No. 23-886

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

REPLY BRIEF FOR PETITIONER

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The split in authorities concerning the question presented is anything but "illusory." Opp. 6. The Seventh, Tenth, and Eleventh Circuits have all squarely held that, where an appellate court corrects its precedent establishing the elements of a criminal offense after a defendant's trial is complete, the Double Jeopardy Clause bars a retrial unless "the jury could have returned a guilty verdict *if properly instructed*." *United States v. Miller*, 84 F.3d 1244, 1258 (10th Cir. 1996) (emphasis added); *see also, e.g.*, *United States v. Hightower*, 96 F.3d 211, 215 (7th Cir. 1996) (retrial prohibited where "the evidence in the record will not sustain a conviction under the law of use as the Supreme Court has now authoritatively interpreted it"); *United States v. Mount*, 161 F.3d 675, 678 (11th Cir. 1998) (retrial prohibited unless the trial record "contain[s] sufficient evidence under which a properly instructed jury could have convicted [the defendant]").

The Commonwealth ignores these holdings. It ignores the fact that the SJC and Second Circuit acknowledge a split. *See* Pet. App. 13a-14a; *United States v. Bruno*, 661 F.3d 733, 743 n.2 (2d Cir. 2011). It concedes (at 22-23) that this case would have come out differently under the Pennsylvania Supreme Court's decision in *Commonwealth v. Shade*, 681 A.2d 710 (Pa. 1996). It ignores the fact that the SJC itself was, until this case, on the other side of the split. *See Commonwealth v. Beal*, 52 N.E.3d 998, 1010 & n.12 (Mass. 2016) (retrial prohibited where the trial record was "insufficient" "if the judge had instructed the jury properly"); Pet. App. 13a n.3 (*Beal* "is no longer valid

precedent"). And its primary argument for distinguishing the Seventh, Tenth, and Eleventh Circuit decisions—that the government "did not ask for a new trial … based on the 'use' prong" that the Supreme Cout had narrowed, Opp. 16—is entirely made up. There is thus a clear and acknowledged split of authority that this Court should resolve.

The SJC's decision also blatantly conflicts with this Court's precedent, as the Commonwealth cannot seriously dispute. The Commonwealth acknowledges that an "acquittal" bars a retrial. Opp. 29. And this Court just reaffirmed—unanimously—that an "acquittal" means "*any* ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *McElrath v. Georgia*, 601 U.S. 87, 96 (2024) (emphasis added). The SJC plainly made such a "ruling": "The Commonwealth … did not introduce sufficient evidence to establish beyond a reasonable doubt an essential element of the crimes." Pet. App. 8a. That should be the end of the matter. Tellingly, the Commonwealth ignores *McElrath*.

This Court granted certiorari in *McElrath* without any split of authority. NAPD/MACDL Br. 7, 10-11. Certiorari is even more warranted here, where there is a split. Put simply, the Commonwealth charged Mr. Guardado with unlicensed possession of a firearm but proved only possession of a firearm. The Double Jeopardy Clause bars the Commonwealth from trying again.

I. There is a clear split in authority.

A. Federal courts

The Seventh, Tenth, and Eleventh Circuits have, in multiple cases, addressed a question that is identical to the one presented here. In each case, the defendant was convicted of a statute that prohibited the "use" of a firearm. *E.g.*, *Hightower*, 96 F.3d at 215. After trial, the Supreme Court, in *Bailey v. United States*, defined "use" more narrowly than it had been defined at trial. 516 U.S. 137, 142-43 (1995). So, in each case, the court of appeals had to decide whether the government could retry the defendant. *E.g.*, *Hightower*, 96 F.3d at 215. All three courts reached the same legal holding: The Double Jeopardy Clause bars a retrial unless, given the trial record, a jury that had been "properly instructed," *Miller*, 84 F.3d at 1258; *Mount*, 161 F.3d at 678, regarding "the law of use as the Supreme Court has now authoritatively interpreted it," *Hightower*, 96 F.3d at 215, could have convicted the defendant. Those holdings conflict with the SJC's decision here, which permitted retrial even though a "properly instructed" jury could *not* have convicted Mr. Guardado.

The Commonwealth ignores these holdings. Instead, it tries to distinguish these cases because the criminal statute at issue also prohibited "carry[ing]" a firearm—a term whose meaning did not change. That is a red herring. The "carry" prong was only relevant in that the courts' sufficiency analysis had to consider whether the trial record supported a conviction under either the "use" prong or the "carry" prong. Each court squarely held, however, that its sufficiency-of-the-evidence inquiry must apply the *correct* interpretation of "use," not the incorrect "use" standard applied at

trial. That is the holding that conflicts with the SJC's decision.

Two key errors permeate the Commonwealth's reliance on the "carry" prong. First, the Commonwealth argues that, because of the "carry" prong, the change in the meaning of "use" "did not affect the government's motivation to introduce evidence of a defendant's conduct relating to firearms." Opp. 11. That makes no sense. Prior to *Bailey*, it was easy for the government to prove "use." *See United States v. Smith*, 82 F3d 1564, 1567 (10th Cir. 1996). If the government could meet that low bar, it had no motivation to introduce additional evidence to meet *Bailey*'s then-unknown "use" standard or to invoke the "carry" prong at all. It was only after *Bailey* that the government would have realized that it needed to meet the higher "use" bar and/or try to prove "carry."

Second, the Commonwealth argues that, in the Seventh, Tenth, and Eleventh Circuit decisions, "the government did not even request retrial on 'use.'" Opp. 11; *see also, e.g.*, Opp. 16, 20. The Commonwealth makes this up out of thin air. The government conceded that the *trial record* did not support a finding of "use," correctly understood. That is the same concession the Commonwealth makes here. Opp. 3 ("the Commonwealth offered no evidence regarding lack of licensure"). But, with one exception, none of the decisions cited in the petition suggests that the government conceded that it could not prove "use" *in a retrial*.[1]

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[1] The government's concession in *United States v. Gonzalez*, 93 F.3d 311, 319 (7th Cir. 1996), that "defendants probably did not 'use' the firearm" appears in no other case.

Stripping away these errors, there is little left of the Commonwealth's circuit-split argument.

Seventh Circuit. The Seventh Circuit's law most clearly splits with the SJC (and other cases on the SJC's side of the split). In three separate cases, the Seventh Circuit explicitly held that, if the pre-*Bailey* trial record does not support a conviction under post-*Bailey* law, the government does not get a retrial to prove "use" under *Bailey*. Pet. 15-16. In *Hightower*, the court evaluated the trial record in light of the "law of use as the Supreme Court has now authoritatively interpreted it." 96 F.3d at 215. In *Gonzalez*, the Court evaluated sufficiency based on "the new law of 'use.'" 93 F.3d at 321. And in *United States v. Robinson*, the court held that "if none of the evidence presented qualifies as either active-employment 'use' or 'carry,' we will reverse the conviction outright." 96 F.3d 246, 250 (7th Cir. 1996). These principles were dispositive in *Hightower*. 96 F.3d at 215.

The Commonwealth offers no serious response. It ignores *Robinson*, which clearly summarizes Seventh Circuit law. It baselessly suggests that the government in *Hightower* did not "request[] retrial on the 'use' issue." Opp. 20. And it ignores *Gonzalez*'s holding that the sufficiency-of-the-evidence inquiry applies the "new law of 'use.'" 93 F.3d at 321. The error in *Gonzalez* was "more akin to trial error," Opp. 19, only because the trial record *could* support a conviction under the "carry" prong.

Tenth Circuit. The Tenth Circuit's decisions in *Miller* and *Smith* also conflict with the SJC's decision—as even the SJC recognized. Pet. App. 13a-14a; *see also Bruno*, 661 F.3d at 743 n.2. *Miller* 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. *Smith* applied that rule and held that a remand would violate the Double Jeopardy Clause if the pre-*Bailey* trial record did not support a guilty verdict under post-*Bailey* law. 82 F.3d at 1567-68.

The Commonwealth's response to *Smith* is, again, that "[t]he government did not ask for a new trial or affirmance based on the 'use' prong." Opp. 16. That is, again, made up. *Smith*, 82 F.3d at 1566 (conceding only that the *trial record* could not support a finding of "use" post-*Bailey*). The Commonwealth's focus on *Miller* and *Smith*'s discussion of the "carry" prong simply ignores the relevant parts of those decisions.

United States v. Wacker, 72 F.3d 1453 (10th Cir. 1995), is consistent with *Miller* and *Smith*. *See* Pet. 14-15. *Wacker* involved a pre-*Bailey* conviction on three counts for "use" of a firearm. Counts 2 and 12 were *not* supported by the pre-*Bailey* trial record, so the Tenth Circuit *prohibited retrial*. 72 F.3d at 1463-64. As to count 7, the court "[could not] say how a jury might decide this issue if properly instructed" under *Bailey*, so the court permitted a "new trial" *limited to that count*. *Id.* at 1464-65. *Wacker*'s holding was thus the same as *Miller* and *Smith*: If the pre-*Bailey* trial record supports a conviction under *Bailey*, the government gets a retrial; if not, no retrial.

The Commonwealth cannot explain why, on its view, *Wacker* did not allow a retrial on counts 2 and 12 given the change in law—the Commonwealth addresses this issue only with rank speculation in a footnote. Opp. 14 n.5. The Commonwealth claims (at 14-15) that *Wacker* did not find sufficient evidence to support a conviction on count 7, but that is wrong: The court "[could not] say how a jury might decide [count

7] if properly instructed" under *Bailey*. *Wacker*, 72 F.3d at 1464-65. The Commonwealth is thus wrong that, on petitioner's view, "no retrials should have been permitted." Opp. 14 n.5. The Commonwealth is left with *Wacker*'s dicta, which, on the Commonwealth's reading, is inconsistent with *Wacker*'s dismissal of counts 2 and 12 and the later decisions in *Miller* and *Smith*.

United States v. Pearl, 324 F.3d 1210 (10th Cir. 2003), confirms petitioner's reading of Tenth Circuit law, not the Commonwealth's. *Contra* Opp. 18. Pearl was convicted of possessing pornography depicting someone who "is, or appears to be," a minor. 324 F.3d at 1213. The Supreme Court held, post-trial, that the "appears to be" prong is unconstitutional. *Id.* In deciding whether to permit a retrial, the Tenth Circuit wrote, citing *Smith*, that "[w]here the government produces *no* evidence at trial, then double jeopardy bars retrial." *Id.* at 1214. That is this case: The Commonwealth "offered no evidence regarding lack of licensure." Opp. 3. Thus, under *Pearl*, Mr. Guardado could not be retried. In *Pearl*, however, the trial record permitted a finding that the children "were actual minors." 324 F.3d at 1214. It was only for that reason that the error was a "'trial error' rather than 'pure insufficiency of evidence,' [so] Mr. Pearl may be retried without violating double jeopardy." *Id.*

Eleventh Circuit. *Mount* clearly held—citing *Hightower*, *Smith*, and *Robinson*—that sufficiency-of-the-evidence review turns on whether a "properly instructed jury" could have convicted the defendant. 161 F.3d at 678. The Commonwealth's response again presumes, without any basis, that the government did not seek a retrial on "use." The Eleventh Circuit's

later decision in *United States v. Robison*, 505 F.3d 1208, 1224-25 (11th Cir. 2007), is irrelevant because, as the Commonwealth does not dispute, *Mount* controls as the earlier decision. Pet. 17-18.

B. State courts

The Commonwealth concedes that Mr. Guardado could not be retried under *Commonwealth v. Shade*, 681 A.2d 710 (Pa. 1996). Opp. 22-23; *see* Pet. 18-19. The Commonwealth bizarrely suggests that *Shade* was not a double-jeopardy decision, but *Shade*'s only basis for barring a retrial was that the trial record was insufficient to support a conviction (under post-trial law). *Shade*, 681 A.2d at 713. That reasoning plainly rests on the Double Jeopardy Clause. *See Burks v. United States*, 437 U.S. 1, 16-18 (1978). And while the majority's reliance on double jeopardy may have been implicit, the concurring Justice's was not. *Shade*, 681 A.2d at 714 (Cappy, J., concurring).

The Commonwealth cites (at 9-10) other state cases that conflict with the Pennsylvania Supreme Court, but that only deepens the split and emphasizes the importance of the question presented. Moreover, those cases are not as unequivocal as the Commonwealth suggests. The Illinois Supreme Court, for instance, recently rejected the portions of *People v. Casler*, 181 N.E.3d 676 (Ill. 2020), on which the Commonwealth relies (at 9), highlighting the confusion in the lower courts. *See People v. Prince*, 220 N.E.3d 1013, 1018-19 (Ill. 2023).

II. The Commonwealth accepts that the question presented is otherwise cert-worthy.

The Commonwealth identifies no reason to deny certiorari beyond its erroneous arguments about the

split in authority. The Commonwealth disputes neither that the question presented arises frequently and is incredibly important when it does arise, Pet. 24-25; NAPD/MACDL Br. 8-13, nor that this case presents an ideal vehicle, Pet. 25.

III. The SJC's decision is egregiously wrong.

An appellate court reviewing a criminal conviction for sufficiency of the evidence must identify the *correct* elements of the offense and then consider whether the trial record contains sufficient evidence as to each element. *Musacchio v. United States*, 577 U.S. 237, 243 (2016) ("sufficiency review … does not rest on how the jury was instructed"). If the record is insufficient, then the Double Jeopardy Clause bars a retrial. *Burks*, 437 U.S. at 18. If (and only if) the record is sufficient, then the court can consider whether other "trial error" requires a retrial. *Id.* at 15. This Court summarized these principles earlier this Term. It reiterated that an "acquittal" bars a retrial and that an "acquittal" includes "*any* ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *McElrath*, 601 U.S. at 96 (emphasis added).

Those principles bar a retrial here because the SJC made a "ruling that the prosecution's proof is insufficient to establish criminal liability." *Id.* It held: "The Commonwealth … did not introduce sufficient evidence to establish beyond a reasonable doubt an essential element of the crimes." Pet. App. 8a. That is plainly an acquittal under *McElrath*. The Commonwealth concedes (at 29-30) that an "acquittal" bars a retrial but ignores *McElrath*'s holding as to what an acquittal is—despite *amici*'s focus on that issue. NAPD/MACDL Br. 3-4, 7, 16.

The Commonwealth argues that, while there was "evidentiary insufficiency," a retrial is nevertheless permissible because the *reason* for that insufficiency was not a failure by the prosecution but the SJC's post-trial ruling that lack of licensure is an element. Opp. 26. But the Double Jeopardy Clause does not permit any inquiry into *why* the trial evidence was insufficient. Regardless whether the trial court misunderstood the elements of the offense, applied a version of the elements that was later rejected, or erroneously excluded key prosecution evidence, the litany of cases cited in the petition and *amicus* brief establish a categorical rule that, as *McElrath* put it, "any ruling that the prosecution's proof is insufficient" bars a retrial. 601 U.S. at 96; Pet. 28-30; NAPD/MACDL Br. 5-10. If there were an exception for "evidentiary insufficiency *not* due to a failure by the government," Opp. 2, then those cases would have come out differently.

The Commonwealth cites no case in which this Court permitted a retrial after a finding of evidentiary insufficiency. It cites (at 25-26) *Lockhart v. Nelson*, 488 U.S. 33 (1988), but the trial record there *did* support a conviction; the appellate court held merely that the trial court had erred in admitting certain prosecution evidence. *Id.* at 40. While the record may have been insufficient *without* that evidence, the sufficiency inquiry looks to the *actual* trial record, and the disputed evidence *had been admitted*. *Id.* The Commonwealth also cites (at 24-25) *Tibbs v. Florida*, 457 U.S. 31 (1982), but *Tibbs* reiterated that a reviewing court's "reversal based on the insufficiency of the evidence has the same effect" as a jury acquittal—*i.e.*, it categorically bars a retrial. *Id.* at 40-41.

IV. There is no coherent distinction between an appellate court correcting a trial court and correcting its own precedent.

The SJC's decision is also irreconcilable with the universal understanding that, when an appellate court rejects the trial court's understanding of the elements of the offense, the appellate court applies the *correct* elements to its insufficiency/double-jeopardy analysis, not the elements applied at trial. Pet. 30-34; NAPD/MACDL Br. 14-16.

The Commonwealth's only response is that, when the court of appeals rejects a trial court's decision rather than its own, the "government's burden has not changed." Opp. 31. That is wrong. For instance, in *People v. Pennington*, 400 P.3d 14, 18 (Cal. 2017), a pretrial order "eliminated the People's burden to prove" that the victim's "primary duty" qualified him as a "peace officer." *Id.* at 17. Thus, at trial, "the People had no reason to offer evidence concerning [the victim's] primary duty." *Id.* at 24. Nevertheless, after the California Supreme Court held that the prosecution *did* have to prove "primary duty," *id.* at 23, the court held that double jeopardy barred a retrial because the prosecution failed to meet that burden, *id.* at 24. Similarly, in *Commonwealth v. Munoz*, the SJC prohibited a retrial even though the prosecution satisfied the elements identified by the trial court, which were consistent with model jury instructions. 426 N.E.2d 1161, 1162, 1165 (Mass. 1981).

In *Pennington*, *Munoz*, and the other cases the petition cited, the "government's burden … changed," Opp. 31, and the "evidentiary insufficiency resulted from a trial error," Opp. 27, just as much as in this case. The incoherent distinction between an appellate

court correcting the trial court and an appellate court correcting itself weighs heavily in favor of granting certiorari, as it heightens the split in authorities and highlights the incoherence of the SJC's decision.

CONCLUSION

This Court should grant the petition.

Respectfully submitted.

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