No.

IN THE

Supreme Court of the United States

CARLOS GUARDADO,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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February 14, 2024

QUESTION PRESENTED

In *Burks v. United States*, 437 U.S. 1, 11 (1978), this Court held that when the evidence the prosecution introduced at a criminal trial is legally insufficient to support a finding of guilt, "[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* that gives the prosecution a second trial in which to supply missing evidence when there was a change in the law after the first proceeding was complete.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

Commonwealth v. Guardado, No. SJC-13315 (Mass.) (original opinion and judgment issued April 13, 2023; order and opinion after reconsideration issued on October 26, 2023)

Commonwealth v. Guardado, No. SJ-2023-M008 (Mass. Single Justice) (order staying execution of sentence entered August 7, 2023)

Commonwealth v. Guardado, No. 2022-P-0132 (Mass. App. Ct.) (no judgment issued; case transferred to Supreme Judicial Court sua sponte on July 29, 2022)

Commonwealth v. Guardado, No. 1981CR00263 (Mass. Sup. Ct.) (judgment entered on guilty verdict on June 3, 2021)

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Carlos Guardado respectfully petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts.

INTRODUCTION

This case presents an important question that has divided the courts of appeals and state supreme courts: If there is a change in law during the appeal of a criminal conviction, and the evidence at trial is insufficient to support a finding of guilt under the correct understanding of the law, does the Double Jeopardy Clause permit a second trial in which the government can attempt to supply the missing evidence? This Court should grant certiorari to resolve this conflict and reiterate 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." *Burks v. United States*, 437 U.S. 1, 11 (1978).

Under Massachusetts law, it is a crime to "possess[] … a firearm … without … having in effect a license to carry firearms." Mass. Gen. Laws ch. 269, § 10(a). The Supreme Judicial Court of Massachusetts (SJC) initially interpreted this provision as a "general prohibition against carrying a firearm." *Commonwealth v. Jones*, 361 N.E.2d 1308, 1311 (Mass. 1977). Licensure, the SJC held, was an exception to that "general prohibition" that the defendant had the burden to raise as an "affirmative defense." *Id.* Thus, prosecutors could prove unlawful possession of a firearm merely by proving possession of a firearm.

Petitioner Carlos Guardado was convicted of unlawful possession of a firearm under this regime: The jury that convicted him was not instructed that it

needed to find lack of licensure and the Commonwealth introduced no evidence at trial that Mr. Guardado lacked a license. On appeal, Mr. Guardado argued that treating licensure as an affirmative defense violates the Due Process Clause in light of this Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). The SJC agreed, reversed its prior precedent, and held that lack of licensure is an element that the prosecution must prove beyond a reasonable doubt—an element the prosecution undisputedly failed to prove in this case.

Given that the trial record contained no evidence regarding an essential element of unlawful possession of a firearm, the SJC's initial decision ordered that "the matter is remanded to the Superior Court *for entry of judgments of not guilty*." Pet. App. 17a (emphasis added). That disposition was consistent with prior SJC precedent holding that double jeopardy principles bar a retrial if "the evidence the Commonwealth introduced was insufficient" to support a conviction "*if the judge had instructed the jury properly*." *Commonwealth v. Beal*, 52 N.E.3d 998, 1010 & n.12 (Mass. 2016) (emphasis added). But after the Commonwealth sought reconsideration on the double jeopardy issue, the SJC changed its mind: It reversed its prior decision in *Beal* and held that, because the law had changed after trial, the Double Jeopardy Clause poses no obstacle to retrying Mr. Guardado. Pet. App. 5a-17a.

This Court should grant certiorari to review the important double jeopardy question raised by the SJC's dueling decisions. This Court held in *Burks* that the Double Jeopardy Clause bars a retrial when

the evidence at the first trial is insufficient to support a finding of guilt as a matter of law. 437 U.S. at 11. The question whether there is a change-in-law exception to *Burks* has sharply divided the courts of appeals and state supreme courts. *Compare*, *e.g.*, *United States v. Miller*, 84 F.3d 1244, 1258 (10th Cir. 1996) ("[W]e will remand for a new trial only if the jury could have returned a guilty verdict *if properly instructed*." (emphasis added)), *with United States v. Ford*, 703 F.3d 708, 711 (4th Cir. 2013) ("[W]here a reviewing court determines that the evidence presented at trial has been rendered insufficient only by a post-trial change in law, double jeopardy concerns do not preclude the government from retrying the defendant."). This deep and entrenched split will not resolve absent this Court's intervention and causes deep unfairness to defendants like Mr. Guardado.

The SJC also got the double jeopardy question wrong. This Court in *Burks* set out a clear rule: When the trial court should have directed a verdict of acquittal because the evidence was "legally insufficient," then "the Double Jeopardy Clause precludes a second trial." 437 U.S. at 18. And this Court held in *Musacchio v. United States*, 577 U.S. 237 (2016), that the "legal" question a court considers on sufficiency review compares the evidence at trial to the "essential elements of the crime" *correctly understood*—a court's decision "on sufficiency review does not rest on how the jury was instructed." *Id.* at 243. The SJC held in this case that, on a correct understanding of the law, the record does not support a finding that Mr. Guardado was guilty of *unlawful* possession of a firearm; it only supports a finding that Mr. Guardado *possessed* a firearm. That should be the end of this case.

Contrary to the SJC, there is not, and should not be, a change-in-law exception to *Burks* and *Musacchio*. The SJC reasoned that, where the law changes post-trial, the government should get one "fair" opportunity to prove its case before a trial court judge who applies the correct legal standard. Pet. App. 9a. But this Court has repeatedly held that trial courts' legal errors in defining the essential elements of a crime—including errors that lead to an erroneous acquittal—do *not* warrant an exception to the Double Jeopardy Clause's prohibition on successive criminal trials when the trial ended, or should have ended, in an acquittal. *E.g.*, *Evans v. Michigan*, 568 U.S. 313, 328-29 (2013); *Arizona v. Rumsey*, 467 U.S. 203, 2011 (1984).

Ultimately, the simple answer to the question presented is the right one: Where the evidentiary record in a defendant's criminal trial does not support a finding of guilt under a correct understanding of the law, the Double Jeopardy Clause bars the government from subjecting the defendant to a second trial. This Court should grant the petition.

OPINIONS BELOW

The SJC's opinion after reconsideration (Pet. App. 1a-17a) is reported at 220 N.E.3d 102. The SJC's order granting reconsideration in part (Pet. App. 18a-20a) is unreported. The SJC's initial opinion (Pet. App. 21a-80a) is reported at 206 N.E.3d 512. The Superior Court's oral order denying the defendant's motion for a required finding of not guilty (Pet. App. 81a-96a) is unreported.

JURISDICTION

The SJC's judgment was entered on April 13, 2023. The SJC granted reconsideration in part and issued a

subsequent opinion on October 26, 2023. On January 9, 2024, Justice Jackson extended the time to file a petition for a writ of certiorari to February 14, 2024. No. 23A632. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

A. For many years, the Supreme Judicial Court holds that Massachusetts prosecutors can prove unlawful possession of a firearm merely by proving possession of a firearm.

Under Massachusetts law, it is a crime to "ha[ve] in [one's] possession; or knowingly ha[ve] under [one's] control in a vehicle; a firearm … without," as relevant here, "having in effect a license to carry firearms." Mass. Gen. Laws ch. 269, § 10(a). The same statute prohibits unlicensed possession of ammunition. *Id.* § 10(h)(1). Massachusetts treats unlawful possession of a firearm as a serious offense. Sentences range from a mandatory minimum of eighteen months

to a maximum of five years. *Id.* § 10(a). If the firearm is "loaded," there is the potential for an additional sentence of up to two-and-a-half years. *Id.* § 10(n). A firearm is considered "loaded" not only if there is a bullet in the chamber such that the firearm could be readily fired, but also if "ammunition is contained … within a feeding device attached" to the firearm. *Id.* § 10(o). The result is that a defendant convicted of unlawful possession of a firearm faces a minimum of one-and-a-half and a maximum of seven-and-a-half years of imprisonment.

A separate provision of Massachusetts law states that "[a] defendant in a criminal prosecution, relying for his justification upon a license … shall prove the same; and, until so proved, the presumption shall be that he is not so authorized." Mass. Gen. Laws ch. 278, § 7. As applied to unlawful possession of a firearm or ammunition, this means that lack of licensure is not an element of the crime but "an affirmative defense," and thus "the burden is on the defendant to come forward with evidence of the defense." *Jones*, 361 N.E.2d at 1311. The net result is that the prosecution can obtain a conviction for *unlawful* possession of a firearm or ammunition simply by proving *possession* of a firearm or ammunition.

Since the 1970s, criminal defendants have challenged this burden-shifting framework as a violation of the Due Process Clause because it relieves the prosecution of its burden to prove all essential elements of the offense beyond a reasonable doubt. The SJC consistently rejected these arguments on the theory that lack of licensure is not an element. The crime, the SJC maintained, is the violation of the "general prohi-

bition against carrying a firearm" under *any* circumstances. *Jones*, 361 N.E.2d at 1311. "The holding of a valid license" merely "brings the defendant within an exception to th[at] general prohibition." *Id.*; *see also, e.g.*, *Comonwealth v. Gouse*, 965 N.E.2d 774, 787-88 (Mass. 2012) (collecting cases reaffirming *Jones*).

Even after this Court's decisions in *McDonald v. Chicago*, 561 U.S. 742 (2010), and *District of Columbia v. Heller*, 554 U.S. 570 (2008), the SJC stuck to its position that the Commonwealth could prove unlawful possession of a firearm simply by proving possession of a firearm. *Gouse*, 965 N.E.2d at 784-91. According to the SJC, *McDonald* and *Heller* only implicated the constitutional right to possess a firearm in the home. *Id.* at 786. Thus, it does not "infringe on constitutionally protected conduct" to define *any* possession of a firearm (outside the home) as the crime, and licensure as a mere affirmative defense. *Id.*

B. The Supreme Judicial Court holds, in this case, that lack of licensure is an element of the offense and reverses Mr. Guardado's convictions and remands for a judgment of not guilty.

1. On January 25, 2019, the Boston police received a tip from a confidential informant that Petitioner Carlos Guardado "was in possession of an unlicensed gun." Pet. App. 24a. Based on that tip, the police looked for and ultimately located Mr. Guardado's car while Mr. Guardado was driving to his job at an AutoZone in Watertown, Massachusetts. The police followed Mr. Guardado to the AutoZone

and watched Mr. Guardado assisting customers. Pet. App. 25a; 3 Tr.[1] 40-44, 83-85, 101-06.

When Mr. Guardado returned to his car, the police approached Mr. Guardado and searched his vehicle, but found nothing remarkable. Pet. App. 26a. The police then frisked Mr. Guardado, but found only Mr. Guardado's keys. *Id.* The police used Mr. Guardado's keys to open the locked glove compartment, where the police found a firearm. *Id.* Though there was no ammunition in the chamber of the firearm, the firearm was attached to a fifteen-round magazine that contained two rounds of ammunition. 3 Tr. 92-94, 174-75.

Mr. Guardado was charged with, as relevant here, one count of unlawful possession of a firearm, Mass. Gen. Laws ch. 269, § 10(a); one count of unlawful possession of ammunition, *id.* § 10(h); and one count of unlawful possession of a loaded firearm, *id.* § 10(n).[2]

At trial, the Commonwealth introduced no evidence regarding licensure. Pet. App. 2a. And, consistent with prior SJC precedent, the trial court did not instruct the jury that it needed to find lack of licensure. Pet. App. 2a, 30a-31a. The jury convicted Mr. Guardado of all three counts.

2. The SJC elected to hear Mr. Guardado's appeal itself and held that, in light of this Court's decision in *Bruen*, the Constitution requires that lack of licensure be treated as an element, not an affirmative defense.

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[1] "Tr." refers to the trial transcript.

[2] Mr. Guardado was also charged with and ultimately convicted of unlawful possession of a large capacity feeding device. Pet. App. 5a n.2. That conviction is not at issue in this petition.

As the SJC explained, "[i]t is now incontrovertible that a general prohibition against carrying a firearm outside the home is unconstitutional." Pet. App. 56a-57a (citing *Bruen*, 597 U.S. at 31). And "[b]ecause possession of a firearm outside the home is constitutionally protected conduct, it cannot, absent some extenuating factor, such as failure to comply with licensing requirements, be punished by the Commonwealth." *Id.* The SJC therefore held that "absence of a license is an essential element" of both unlawful possession of a firearm and unlawful possession of ammunition. *Id.*

Given that the Commonwealth had not introduced any evidence of lack of licensure, the SJC ordered that the convictions "are vacated and set aside, and the matter is remanded to the Superior Court for entry of judgments of not guilty on those indictments." Pet. App. 62a-63a. While the SJC did not explain its basis for ordering "entry of judgments of not guilty," that disposition flowed directly from two prior SJC decisions: *Commonwealth v. Munoz*, 426 N.E.2d 1161 (Mass. 1981), and *Commonwealth v. Beal*, 52 N.E.3d 998 (Mass. 2016).

Munoz involved the crime of operating an uninsured motor vehicle. The trial court, consistent with model jury instructions, instructed the jury that lack of insurance was an affirmative defense, not an element. 426 N.E.2d at 1162, 1165. Given that instruction, the Commonwealth had introduced no evidence concerning lack of insurance. *Id.* at 1162. The SJC reversed, held that lack of insurance is an element, and ordered "[j]udgment for the defendant"; the SJC did not permit a retrial for the Commonwealth to prove lack of insurance. *Id.* at 1165.

The question in *Beal* was whether the defendant had been convicted of two "violent crimes" under the Massachusetts version of the Armed Career Criminal Act (ACCA)—a question that, under Massachusetts law, goes to a jury. 52 N.E.3d at 1008 & n.10. The Commonwealth had introduced copies of prior convictions, but nothing else. *Id.* at 1008. The trial court had, prior to this Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015), instructed the jury that the certified copies of the prior convictions were sufficient to show convictions for violent crimes as a matter of law. *See id.* at 1010 n.12. The jury convicted, but the SJC reversed. It deemed ACCA's residual clause unconstitutional under *Johnson* and held that, absent the residual clause, the certified copies of convictions did not provide sufficient evidence to support a conviction. *Id.* at 1007-11.

The SJC then rejected "the Commonwealth's request that we remand the matter so that the Commonwealth may present at a second trial evidence sufficient to establish that the defendant violated the ACCA," holding that such a remand would violate "[t]he prohibition against double jeopardy." *Id.* at 1010. Even though *Johnson* changed the law by invalidating the residual clause, the SJC held that "the dispositive issue here is sufficiency of the evidence; even if the judge had instructed the jury properly, the result on appeal would be no different because the evidence the Commonwealth introduced was insufficient." *Id.* at 1010 & n.12.

C. On the Commonwealth's motion for reconsideration, the Supreme Judicial Court changes its mind and holds that the Commonwealth gets a second chance to prove lack of licensure.

The Commonwealth moved for reconsideration, arguing, as relevant here, that it should get a second chance to prove lack of licensure. In response, the SJC recognized that the Commonwealth "concedes that it did not present evidence at trial to indicate that the defendant lacked a firearms license. The Commonwealth therefore did not introduce sufficient evidence to establish beyond a reasonable doubt an essential element of the crimes at issue." Pet. App. 8a. The SJC also acknowledged that "[t]he prohibition against double jeopardy generally precludes retrial if the Commonwealth presented insufficient evidence at the original trial to support the defendant's conviction." Pet. App. 6a.

Nevertheless, the SJC granted the Commonwealth's motion and held that a retrial is permissible in this case because "the evidence against the defendant was insufficient only when viewed through the lens of a legal development that occurred after trial." Pet. App. 8a-9a. Prohibiting a retrial in such a case, the SJC held, would deprive the government of "a fair opportunity to offer whatever proof it could assemble at trial." Pet. App. 8a-9a (quotation marks and alterations omitted).

The SJC purported to distinguish this case from its prior decisions in *Munoz* and *Beal*. As to *Munoz*, the SJC claimed that there was no "new" rule in that case even though the model jury instructions treated insurance as an affirmative defense. Pet. App. 10a-11a.

The SJC distinguished *Beal*, too, on the ground that there was no change in the law, just some uncertainty. Pet. App. 11a-12a. The SJC recognized, however, that allowing a retrial in this case is inconsistent with *Beal*'s statement that the "dispositive issue" concerning whether a retrial is permissible is whether the evidence would have been sufficient "*if the judge had instructed the jury properly*." Pet. App. 13a n.3 (emphasis added). The SJC held that this discussion in *Beal* "is no longer valid precedent." *Id.*

The SJC acknowledged that the federal courts of appeals are divided on the question presented. While the SJC identified multiple courts of appeals supporting its decision, it also recognized a conflict with the Tenth Circuit's decision in *Miller*. Pet. App. 13a-14a.

REASONS FOR GRANTING THE WRIT

This Court held in *Burks* that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient" to sustain a finding of guilt. 437 U.S. at 18. And this Court held in *Musacchio* that "sufficiency review" looks to the *actual* "elements of the charged crime"—the court's "determination … does not rest on how the jury was instructed." 577 U.S. at 243.

The SJC's two conflicting decisions in this case are at the heart of a deep and entrenched conflict concerning whether there is an exception to these principles when the law changes after the first trial. This Court should grant certiorari to resolve that conflict and reverse the SJC's decision, which is inconsistent with core double jeopardy principles.

I. The courts of appeals and state supreme courts are divided concerning the question presented.

There is a deep, intractable divide across the courts of appeals and state supreme courts regarding whether the government is entitled to a second chance to satisfy its burden of proof when the law changes after the first trial—a conflict that will not resolve without this Court's intervention.

A. The SJC's decision in this case conflicts with the decisions of three courts of appeals and at least one state supreme court. The SJC conceded a split, but erroneously sought to limit its scope.

1. The Tenth, Seventh, and Eleventh Circuits, as well as the Pennsylvania Supreme Court, have all held that the Double Jeopardy Clause forbids a retrial when the trial record is insufficient to support a conviction under the correct legal standard—even if the legal standard changed after trial.

Tenth Circuit. Both *United States v. Smith*, 82 F.3d 1564, 1567 (10th Cir. 1996), and *Miller*, 84 F.3d at 1258, involved defendants charged with "us[ing] or carr[ying] a firearm" in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1). In both cases, the jury convicted the defendant after having been given a broad instruction regarding the meaning of "use." While these cases were on appeal, this Court decided *Bailey v. United States*, 516 U.S. 137 (1995), which defined "use" more narrowly.

In both *Smith* and *Miller*, the Tenth Circuit held that (1) *Bailey* required vacating the convictions, and (2) if the original trial record did not support a conviction under post-*Bailey* law, the Double Jeopardy

Clause precludes a retrial. In *Smith*, the court wrote that, if the jury could have convicted even if it had been instructed with *Bailey*'s definition of "use," then "we can remand for a new trial without violating double jeopardy principles." *Smith*, 82 F.3d at 1567. By contrast, "if the evidence was insufficient so that a directed verdict of acquittal should have been entered, remand would violate the Double Jeopardy Clause." *Id.* The court found the evidence insufficient to establish either "using" a firearm as defined in *Bailey* or "carrying" a firearm. *Id.* at 1568. The court therefore reversed the conviction and remanded "with directions that the conviction and sentence thereon be set aside"—the court did not give the government a chance to prove "use" under *Bailey*. *Id.* The Tenth Circuit in *Miller* similarly held that "we will remand for a new trial only if the jury could have returned a guilty verdict if properly instructed." 84 F.3d at 1258. Unlike in *Smith*, however, the Tenth Circuit in *Miller* held that the government did introduce sufficient evidence in the first trial to support a conviction even under post-*Bailey* law. *Id.* at 1260. The court therefore remanded for a new trial.

As *Miller* explained, these cases are consistent with the Tenth Circuit's prior decision in *United States v. Wacker*, 72 F.3d 1453 (10th Cir. 1995). In that case, the Tenth Circuit reversed two convictions under § 924(c)(1) without remanding for a new trial because there was insufficient evidence to support those convictions under *Bailey*, but remanded for a new trial on a third § 924(c)(1) conviction because, based on the trial record, the court "[could not] say how a jury might decide this issue if properly instructed under the law as defined by *Bailey*." *Miller*, 84 F.3d at 1258 (quoting *Wacker*, 72 F.3d at 1465).

To be sure, *Wacker* did go on to state that "the government here cannot be held responsible for failing to muster evidence sufficient to satisfy a standard which did not exist at the time of trial." 72 F.3d at 1465 (quotation marks omitted). But that statement was dicta, as the Tenth Circuit had already concluded that the government *had* mustered evidence to satisfy the correct, post-*Bailey* standard. *Id.* at 1464-65. The Tenth Circuit's similar statements in *Linam v. Griffin*, 685 F.2d 369, 372-74 (10th Cir. 1982), were also dicta, as the court ultimately held that the sentencing hearing at issue did not trigger double jeopardy protections *at all*, *id.* at 374-76.

Miller and *Smith* repudiated the Tenth Circuit's earlier dicta in *Wacker* and *Linam*. Indeed, earlier this year the Tenth Circuit again held, consistent with *Miller* and *Smith*, that, "when faced with a sufficiency challenge, a court asks … whether there was sufficient evidence presented at trial for a reasonable jury, *properly instructed*, to have found the essential elements of the crime beyond a reasonable doubt." *United States v. Simpkins*, 90 F.4th 1312, 1315-16 (10th Cir. 2024) (quotation marks and alterations omitted); *see also United States v. Wyatt*, 964 F.3d 947, 951 (10th Cir. 2020) (question on sufficiency review is "whether there was sufficient evidence presented at trial for a reasonable jury, properly instructed," to convict).

Seventh Circuit. In *United States v. Gonzalez*, 93 F.3d 311 (7th Cir. 1996), the Seventh Circuit endorsed the Tenth Circuit's approach to post-*Bailey* appeals in *Miller*. If the pre-*Bailey* trial record "would have supported, but not compelled" a conviction under post-*Bailey* law, the court explained, then the court should

"set aside the convictions and remand[] for a new trial." *Gonzalez*, 93 F.3d at 321. By contrast, "when the evidence of record will not sustain a conviction under the new law of 'use' and also will not sustain a conviction for 'carrying' the weapon, we have vitiated the conviction." *Id.* Thus, like the Tenth Circuit in *Miller*, the court held that a remand is allowed only "if the evidence of record established that a jury *properly instructed* could have found the defendant guilty of either 'use' or 'carry.'" *Id.* at 322 (emphasis added); *see also United States v. Robinson*, 96 F.3d 246, 250 (7th Cir. 1996) ("[I]f none of the evidence presented qualifies as either active-employment 'use' or 'carry,' we will reverse the conviction outright[.]"). The Seventh Circuit in *Gonzalez* ultimately held that the record supported a finding of guilt under the "carry" prong, and that a new trial was therefore permissible. 93 F.3d at 323.[3]

In *United States v. Hightower*, 96 F.3d 211 (7th Cir. 1996), the Seventh Circuit, consistent with its prior decision in *Gonzalez*, refused to give the government a second chance to prove "use" under *Bailey*. The court held that the trial record could not support a conviction under the correct "use" instruction. Because "the evidence in the record will not sustain a conviction *under the law of use as the Supreme Court has now authoritatively interpreted it*," the "only step to be taken on this record is to vacate the conviction … and to remand for dismissal of those charges." *Id.* at 215 (emphasis added).

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[3] The SJC cited *Gonzalez* as support for its position, Pet. App. 13a, but that is wrong. *Gonzalez* explicitly followed the Tenth Circuit's decision in *Miller*, which rejects the SJC's view, as even the SJC recognized. *Id.* 13a-14a.

Eleventh Circuit. In *United States v. Mount*, 161 F.3d 675 (11th Cir. 1998), the Eleventh Circuit joined the Seventh and Tenth Circuits in holding that, if the pre-*Bailey* trial record does not support a conviction under post-*Bailey* law, then the defendant must be acquitted. Mount was also convicted under § 924(c)(1) prior to *Bailey*. The Eleventh Circuit, citing the Seventh and Tenth Circuit decisions discussed above, looked to whether the trial record "contain[s] sufficient evidence under which a properly instructed jury could have convicted [the defendant]." *Id.* at 678. If it does not, "then double jeopardy principles mandate that we vacate the conviction and remand to the district court with directions to enter a judgment of acquittal on the count in question." *Id.* (citing *Hightower*, 96 F.3d at 215; *Smith*, 82 F.3d at 1567).

Confusingly, the Eleventh Circuit seemed to reach the exact opposite conclusion on the same double jeopardy question in a later case, without acknowledging *Mount* or the Seventh or Tenth Circuit cases on which *Mount* relied. *United States v. Robison*, 505 F.3d 1208, 1224-25 (11th Cir. 2007). Notably, the district court on remand in *Robison* viewed the double jeopardy issue as still open despite the Eleventh Circuit's decision and strongly criticized the Eleventh Circuit's double jeopardy analysis. *United States v. Robison*, 521 F. Supp. 2d 1247, 1263 (N.D. Ala. 2007) (listing among the outstanding issues: "If the evidence was insufficient, should the Double Jeopardy Clause bar another trial? Does the Double Jeopardy Clause go out the window when there is a change of law?"). Regardless, to the extent *Robison* conflicts with *Mount*, *Mount* controls as the earlier decision. *Caplan v. All Am. Auto Collision, Inc.*, 36 F.4th 1083, 1093-94 (11th

Cir. 2022) ("Because we cannot reconcile our caselaw, we must follow the earlier decision[.]").

Pennsylvania Supreme Court. In *Commonwealth v. Shade*, 681 A.2d 710 (Pa. 1996), the Pennsylvania Supreme Court adopted the same approach as the Seventh, Tenth, and Eleventh Circuits. The defendant had been charged with operating a vehicle while having blood alcohol content of .10% or greater. The prosecution introduced breath alcohol tests but no evidence concerning what those tests meant about the defendant's blood alcohol content "*at the time he was driving*." *Id.* at 711. Consistent with existing law, the trial court instructed the jury that evidence relating the tests back to the time of driving was not necessary. *Id.* The jury convicted the defendant.

After the verdict, but while the trial court was considering post-trial motions, the Pennsylvania Supreme Court changed the law, holding that such relation-back evidence *is* required to support a conviction. *Id.* at 712-13; *see also id.* at 714 (Cappy, J., concurring) ("[B]etween the time of the trial and the time when the trial court was considering the post trial motions, the state of the law had changed."). The trial court ordered a retrial, but the Pennsylvania Supreme Court reversed. Because "the evidence underlying [the] conviction is insufficient as a matter of law" under the correct legal standard, "[t]he proper remedy in this case should have been to grant [defendant's] motion" for acquittal, not to give the government a retrial. *Id.* at 713. As the concurring Justice explained, ordering an acquittal "where the Commonwealth fails to produce sufficient evidence is constitutionally compelled" because "double jeopardy precludes a retrial once an appellate court has found the evidence legally

insufficient." *Id.* at 714 (Cappy, J., concurring) (quotation marks omitted).

2. The SJC did not dispute that its decision implicates a circuit conflict. The SJC agreed that its decision conflicts with at least the Tenth Circuit's holding in *Miller* that "we will remand for a new trial only if the jury could have returned a guilty verdict if properly instructed." Pet. App. 13a-14a (quoting *Miller*, 84 F.3d at 1258).

To the extent the SJC suggested that *Miller* is the *only* decision rejecting its position, the SJC erred. The SJC did not address several of the cases discussed above, including the Pennsylvania Supreme Court's decision in *Shade*. Moreover, while the SJC purported to "distinguish" the Seventh, Tenth, and Eleventh Circuits' decisions in *Hightower*, *Smith*, and *Mount*, its reasoning ignores the relevant parts of those decisions. Pet. App. 15a-16a.

As the SJC noted, and as explained above, the statutory provision at issue in *Hightower*, *Smith*, and *Mount* required that the defendant have either "use[d]" or "carrie[d]" a firearm. In all three cases, the district court had given a "use" instruction that conflicted with the Supreme Court's post-trial decision in *Bailey*. And in all three cases, the court of appeals held that *acquittal* was required—*not* just a retrial—where the trial record was insufficient to support *either* a finding that the defendant had "use[d]" a firearm (as defined in *Bailey*) *or* a finding that the defendant had "carrie[d]" a firearm.

The SJC brushed these decisions off as "inapposite" because "the juries in these cases already had been instructed properly on the alternative 'carry'

prong, and because there was insufficient evidence to convict the defendants under this alternative theory, the proper remedy was vacating the defendants' convictions rather than remanding for a new trial." Pet. App. 15a-16a. That ignores, not distinguishes, the parts of those decisions that address the question presented here—*i.e.*, the parts of the decisions about the "use" prong. After all, the Seventh, Tenth, and Eleventh Circuits held that the defendant must be acquitted—*not* just retried—when the *pre-Bailey* trial record could not support a finding of "use" under *post-Bailey* law. And that was the case *even though the government never had a chance to prove "use" under* Bailey. Applied to this case, that rule would plainly require that Mr. Guardado be acquitted, not just retried.

B. Five courts of appeals and at least one state supreme court have agreed with the SJC that, when the law changes after trial, the Double Jeopardy Clause does not preclude a retrial even where the trial court should have entered a judgment of acquittal under a correct understanding of the law.[4]

Fourth Circuit. In two cases, the Fourth Circuit, like the SJC, held that where "[a]ny insufficiency in proof was caused by the subsequent change in the law …, not the government's failure to muster evidence," then the government can retry the defendant consistent with double jeopardy principles. *United States v. Ellyson*, 326 F.3d 522, 533-34 (4th Cir. 2003); *see*

[4] The Third Circuit reached the same conclusion in *United States v. Nasir*, 982 F.3d 144, 176 (3d Cir. 2020), but this Court vacated that decision on other grounds, 142 S. Ct. 56 (2021).

also United States v. Ford, 703 F.3d 708, 711-12 (4th Cir. 2013).[5]

Sixth Circuit. In *United States v. Houston*, 792 F.3d 663 (6th Cir. 2015), the Sixth Circuit acknowledged that a "sufficiency-based reversal would preclude retrial under the Double Jeopardy Clause." *Id.* at 669. But the court wrote that, "[o]ddly enough," in the case of a post-trial change in the law, the sufficiency of the evidence must be measured against "the wrong instruction (what was given)," rather than "the right one (what would otherwise be given on remand)." *Id.* at 669-670.

Eighth Circuit. In *United States v. Harrington*, 997 F.3d 812 (8th Cir. 2021), the Eighth Circuit adopted the same view, holding that "when evidence offered at trial was sufficient to support the conviction under the law at the time but later was rendered insufficient by a post-conviction change in the law, the setting aside of a conviction on this basis is equivalent to a trial-error reversal rather than to a judgment of acquittal," so "the Double Jeopardy Clause does not bar retrial." *Id.* at 817.

Ninth Circuit. The Ninth Circuit also adopted the SJC's position, writing that, when the law changed after trial and the evidence is insufficient under the new standard, "double jeopardy protections do not bar retrial" because the government "is not being given a

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[5] In *Ford*, the Fourth Circuit suggested that its position is consistent with the Eleventh Circuit's decision in *Robison* and the Tenth Circuit's decision in *Wacker*. 703 F.3d at 711. As discussed above, however, *Robison* is not good law, pp. 17-18, *supra,* and the Tenth Circuit subsequently rejected the dicta in *Wacker* that the Fourth Circuit cited, pp. 14-15, *supra*.

second opportunity to prove what it should have proved earlier." *United States v. Weems*, 49 F.3d 528, 531 (9th Cir. 1995).

D.C. Circuit. In *United States v. Reynoso*, 38 F.4th 1083 (D.C. Cir. 2022), the D.C. Circuit recognized that "[a] successful sufficiency challenge results in outright acquittal, not retrial, because '[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.'" *Id.* at 1091 (quoting *Burks*, 437 U.S. at 11). But it held that "a defendant cannot make out a sufficiency challenge as to offense elements that the government had no requirement to prove at trial under then-prevailing law." *Id.*

Supreme Court of Connecticut. In *State v. Drupals*, 49 A.3d 962 (Conn. 2012), the Supreme Court of Connecticut held that "[d]ouble 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." *Id.* at 976 & n.12.

C. The conflict across the courts of appeals and state supreme courts will not resolve without this Court's intervention. There are at least three courts of appeals and one state supreme court on each side of the conflict, and there is no realistic chance that enough courts change positions that the conflict resolves on its own.

That is especially true given how closely contested this issue has been and how much confusion it has caused. As discussed above, both the Eleventh Circuit and SJC have issued decisions on both sides of the

conflict, with the Eleventh Circuit issuing two conflicting opinions and the SJC reversing its prior precedent in this case. The uncertainty and confusion this issue has caused will continue until this Court intervenes.

D. The circuit conflict is especially pernicious given the apparently uniform view in the state and federal courts that when an appellate court reverses the trial court by *clarifying* the law, rather than changing it, then the appellate court applies its *new*, clarified version of the law on sufficiency review—not the version applied by the trial court. *E.g.*, *Simpkins*, 90 F.4th at 1315-16. Even the SJC and courts on its side of the circuit conflict agree that appellate courts should not apply erroneous trial court instructions in conducting sufficiency review so long as the appellate court is not rejecting its own prior decision. *E.g.*, Pet. App. 11a-12a (distinguishing *Munoz* on this ground); *United States v. Hillie*, 14 F.4th 677, 682 (D.C. Cir. 2021) (sufficiency review rests on "how a properly instructed jury would assess the evidence").

As discussed in more detail below, this uniform line of cases strongly undermines the merits of the SJC's double jeopardy ruling. Pp. 30-34, *infra*. But it also heightens the unfairness of the circuit conflict. It is largely arbitrary that, for instance, Mr. Munoz was acquitted after the SJC rejected a model jury instruction making insurance an affirmative defense but Mr. Guardado can be retried after the SJC rejected its prior precedent making licensure an affirmative defense. In both appeals, the SJC rejected the legal premise on which the trial was conducted, and there is no reason one appeal should result in an acquittal and the other in a retrial.

II. The question presented is important and recurs frequently.

The Constitution's prohibition against putting criminal defendants twice in jeopardy "has been regarded as so important that exceptions to the principle have been only grudgingly allowed." *United States v. Wilson*, 420 U.S. 332, 343 (1974). The Double Jeopardy Clause "guarantees that the State shall not be permitted to make repeated attempts to convict [a defendant], thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Id.* (quotation marks omitted). Whether a defendant like Mr. Guardado can invoke such an important protection as a shield against a second trial—and the "embarrassment, expense and ordeal" that go with it—should not vary based on geographic happenstance.

That is especially true given that the question presented arises with considerable frequency. As the cases cited above show, appellate courts are often called upon to clarify the scope of criminal laws targeting conduct that ranges from structuring currency transactions, *see Weems*, 49 F.3d at 530, to water pollution, *see Robison*, 505 F.3d at 1224, to driving under the influence of alcohol, *see Shade*, 681 A.2d at 711-13, to uninsured operation of a motor vehicle or unlicensed possession of a firearm, *see Munoz*, 426 N.E.2d at 1162; Pet. App. 3a-4a. Not infrequently, the resulting decisions change existing precedent in some way. Every time such an appellate decision is issued, there will likely be cases in which the trial record is insufficient to support a conviction on a correct understanding of the law, even though the record might support a conviction on the erroneous view of the law that the

trial court applied. It is therefore critical that there be a uniform answer to the question of whether the Double Jeopardy Clause permits a retrial in that situation.

III. This case is an ideal vehicle for resolving the question presented.

This case cleanly raises the question presented. It is undisputed that the trial court did not instruct the jury that it needed to find lack of licensure. Pet. App. 2a. The Commonwealth also "concedes that it did not present evidence at trial to indicate that the defendant lacked a firearms license." Pet. App. 8a. It is therefore undisputed that, under a correct understanding of the law, "[t]he Commonwealth … did not introduce sufficient evidence to establish beyond a reasonable doubt an essential element of the crimes at issue." *Id.*

To the extent the Commonwealth notes, in its opposition, that Mr. Guardado did not object to the jury instructions at trial, that poses no obstacle to this Court's review. The SJC held that, because this Court did not decide *Bruen* until after Mr. Guardado's trial, it could consider Mr. Guardado's argument that lack of licensure is an essential element of unlawful possession of a firearm and ammunition even though Mr. Guardado did not raise that issue below. Pet. App. 51a-52a, 57a. This Court can and should simply accept that state-law procedural ruling.

IV. The Supreme Judicial Court's decision is wrong.

A. This Court has never explicitly confronted the question presented, but its decisions in *Burks* and *Musacchio* compel the conclusion that retrying Mr. Guardado would violate the Double Jeopardy Clause.

In *Burks*, this Court addressed "whether an accused may be subjected to a second trial when conviction in a prior trial was reversed by an appellate court solely for lack of sufficient evidence to sustain the jury's verdict." 437 U.S. at 2. Prior to *Burks*, the Court had drawn a distinction between trial court decisions ordering acquittal based on insufficient evidence (retrial prohibited) and appellate decisions holding that the trial court *should* have ordered acquittal (retrial permitted). *Burks* rejected that distinction, holding that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient." *Id.* at 18. As this Court put it: "The 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." *Id.* at 11. *Burks* thus stands for a straightforward proposition: If an appellate court concludes that the evidence in the trial record is "legally insufficient" to permit a finding of guilt, then the defendant should be acquitted.

Musacchio addressed what law an appellate court should apply in conducting sufficiency review. In *Musacchio*, the jury instructions erroneously added an element to the offense and the defendant argued that the trial evidence was legally insufficient to support a finding as to that extra element. 577 U.S. at 241. This

Court held that, for purposes of sufficiency-of-the-evidence review, the district court's erroneous instruction was irrelevant. "On sufficiency review," this Court explained, "[t]he reviewing court considers only the 'legal' question whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 243 (emphasis and quotation marks omitted). In answering that "'legal' question," an appellate court looks to the *actual* "elements of the crime," not the erroneous elements identified by the district court. "A reviewing court's limited determination on sufficiency review thus does not rest on how the jury was instructed." *Id.*

These two cases control the outcome here. *Burks* held that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient." 437 U.S. at 18. And *Musacchio* held that sufficiency-of-the-evidence review "does not rest on how the jury was instructed," but turns on the "elements of the crime," correctly understood. 577 U.S. at 243. While *Musacchio* involved an extra element, not a missing one, its reasoning turned on "the nature of a court's task in evaluating a sufficiency-of-the-evidence challenge," which is whether the evidence introduced at trial is legally sufficient to support a conviction. *Id.* That "'legal' question," *id.*, requires applying the legally correct elements of the offense—it would make little sense to compare the trial evidence to the wrong elements. *See Simpkins*, 90 F.4th at 1315-16 (applying *Musacchio* in a missing-element case because there is "no reason why a different result should follow" when "the jury instructions

omitted an essential element," rather than "*add[ed]* an element").

B. The SJC (and courts adopting its view) do not dispute the above principles as a general matter but conclude that they should not apply when the law changed after trial. According to the SJC, such an exception is needed so the government gets a "fair opportunity" to try its case before a trial court judge who applies the correct legal standard. Pet. App. 9a. That reasoning is flawed for a number of reasons.

1. The fundamental premise of the SJC's decision—that the government is entitled to a "fair opportunity" to try its case before a trial court judge who applies the correct legal standard—is simply wrong. This Court has repeatedly held that the Double Jeopardy Clause precludes a retrial when the initial trial ended or, according to a court, should have ended in an acquittal. *See Smith v. Massachusetts*, 543 U.S. 462, 466-67 (2005) (collecting cases). That categorical rule is needed to protect the "defendant's expectation of repose," which is at the core of the Double Jeopardy Clause. *Evans*, 568 U.S. at 319. This Court has repeatedly defended that rule even though it may "den[y] the prosecution a full and fair opportunity to present its evidence to the jury." *Id.* at 329.

There are numerous examples of this. If the district court's jury instructions impose an erroneously heightened burden on the government—for instance, by erroneously adding an element or giving an erroneously narrow instruction regarding an element—the government has no recourse if the jury acquits based on that legal error. *See, e.g.*, *Evans*, 568 U.S. at 328 ("There is no question that a jury verdict of acquittal

precludes retrial, and thus bars appeal of any legal error that may have led to that acquittal."). The government also has no recourse when the trial court enters a *pre*-verdict judgment of acquittal, even if that judgment rested *entirely* on legal error. *Evans*, 568 U.S. at 320 (trial court order directing acquittal precluded retrial even though "[t]here is no question the trial court's ruling was wrong; it was predicated upon a clear misunderstanding of what facts the State needed to prove under state law"); *Rumsey*, 467 U.S. at 211 (even though "the trial court relied on a misconstruction of the statute," the "acquittal on the merits bars retrial even if based on legal error"); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (district court's pre-verdict judgment of acquittal precludes retrial even though "the Court of Appeals thought, not without reason, that the acquittal was based upon an egregiously erroneous foundation").

Barring a retrial in this case would be no more "unfair" than in these other cases. In all of those cases, the government never got a "fair opportunity" to try its case to the jury on the correct law because the Double Jeopardy Clause's strong policy of repose barred a retrial when the trial ended in an acquittal. The same is true here: On a correct understanding of the law, the trial court should have ordered that Mr. Guardado be acquitted because the government failed to prove lack of licensure—an essential element of the crime. The government may not have known that lack of licensure was an element at trial, but that is no more unfair than ordering an acquittal based on legal error. Some vague concept of fairness to the government does not warrant an exception to the clear rule this Court laid out in *Burks* and *Musacchio*.

2. For similar reasons, an insufficiency argument based on a post-trial change in law cannot be brushed off as a mere "trial error" to which *Burks* does not apply—as some courts have suggested. *E.g.*, *Reynoso*, 38 F.4th at 1091. *Burks* holds that there can be a retrial after "trial error" only when there was *not* "evidentiary insufficiency." 437 U.S. at 15. This Court therefore struck a balance: Acquittal is required to protect a defendant's interest in repose when the trial record does not support a finding of guilt, but defendants are not "granted immunity from punishment because of *any* defect sufficient to constitute reversible error." *Id.* (emphasis added). Thus, a court is *always* required to consider the sufficiency of the evidence introduced at trial and order an acquittal if the evidence is insufficient. *Id.* at 17-18. And this Court held in *Musacchio* that, in considering evidentiary insufficiency, the court should apply the elements of the offense, *correctly understood*; it does not matter "how the jury was instructed." 577 U.S. at 243. Thus, the Double Jeopardy Clause only permits a retrial after "trial error" if the trial record permits a finding of guilt under a correct view of the law.

3. The SJC's decision and other decisions on the SJC's side of the split also rest on a flawed distinction between *clarifications* of the law and *changes* in the law—a distinction that conflicts with both the "fairness" and "trial error" rationales discussed above.

As far as Petitioner is aware, the SJC and every other court to consider the question after *Musacchio* have held that when the appellate court *clarifies* the law by rejecting the district court's interpretation, and holds that the evidence is legally insufficient to support a finding of guilt under the correct version of the

law, then the Double Jeopardy Clause precludes a retrial. For instance, as explained above, the SJC held in *Munoz* that the trial court had erred in following a model jury instruction that did not require the jury to find lack of insurance in order to convict the defendant of uninsured operation of a motor vehicle. 426 N.E.2d at 1162. The SJC then ordered acquittal, *not* a retrial, because the prosecution had not proven lack of insurance. *Id.* at 1165.

The D.C. Circuit also applies the change-in-law exception to *Burks* and *Musacchio*, *Reynoso*, 38 F.4th at 1091, but holds that clarifications to the law are different. In *United States v. Hillie*, 14 F.4th 677 (D.C. Cir. 2021), the court adopted an interpretation of a federal criminal statute that was significantly narrower than the interpretation adopted by the district court and *seven* other courts of appeals. *Id.* at 691-93. Rather than remand for a retrial under that interpretation, however, the court applied its narrow interpretation to the defendant's sufficiency-of-the-evidence argument, found the evidence insufficient on several counts, and ordered a "judgment of acquittal." *Id.* at 689. Under *Musacchio*, the court explained, an appellate court evaluating the sufficiency of the evidence looks to "how a properly instructed jury would assess the evidence." *Id.* at 682.

Other courts are in accord. For instance, in *Simpkins*, neither the defendant, the government, nor the trial court recognized that an essential element of the offense was that the defendant not be Indian. 90 F.4th at 1314. The government introduced no evidence regarding whether the defendant was Indian, so the Tenth Circuit, applying *Musacchio*, found insufficient evidence to support a conviction and ordered

"a judgment of acquittal." *Id.* at 1317-18. In *People v. Pennington*, 400 P.3d 14 (Cal. 2017), the trial court had ruled that a harbor patrol officer was a "peace officer" as a matter of law in a prosecution for battery of a peace officer. The prosecution thus introduced no evidence on that issue. *Id.* at 17, 24. The California Supreme Court disagreed, holding that the prosecution had the burden to prove to the jury, as a factual matter, that the harbor patrol officer's "primary duty is law enforcement." *Id.* at 16. Because the prosecution had introduced no such evidence, the Court held, *Burks* precluded a retrial. *Id.* at 24.

The distinction between clarifications and changes to the law makes no sense when viewed against the "fairness" and "trial error" justifications for the change-in-law exception that the SJC and other courts have articulated. Starting with "fairness," the government hardly had a less "fair" opportunity to prove its case in this case than it did in the clarification cases. In *Munoz*, the government had followed the applicable model jury instruction; in *Hillie*, the government had followed the legal standard adopted by *seven* other courts of appeals; in *Simpkins*, neither the defendant nor the court suggested that the government needed to introduce evidence of non-Indian status; and in *Pennington*, the government had followed the trial court's ruling that it did not need to prove "peace officer" status. While no appellate court formally changed positions, the prosecutors followed what they reasonably perceived to be the law—and yet were denied an opportunity for a retrial under the correct legal standard.

The *change* in law in this case was arguably at least as predictable as the *clarifications* in the cases

discussed above. At the time of trial, this Court had already granted certiorari in *Bruen*, 141 S. Ct. 2566 (2021), and multiple federal courts had held that possession of a firearm outside the home was constitutionally protected conduct, *e.g.*, *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012); *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017). Given these pre-trial developments, the ultimate change in law at issue in this case, while not inevitable, was far from shocking. Because clarifications can be just as unpredictable as changes, distinguishing between cases that *clarify* versus *change* the law is not a coherent way to ensure "fairness" to the government.

The point is not, of course, that the clarification cases are wrong—to the contrary, those cases follow directly from *Musacchio*. The point is that the (correct) reasoning in the clarification cases makes clear why the change-in-law cases should come out the same way: Under this Court's precedent, the government is entitled to one chance to prove its case, not one chance to prove its case before a trial court judge who applies the correct legal standard. *See Burks*, 437 U.S. at 11 n.6 ("[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination.").

The change-versus-clarification distinction is also impossible to square with the decisions classifying cases like this one as involving mere "trial error" for which a retrial is permissible. The logical implication of the "trial error" argument is that *any* jury-instruction challenge is a "trial error" that, if successful,

would *always* result in a retrial under the correct instruction. Yet that is flatly inconsistent with the apparently universal view that a court of appeals can *clarify* the law and then apply its clarified standard to evaluate an insufficiency challenge—no matter how unexpected the clarification may have been and how much the law set forth by the appellate court differs from the law applied at trial.

* * * * *

In sum, had Mr. Guardado been tried in Indiana, rather than Massachusetts, his criminal proceedings would be over. This Court should not allow such geographic happenstance to determine whether the Commonwealth gets a second chance to prove not only that Mr. Guardado possessed a firearm, but that he did so unlawfully.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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February 14, 2024