

No. \_\_\_\_\_

---

---

**In the Supreme Court of the United States**

---

CARLOS GUARDADO,

*Applicant,*

v.

COMMONWEALTH OF MASSACHUSETTS,

*Respondent.*

---

**APPLICATION FOR AN EXTENSION OF TIME TO FILE  
A PETITION FOR A WRIT OF CERTIORARI**

---

To the Honorable Ketanji Brown Jackson, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the First Circuit:

Pursuant to Supreme Court Rule 13.5, applicant Carlos Guardado respectfully requests a 21-day extension of time, until February 14, 2024, within which to file a petition for a writ of certiorari. The Supreme Judicial Court of Massachusetts (“SJC”) issued its original opinion in this case on April 13, 2023. A copy of that opinion is attached as Exhibit A. The Commonwealth of Massachusetts (the “Commonwealth”) moved for reconsideration. On October 26, 2023, the SJC granted that motion and modified its original opinion in part, both through entry of an order on the docket (attached as Exhibit B) and the issuance of a second opinion

(attached as Exhibit C). This Court’s jurisdiction would be invoked under 28 U.S.C. § 1257.

Absent an extension, a petition for a writ of certiorari would be due January 24, 2024. This application is being filed more than 10 days in advance of that date, and no prior application has been made in this case.

1. This petition concerns a conflict across the federal courts of appeals and state supreme courts on an important question concerning the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. Specifically, this Court held in *Burks v. United States*, 437 U.S. 1, 11 (1978), that “[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.” The question presented in this case is whether there is an exception to this Court’s holding in *Burks* when there was a change in the law as to the elements of the offense after the first proceeding was complete.

a. Under Massachusetts law, it is a crime to “own[], possess[] or transfer[] a firearm, rifle, shotgun or ammunition without complying with” specified licensing requirements. Mass. G.L. ch. 269 s. 10(h)(1). For many years, the SJC held that licensure was an affirmative defense under this statute, such that the Commonwealth could obtain a conviction solely by proving possession of a firearm. *E.g., Commonwealth v. Allen*, 48 N.E.3d 427 (Mass. 2016). Applicant Carlos Guardado was convicted of unlawful possession of a firearm and ammunition under this regime: The jury that convicted him was “not instructed that, to find him

guilty of unlawful possession of a firearm, the Commonwealth had to prove that he did not have a firearms license.” Ex. A at 10. Moreover, the Commonwealth conceded that “it did not present evidence at trial to indicate that the defendant lacked a firearms license.” Ex. C at 4.

Mr. Guardado appealed his conviction, arguing (as relevant here) that, in light of this Court’s decision in *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022), the SJC was required to treat lack of licensure as an element, not an affirmative defense. Ex. A at 10. The SJC agreed: It reversed its prior precedent and held “that the defendant’s rights under the Second Amendment and his rights to due process were violated when he was convicted of unlawfully possessing [a firearm and] ammunition although the jury were not instructed that licensure is an essential element of the crime.” Ex. A at 14. Moreover, the SJC concluded that the proper remedy was that the case be remanded “for entry of judgments of not guilty on those indictments.” Ex. A at 14. That remedy was consistent with the SJC’s prior decision in *Commonwealth v. Beal*, 52 N.E.3d 998, 1010 & n.12 (2016), which held that, when the trial evidence was insufficient to support a conviction under the correct legal standard, Double Jeopardy barred a retrial even though the trial evidence was sufficient to support a conviction under the legally erroneous instructions given to the jury.

b. The Commonwealth moved for reconsideration on the Double Jeopardy issue, arguing that it is entitled to try Mr. Guardado for a second time even though the record in the first trial contains no evidence that could support a finding that

Mr. Guardado did not have a license to possess a firearm or ammunition. The SJC granted the Commonwealth's motion for reconsideration and held that its prior decision in *Beal* is "no longer valid precedent." Ex. C at 6, 8 n.3. Specifically, the SJC held that the Double Jeopardy Clause does not bar a retrial when "the evidence against the defendant was insufficient only when viewed through the lens of a legal development that occurred after trial." Ex. C at 5. It therefore "remand[ed] to the Superior Court for a new trial."<sup>1</sup> Ex. C at 8.

c. The courts of appeals and state supreme courts are divided concerning whether the Double Jeopardy Clause permits a retrial when the record in the first trial is insufficient to support a conviction based on a legal development that occurred after that first trial was complete. Multiple courts of appeals have held that a retrial is *not* permitted in that circumstance. *E.g., United States v. Hightower*, 96 F.3d 211, 215 (7th Cir. 1996) ("where the evidence in the record will not sustain a conviction under the law ... as the Supreme Court has now authoritatively interpreted it," the "only step to be taken ... is to vacate the conviction ... and to remand for dismissal of those charges" even though the evidence was sufficient to sustain a conviction based on the law at the time of trial); *United States v. Miller*, 84 F.3d 1244, 1258 (10th Cir. 1996) ("we will remand for a new trial only if the jury could have returned a guilty verdict if properly instructed"). Other courts of appeals and state supreme courts, by contrast, have

---

<sup>1</sup> On the same date the SJC issued its second opinion, the SJC also entered a docket order that modified its original decision in other ways not relevant to this Application or Mr. Guardado's anticipated petition for a writ of certiorari. *See* Ex. B at 4.

held, like the SJC, that a retrial is permitted when there was a change of law after the first trial. *E.g.*, *United States v. Ford*, 703 F.3d 708, 710 (4th Cir. 2013) (“when a conviction is reversed because of a post-trial change in law, a second trial is permitted”); *State v. Drupals*, 49 A.3d 962, 976 n.12 (Conn. 2012) (“Double jeopardy concerns do not mandate an acquittal when the evidence presented was sufficient to establish the crime under the standard applicable at the time of trial, but not under the newly articulated standard, because any insufficiency in proof may well have resulted from the change in the law.”).

2. Mr. Guardado respectfully requests a 21-day extension of time to file his petition for a writ of certiorari from the SJC’s decision holding that he can be subjected to a retrial on his vacated convictions. Mr. Guardado only recently retained undersigned counsel from Goodwin Procter to serve as lead counsel in representing Mr. Guardado before this Court. As such, counsel need additional time to familiarize themselves with the facts and complex legal issues in this case. Moreover, undersigned counsel have a number of other pending matters that would make it difficult to complete and file a petition for a writ of certiorari in this case by the current deadline, including reply briefs at the U.S. Court of Appeals for the Federal Circuit (due January 26 and February 5), an opening brief at the U.S. Court of Appeals for the Ninth Circuit (due February 1), and amicus briefs at this Court and the U.S. Court of Appeals for the Fifth Circuit (due January 22 and February 1). Given these pending matters, it would be difficult for counsel to prepare and file

a petition for a writ of certiorari in this case by the current deadline of January 24, 2024.

*Wherefore*, applicant respectfully requests that the Court extend the time to file a petition for a writ of certiorari by 21 days to February 14, 2024.

January 5, 2024

Respectfully submitted,



---

David J. Zimmer  
*Counsel of Record*

JORDAN BOCK  
JONATHAN RANKIN  
GOODWIN PROCTER LLP  
100 Northern Ave.  
Boston, MA 02210  
617.570.1192  
dzimmer@goodwinlaw.com

Elaine Fronhofer  
6 University Dr., Ste. 206  
Amherst, MA 01002

*Counsel for Applicant Carlos  
Guardado*