justification. None of the factors listed in *Rogers* are present in Petitioner's case, and none were cited by the court in *Britt*. The knowledge requirement that another co–venturer was armed was not based upon nor rendered obsolete by scientific advances. No jurisdictions were cited as having abolished the rule. "[M]ost importantly," according to *Rogers,* 532 U.S. at 463–464, the knowledge requirement had a long and unbroken jurisprudential history, being applied in numerous cases and not once being questioned. *See, e.g.*, *Lydon*, 597 N.E.2d at 39 nt. 2; *Green*, 652 N.E.2d at 578; *Phillips*, 897 N.E.2d at 44; *Zanetti*, 910 N.E.2d at 875*; Norris*, 967 N.E.2d at 120 nt. 6. In fact, the knowledge requirement was acknowledged in *Norris*, just weeks before Petitioner's trial. *Id*.

The SJC in *Britt* mentioned none of the *Roger's* factors, as none were present. The justification for eliminating the knowledge requirement was that the court simply disagreed with its prior decisions applying that principle. *Britt*, 987 N.E.2d at 567–569. Far from being a "routine exercise of common law decision making," the court recognized it was making a marked alteration in the law, which is why it held its decision to be prospective only. *Id*. The district court omitted reference to that part of the *Britt* holding.

In a somewhat contradictory ruling, the superior court judge ruled that the retroactive application of *Britt* was not unexpected (or unforeseeable) and therefore

not a Due Process violation, because it did not change the definition of the crime charged, it only lowered the prosecution's burden of proof. (App. 44a) However the retroactive alteration in a criminal law that lowers the prosecution's burden of proof violates the indefensible aspect of this Court's test for a Due Process violation, as shown immediately below. *See, Marks*, 430 U.S. at 189. Whether the alteration changes the definition of the crime is irrelevant.

2. The indefensible requirement for a due process violation

The district court did not address this requirement since it held *Britt's* change to be foreseeable. In crafting the "unexpected" portion of the test, the Supreme Court established a specific prejudice standard for cases asserting a Due Process violation emanating from a retroactive application of "a judicial alteration of a common law doctrine of criminal law." *Rogers*, 522 U.S. at 462. That standard is the indefensible portion of the *Rogers* test. *Id., Marks*, 430 U.S. at 189, and *Bouie,* 378 U.S. at 354.

Retroactive application of an alteration of a common law doctrine of criminal law is indefensible if it works to the legal detriment of a defendant. *Marks*, 430 U.S. at 189. That is true if, for example, it lowers the burden of proof previously required for a crime, thereby expanding criminal liability; *id* at 196; or if the alteration makes criminal, conduct that would not be criminal pursuant to the prior law. *Id* at 194-196; *Bouie,* 378 U.S. at 354-355; *see,* Hall, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960), at 61, cited in *Bouie,* 378 U.S. at 353. Thus, retroactive application of an unexpected alteration in a criminal law violates Due Process when there is a particular kind of prejudice to the defendant.

The question presented here is the same as in *Marks*: whether legal principles expanding the scope of criminal liability and reducing the government's burden of proof announced after the charged conduct "can be applied retroactively to the potential detriment of a defendant in a criminal case." *Marks*, 430 U.S. at

188–189. In *Marks*, the obscenity law as construed in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), was at the time of the charged conduct, settled and unchallenged. Between the time of the conduct and the trial, the Court decided *Miller v. California*, 413 U.S. 15 (1973), which, petitioners argued, "unforeseeably expanded the reach of the federal obscenity statutes beyond what was punishable under the standards announced in *Memoirs*. In *Marks*, the Court noted that "every Court of Appeals that considered the question between *Memoirs* and *Miller* ..." considered the earlier case to be controlling. 430 U.S. at 194.

In the present case, as established above, at the time of the crime and the trial, the law in Massachusetts was settled and unchallenged. In cases charging joint venture deliberately premeditated murder, the prosecution had to prove the defendant knew another of the co-ventures was armed. See cases cited *supra* at pg. 17. Every case listed, from *Lydon*, in 1992, to *Norris*, in 2012, decided a few weeks prior to Petitioner's trial, considered that law to be controlling. In *Britt*, the court noted that controlling line of precedents and overruled them, but cited no decision to the contrary. *Britt,* 987 N.E.2d at 56–59.

As the Supreme Court held in *Marks*, this was not just a clarification of the law in earlier cases, but "a significant departure from it." 430 U.S. at 194. The Court distinguished between a "clarification" and a "significant departure," by noting first, a decrease in the prosecution's burden of proof, and second, the fact that "some conduct which would have gone unpunished under … [the earlier case] would result in conviction under [the new case]." *Id*. As noted above and by the superior court judge, (App. 44a), the alteration of the law in *Britt* lowered the Commonwealth's burden of proof by eliminating the requirement it prove beyond a reasonable doubt that the defendant knew another co–venturer was armed. Furthermore, conduct that would have gone unpunished under the earlier law (where a defendant had no knowledge another co–venturer was armed), would

result in a conviction under *Britt* despite the defendant's having no knowledge a co–venturer was armed. *Britt* "was not a routine exercise of common law decision-making in which the court brought the law into conformity with reason and common sense," as the district court held, (App. 16a), but a "significant departure" from well established precedent. *See*, *Marks*, 430 U.S. at 194.

Britt's alteration in the criminal law constituted a significant departure from the prior law, and worked to "the potential detriment of a defendant in a criminal case." *Marks*, 430 U.S. at 189, 196. Therefore, the retroactive application of the judicial alteration in the doctrine of joint venture deliberately premeditated murder announced in *Britt*, violated Petitioner's Due Process rights. *Id.*

Based on the above threshold analysis, Petitioner has made "a substantial showing of the denial of a constitutional right," in that "the issues are debatable among jurists of reason, that a court could resolve the issues [in a different manner], or that the questions are 'adequate to deserve encouragement to proceed further.' *Barefoot*, 463 U.S. at 893 and nt. 4 (1983); *Buck*, 137 S.Ct. at 773; *Miller-El*, 537 U.S. at 326–336.

C. The district court failed to apply the indefensible test for prejudice; it erroneously applied the Brecht standard instead

Since the district court wrongly held that *Britt's* change in the law was not unexpected, it did not apply the "indefensible" prong of the *Rogers* and *Marks* test for prejudice. The "indefensible" requirement of the test addresses the consequences of a retroactive application of an alteration in a criminal law doctrine. That application must prejudice a defendant; it must operate to his legal detriment. *Marks*, 430 U.S. at 189, 194–196. It can do so by lowering the prosecution's burden of proof, or by expanding criminal liability. *Id*. That standard is part of the clearly established law for establishing a Due Process violation in these circumstances. This is the same as the Court's establishing a separate prejudice standard for

ineffective assistance of counsel claims in *Strickland v Washington*, 466 U.S. 668, 694 (1984). *See, Williams v Taylor*, 529 U.S. 362, 390–391 (2000), and O'Connor, J., concurring at 414–415. *See also, cf., Premo v. Moore*, 562 U.S. 115, 122 (2011). Petitioner established immediately above, that the retroactive application of *Britt's* substantive change in the law was indefensible by reference to the law which had been expressed prior to the conduct in issue. He thereby established that he was prejudiced by that retroactive application.

The district court did address the prejudice requirement, but under the wrong standard. (App. 16a) Instead of the test for prejudice established in *Bouie*, *Rogers* and *Marks*, the district court applied the prejudice standard announced *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), for most habeas cases. That standard, taken from *Kotteakos v. United States*, 328 U.S. 750, (1946), is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." The focus of the *Kotteakos–Brecht*, test for prejudice is on the deliberations of a jury. *Id*. It is not designed to evaluate prejudice resulting from appellate errors, as in the present case. *Brecht* is simply inapposite for such an inquiry.

Thus, the district court failed to follow the clearly established law of this Court. Jurists of reason could, therefore, find debatable or wrong the district court's decision holding Petitioner was not prejudiced by the retroactive application of *Britt's* alteration in the substantive criminal law, since it applied the wrong standard, and since Petitioner has established he was prejudiced pursuant to the "indefensible" test established in *Bouie*, *Rogers* and *Marks*.

D. Even if the Brecht test applied, jurists of reason could conclude that petitioner met its test for harmfulness

However, even bypassing the appellate error asserted herein, and focusing on the trial error in the jury instructions, prejudice arising from the failure to instruct the jury on an element of the crime as required by the controlling law at the time of

trial is manifest. The standard is not whether the weight of the evidence supported the verdict apart from the error. As this Court held in *Kotteakos*, 328 U.S. at 764–765, "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." Thus, the focus is on the deliberative process, not the sufficiency or weight of the evidence.

By relieving the prosecution of its burden of proving Petitioner knew another co–venturer was armed, the trial court removed from the jury's consideration a critical element of the crime of joint venture deliberately premeditated murder. Clearly the jury was considering that theory of liability since it asked to be re-instructed on it. (Tr. Vo. IX: 122-127; S.A. at 1806–1811). Failure to instruct that such knowledge had to be proven beyond a reasonable doubt, "had [a] substantial and injurious effect or influence in determining the jury's verdict as required by *Brecht*, 507 U.S. at 637. It directly impacted the deliberative process by removing an element of the crime from the jury's consideration, and substantially lowering the prosecution's burden of proof. A demonstrably prejudicial effect on the deliberative process is evident.

The district court, in direct contradiction to *Brecht* and *Kotteakos*, based its finding of no prejudice on the weight of the evidence. (App. 16a) The district court relied on five factors in ruling Petitioner suffered no prejudice from the trial error. (App. 17a) The first was that Petitioner was armed. *Id*. The court failed to acknowledge that this is precisely the problem created by the failure to charge the jury that to convict on a joint venture deliberately premeditated murder theory, the prosecution had to prove beyond a reasonable doubt that Petitioner knew another of the alleged co–venturers was armed. *Zanetti*, 910 N.E.2d at 875 and cases listed, *supra* at 14. It is not enough to convict to prove that Petitioner was armed. *Id*. The court then asserted that Petitioner "fired the shot that killed the victim." (App. 17a)

That is simply false! Neither the murder weapon nor the bullet that killed the victim was found, (App. 53a), and there were two other men who were shooting. The court said Petitioner was seen shooting at the victim, but Caraballo's testimony was shown to be incredible since he could not have seen Petitioner, much less see him shooting, while lying on his stomach in his driveway below a snow bank. *Supra* at 4–5.

The important, indeed critical, omission from the court's decision is the singular factor this Court in *Brecht,* 507 U.S. at 637*,* held to be determinative in a prejudice evaluation: whether the error "had a substantial and injurious effect or influence in determining the jury's verdict." Nowhere did the district court ever mention that the erroneous jury instruction failed to charge on an element of the crime, that it eliminated the prosecution's burden of proof, or that the jury asked to be re-instructed on the law of joint venture. (S.A. at 1806) The impact the failure properly to charge the jury had on the jury's deliberative process was the only question the court had to address. It failed, totally, to do so. That the Constitutional trial error in this case "had a substantial and injurious effect or influence in determining the jury's verdict as required by *Brecht*, 507 U.S. at 637*,* is not just reasonably debatable, it is compelling.

CONCLUSION

Based on the above reasons, Petitioner asserts that he has made a substantial showing of the denial of a Constitutional right, or reasonable jurists could so conclude. Thus, a COA should issue. Review by this Court is warranted to insure the Constitutional promise of equal application of the law. Therefore, Petitioner respectfully prays that the Petition for a Writ of Certiorari be granted**.**

Respectfully Submitted

November 8, 2021 /s/ Stewart T. Graham Jr.

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