No. _____

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In the Supreme Court of the United States

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AMADI SOSA,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

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

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. In a joint trial on a joint venture murder charge, the trial judge implemented a state protocol[1] that enabled one co-defendant to give perjured testimony in his own defense and barred the other defendant [Petitioner] from cross-examining the perjuring witness about the influence of this order on his testimony. That order also authorized the prosecutor to make unlimited use of the perjury.

The judge then denied Petitioner's prompt motion for relief from prejudicial joinder. The perjury protocol was implemented on the trial judge's terms.[2]

The parties agree that the vast majority of the perjuring witness's testimony was false. No specific instances of perjury can be identified given the requirements for implementing the perjury protocol.

In these circumstances:

**A. Did the combined impact of implementing the perjury protocol and denying severance violate Petitioner's due process right to a trial free of the knowing use of perjured testimony against him by state officials?**

**B. Did the perjury protocol as implemented violate Petitioner's sixth amendment right to confront and cross-examine this perjuring witness?**

2. Under Massachusetts felony-murder doctrine of "constructive malice," the intent to commit the predicate felony is substituted for the malice aforethought element of murder.[3] For first degree felony-murder, the predicate felony must be one punishable by life imprisonment. Thus

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1 Rule 3.3(e), Massachusetts Rules of Professional Conduct, a23.

2 *Commonwealth v. Leiva*, 484 Mass 766, 146 N.E.3d 1093 (2020).

3 *Commonwealth v. Matchett*, 386 Mass 492, 502, 436 N.E.2d 400 (1982).

the first element of felony-murder in the first degree is that the killing occurred in the course of the commission of a felony for which the maximum penalty is life imprisonment.[4]

**Is the fact of the maximum penalty for the specified predicate felony a *Winship*[5] fact that must be proved by evidence beyond a reasonable doubt?**

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4 *Commonwealth v. Burton,* 455 Mass 55, 57, 876 N.E.2d 411 (2007).

5 *In re Winship,* 397 U.S. 358, 990 S.Ct 1068, 25 L.Ed.2d 368 (1970)

## PARTIES TO THE PROCEEDINGS IN STATE COURT

Petitioner Amadi Sosa was a defendant in the Hampden County Superior Court joint venture murder prosecution, accused as an accomplice, and the appellant in the Massachusetts Supreme Judicial Court review of his convictions, *Commonwealth v. Sosa*, No. SJC-12166. Julio Leiva was Sosa's co-defendant, charged with shooting the victim. Leiva testified in the joint trial of these two defendants, under an order implementing Rule 3.3(e) of the Massachusetts Rules of Professional Conduct. His appeal was decided separately by the Supreme Judicial Court. *Commonwealth v. Leiva*, 484 Mass 766, 146 N.E.3d 1093 (2020). He was not a party to Petitioner's state appeal.

Respondent Commonwealth of Massachusetts was the plaintiff-appellee in the Supreme Judicial Court.

## RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6 petitioner states that he has no relationships that require disclosure.

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## JURISDICTION

The Supreme Judicial Court's judgment was entered November 30, 2023. A timely petition for rehearing was denied on February 16, 2024. (App., infra ). A timely motion to enlarge the time for filing a petition for a writ of certiorari to July 15, 2024 was granted on May 9, 2024 [Application 23A1001]. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution provides in relevant part:

"[T] he Laws of the United States * * * shall be the supreme Law of the Land * * * any Thing in the Constitution or laws of any State to the Contrary notwithstanding."

*U.S. Constitution art. VI, cl. 2.*

The Fifth Amendment to the Constitution provides in relevant part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the Constitution provides in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . ., and to have the assistance of counsel for his defense."

The Fourteenth Amendment to the Constitution provides in relevant part:

"No state shall . . . deprive any person of life, liberty, or property, without due process of law(.)"

## STATEMENT OF THE CASE

### INTRODUCTION

Petitioner Amadi Sosa was convicted of first degree murder in a joint trial with co-defendant Julio Leiva. Two orders by the trial judge interjected perjured testimony into the trial stripping Petitioner of his due process right to a trial free from the knowing use of perjury by state authorities. The judge's order wholly deprived Petitioner of his right to confront and cross examine Leiva about his perjury.

This happened to Petitioner only because he was being tried jointly with Leiva and the judge enabled Leiva's perjury but denied Petitioner's motion for relief from prejudicial joinder.

Without warning at the close of the prosecution's case, Leiva's attorney invoked Rule 3.3(e) of the Massachusetts Rules of Professional Conduct, requesting that the trial judge enable Leiva to perjure his testimony. The judge, the prosecutor and Petitioner's counsel were all unaware of the fact that, in 2003, the Massachusetts Supreme Judicial Court had devised a protocol, based on Rule 3.3(e), for dealing with the problem of "client perjury" by permitting a defendant to testify falsely

with only minimal assistance of counsel and limited cross-examination. Leiva's motion prompted a brief sidebar discussion and a short recess to permit some superficial research. The judge then issued an impromptu order having three unconstitutional provisions: [1] Leiva was enabled to perjure his testimony while enjoying the benefit of his lawyer's confidences; [2] The prosecutor was allowed to make unlimited use of Leiva's testimony; and [3] Leiva could not be cross-examined about the fact that he was testifying under Rule 3.3(e) nor about the impact of that protocol on his testimony or credibility.

When implemented the Rule 3.3(e) protocol misleads the jury by masking the facts that the court is knowingly permitting the perjuring witness to give perjured testimony. This is a device that is at war with justice and the truth. *United States v. Alvarez*, 567 U.S. 709, 720-721, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012). There was a simple remedy for Petitioner's conundrum, and he promptly asked for it: relief from prejudicial joinder. Without explanation the trial judge denied both motions Petitioner made, one before and the other after Leiva testified. In these circumstances, Petitioner was constitutionally entitled to a separate

trial. See, *Da Luna v. United States*, 308 F2d 140, 155 (5th Cir. 1962). But the Massachusetts Supreme Judicial Court rejected Petitioner's claims of constitutional error.

Petitioner was convicted of felony-murder on a verdict that he was involved in a death that occurred during the commission of an attempted armed robbery, which is punishable by life imprisonment. To convict Petitioner of this type of murder the prosecution had to prove that the predicate felony was a life felony. *Commonwealth v. Sosa*, 493 Mass 104, 119, 223 N.E.3d 5 (2023), a12-a13. But no evidence was presented to prove this point; it was established by information conveyed to the jury in a judicial instruction. a42-a44. Petitioner asserts that the fact of a life felony is an element that must be proved by evidence beyond a reasonable doubt. The Supreme Judicial Court held that the proposition is not an element that must be found by a jury; it did not rule on the issue of proof by evidence beyond a reasonable doubt. It denied his claim of right to an acquittal. *Sosa*, *id.*

Because the Massachusetts courts have denied Petitioner constitutionally required relief, he asks this Court to review and reverse

his convictions.

## Key Procedural Facts

In January 2016 Petitioner was called to trial in the Superior Court of Hampden County Massachusetts with codefendants Julio Leiva and Alex Santana in a joint venture murder prosecution. Leiva was accused of shooting William Serrano on November 10, 2013 in the course of a confrontation that might have been an attempted armed robbery. Petitioner and Santana allegedly participated as Leiva's accomplices.

In a pretrial hearing on January 21, 2016 the trial judge granted Santana's motion to sever, with the prosecutor's assent. This meant that a second trial in the case was at least contemplated before Petitioner's joint trial with Leiva commenced.

## The Essential Facts Of The Crime

According to the only eyewitness, Caitlin Roncalli, she was sitting on the back porch with her new boyfriend, Serrano. Three men came onto the unlit porch. One of the men, Julio Leiva, was Roncali's longtime "on and off" boyfriend; he was armed with a shortened rifle. Leiva instructed the two men with him to "run" Serrano's pockets. The two gestured as if

to do that. Suddenly, without provocation, Leiva shot Serrano seven times. 493 Mass at 107, a3. Police arrived within minutes in response to a 911 call. Serrano subsequently died at a local hospital.

Roncali immediately provided police with information about Leiva, asserting that he had carried the rifle that was used to shoot Serrano. 493 Mass at 106, a2. Later, referring to photo arrays shown to her, Roncalli identified John and Amadi Sosa as the two Leiva accomplices. From that point through her trial testimony, Roncalli never waivered from her "210%" certainty that John and Amadi were the two Leiva accomplices. However, police investigation definitively established that John Sosa could not have been at the shooting because his GPS monitor placed him elsewhere at the time. Thereafter the police charged Alex Santana, as the second accomplice. Roncalli claimed to be acquainted with both Sosa brothers and Santana.

Roncalli never placed Santana at the shooting, consistently naming John and Amadi Sosa as the accomplices. This likely contributed to the prosecutions agreement to sever Santana from the trial of Leiva and Sosa. Roncalli was the only witness to place Amadi at the scene. Amadi Sosa's

defense was misidentification.

At the close of the evidence, the judge directed a verdict in Petitioner's favor of armed assault with intent to murder. a25. The jury convicted Petitioner of first degree murder on both felony-murder and deliberately premeditated theories, armed assault with intent to rob and unlawful possession of ammunition, each as a joint venturer. It acquitted him of armed robbery.

Following a timely notice of appeal, Petitioner's direct appeal was heard by the Supreme Judicial Court, which affirmed each of his convictions except unlawful possession of ammunition, which it reversed and remanded for a new trial. *Commonwealth v. Sosa*, 493 Mass 104, 223 N.E.3d 5 (2023). Petitioner's timely motion for reconsideration or modification was denied, as was his motion for a new trial. a21-a22.

**A. The First Question This Petition Presents Is Whether The Trial Judge's Order Implementing The Perjury Protocol Violated Petitioner's Rights To A Trial Free From The Knowing Use By State Authorities Of Perjured Testimony, And To Confront And Cross Examine The Perjuring Witness, Leiva, Such That Relief From Prejudicial Joinder Was Constitutionally Required.**

**1. Presentation of Petitioner's Federal Perjury And Confrontation Claims To The State Courts.**

**a. Trial Court Motions For Relief From Prejudicial Joinder.**

Petitioner's core claim of *judicial error* in the implementation of the Rule 3.3(e) protocol is two-fold. First, the judge's decision to implement the Rule 3.3(e) protocol interjected perjury into Petitioner's trial, violating Petitioner's due process right to a trial free from the knowing use of perjury by state authorities and his right to cross-examine Leiva about this arrangement and its impact on his credibility. This judicial order barred cross-examining Leiva about the Rule 3.3(e) protocol and how it might affect his credibility. It authorized the prosecutor to exploit Leiva's perjury. Second, given the Rule 3.3(e) order, because only severance could protect Petitioner's federal rights, relief from prejudicial joinder was constitutionally required.

These claims were properly and timely presented to the trial court by Petitioner's motions for relief from prejudicial joinder, made promptly after the trial judge issued the Rule 3.3(e) order and repeated after Leiva finished testifying. a39, a40.

Under Massachusetts law, Rule 22 of the Rules of Criminal

Procedure specifies the actions required to preserve an issue for appellate review. Rules of procedure have the force of statutory law. *Commonwealth v. Yasin*, 483 Mass 343, 350, 132 N.E.3d 531 (2019). Rule 22 provides, in pertinent parts:

> [I]t is sufficient that a party, at the time of the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court(.)

Massachusetts Rules of Criminal Procedure, Rule 22 [cleaned up]. Either an articulated objection **or** a request for a specific remedial action serves to preserve an issue for appellate review under this rule. *Commonwealth v. Baseler*, 419 Mass 500, 514 n. 9, 645 N.E.2d 1179 (1995); *Toci v. Toci*, 490 Mass 1, 8-9, 189 N.E.3d 241 (2022).

The proper timing of a motion for relief from prejudicial joinder is specified in *Commonwealth v. Moran*:

> [Judicial economy] considerations must yield at some point to the rights of the accused. The point is reached when the prejudice resulting from a joint trial is so compelling that it prevents a defendant from obtaining a fair trial. In such circumstances, and upon the making of a timely motion, failure to sever constitutes an abuse of discretion.

387 Mass 644, 659, 442 N.E.2d 399, 407 (1982) [The risk that perjury by

a codefendent will be introduced is prejudice requiring severance: "The Commonwealth's use of [perjured] testimony by a codefendant is fundamentally unfair and does not serve the public's interest in justice" *Id*, at 408].

Petitioner's motions for relief from prejudicial joinder fully satisfied Rule 22 in preserving Petitioner's claims of judicial error in implementing Rule 3.3(e) in the trial court.

**2. Presentation In The Supreme Judicial Court.**

Petitioner asserted that the trial judge erred in implementing Rule 3.3(e) in his joint trial with Leiva, which encompassed enabling Leiva to perjure his testimony, authorizing the prosecutor to make unlimited use of Leiva's perjury, and barred Petitioner from cross-examining Leiva about testifying under the perjury protocol, and in denying him relief from prejudicial joinder, which was the only remedy available at that time. The SJC rewrote that claim as asserting that prosecutorial misconduct in knowingly using Leiva's perjury, or allowing Leiva's perjury to go uncorrected, constitutionally required severance. 493 Mass at 109-110, a5. The court pointed out that Petitioner's counsel never argued in the trial

court that severance should be granted because of Leiva's false testimony. *Id.*, at n. 5.

Nevertheless, the SJC ruled on the merits of the claims it identified as defaulted, concluding: "Accordingly, because the prosecutor did not knowingly use, or knowingly fail to correct, false testimony from Leiva, *the defendant's due process rights were not violated.*" 493 Mass at 111, a6 [emphasis added]. This is a determination of federal constitutional law that is part of the court's analysis and decision. Because the state court ruled on the merits of the purportedly waived claim, any waiver is not independent of federal law:

> [W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong is not independent of federal law, and our jurisdiction is not precluded.

*Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

## B. REASONS FOR GRANTING THE WRIT ON QUESTION ONE

### 1. On Direct Appellate Review The Supreme Judicial Court Failed To Apply Controlling Federal Precedents As Required By The Supremacy Clause.

Petitioner filed a timely notice of appeal. By statute this entitled him

to review of his entire case. M.G.L. c. 278, §33E.[6] Under the Supremacy Clause, Petitioner was entitled to have the Supreme Judicial Court adjudicate each of the federal constitutional claims properly presented to that Court. *Arizona v. Evans*, 514 U.S. 1, 9-10 (1995)["State courts, in appropriate cases, are not merely free to – they are bound to – interpret the United States Constitution. In doing so, they are *not* free from the final authority of this Court"].

On direct review, the Supreme Judicial Court failed to acknowledge or adjudicate Sosa's claim that judicial action – the trial judge's Rule 3.3(e) order – violated Sosa's due process right to a trial free from the

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Section 33E, as interpreted by this Court, creates a "uniquely broad" and "**thorough** form of review," *Commonwealth v. Gunter*, 459 Mass 480, 486, 945 N.E.2d 386 (2011) [emphasis added], while imposing a demanding obligation on the Court in adjudicating appeals of first degree murder convictions, consequent to the "infamy of the crime and the severity of its consequences." *Dickerson v. Attorney General*, 396 Mass 740, 743, 488 N.E.2d 757 (1986)["uniquely thorough"]. "Plenary review means that in direct appeals that are subject to §33E, the Court is required to review the entire case on the law and the facts, which includes reading the entire trial record." *Commonwealth v. Billingslea*, 484 Mass 606, 617, 143 N.E.3d 425 (2020). It includes review of preserved issues "*according to their constitutional or common law standard.*" *Commonwealth v. Miranda*, 492 Mass 301, 305, 211 N.E. 3d 54 (2023)[emphasis added].

knowing use of perjury by state authorities.[7] The state court deliberately considered only prosecutorial actions that Petitioner had not identified as constitutional delicts.

The trial judge's order constituted state action. See, *Cuyler v. Sullivan*, 446 U.S. 335, 343, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)[judicial actions violating defendant's right to counsel "imputed to the state"] and *McCoy v. Louisiana*, 584 U.S. 414, 426-427, 138 S.Ct. 1500, 200 L.Ed.2d 821 (2018)["the violation of McCoy's protected autonomy right was complete when the trial court allowed counsel to usurp control of an issue within McCoy's sole perogative"]. The Commonwealth conceded that the vast majority of Leiva's testimony was false [Commonwealth's Brief, 41, 43] Petitioner asserted that, because Leiva's specific falsehoods cannot be identified in the record, the materiality of his perjury cannot be assessed, so the error is structural. See, *Weaver v. Massachusetts*, 582 U.S. 286, 295-296 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017) ["an error has been deemed

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Petitioner filed a timely motion for reconsideration arguing that the SJC's failure violated his rights to due process and to counsel, and renewed that claim in a supplemental motion for new trial that was part of his direct appeal. a21. The SJC denied reconsideration and the supplemental motion for new trial in unexplained docket entries. a22.

structural if the effects of the error are simply too hard to measure"]; *McCoy v. Louisiana*, 584 U.S. at 427-428.

The SJC concluded that, because the prosecutor did not put Leiva on the stand, he "did not affirmatively present false testimony." *Sosa*, 493 Mass at 110, a5. But 40 of the 46 pages of Sosa's testimony recorded the prosecutor's cross-examination, aggressively eliciting testimony that he considered favorable enough to use in his summation.[8] Known perjury elicited in a prosecutor's cross-examination is perjury for due process purposes.

The Supreme Judicial Court did not adjudicate Petitioner's claim that, with this trial court authorization, the prosecutor violated due

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> "Thus, when a proponent produces a witness, the opposing counsel may cross-examine the witness as to all aspects of the case, whether or not a particular aspect was elicited during direct examination. This rule applies to the criminal defendant who chooses to testify in his own behalf: he thereby renders himself subject to cross-examination on all facts relevant to the crime. Under Massachusetts practice, a party may put in its own affirmative case on cross-examination of the opposing party's witness, regardless of whether the matters were raised on direct."

Brodin & Avery, *Handbook of Massachusetts Evidence*, §6.7, at 356-357 (2017).

process by exploiting Leiva's known perjury to bolster the prosecution's case against him, as authorized by the judge.

**2. Petitioner's Claim That Judicial Implementation Of The Perjury Protocol Violated His Due Process Right To A Trial Free Of Knowing Use Of Perjury By State Officials Is An Issue Of First Impression That Marks Invidious Constitutional Errors**

The Supreme Judicial Court's ruling in Sosa presents an issue of first impression that cannot be reconciled with long-standing constitutional precedents of this Court. While the use of a perjury protocol like Rule 3.3(e) is fairly common[9], only Massachusetts has resorted to tolerate defendant perjury in joint trials. As the ruling in Petitioner's appeal demonstrates, it is a short but constitutionally devastating step to casually interject perjury into the trial of a codefendant who has not asked for it.

The Supreme Judicial Court's *Sosa* decision demonstrates that

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9 See, e.g., *Shockley v. State*, 565 A.2d 1373, 1379 (Del. 1989); *Commonwealth v. Mascitti*, 368 Pa. Super 454, 534 A2d 524, 528-529 (Pa. Super. 1987); *State v. Fosnight*, 235 Kansas 52, 679 P2d 174, 180 (1984); *People v. Bartree*, 208 Ill. App. 3d 105, 108, 566 N.E.2d 855, cert. denied, 502 U.S. 1014, 116 L.Ed2d 752, 112 S.Ct. 661 (1991); *People v. Salquerro*, 107 Misc. 155, 158-159, 433 NYS2d 711 (1980); *Butler v. United States*, 414 A2d 844, 850 (D.C.Cir. 1980); *United States v. Long*, 857 F2d 436, 466 & n. 7 (8th Cir. 1988).

indispensable federal due process and confrontation principles leave no room for this innovation; as this Court said in *Giles v. California*: "abridging the constitutional rights of criminal defendants is not in the State's arsenal" of solutions to difficult criminal justice problems. 554 U.S. 353, 376, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008). This Court should step in and eliminate the dangerous precedent the Massachusetts courts have set in Petitioner's case.

Federal due process principles guarantee every criminal defendant the right to a trial free from the knowing use by state authorities of evidence that they knew or should have known to be false. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); see also, *Giglio v. United States*, 405 U.S. 150, 155, 92 S.Ct. 763, 31 L.ed.2d 104 (1972)[falsity known or should have been known]; *Alcorta v. Texas*, 355 U.S. 28, 30-32, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957) [deliberately misleading testimony]. But, the trial judge expressly authorized the prosecutor to make unlimited use of Leiva's perjury, a clear violation of his constitutional duties. The Supremacy Clause prohibits granting a trial judge the discretionary authority to permit a prosecutor to violate the due

process prohibition against exploiting perjured testimony. *Arizona v. Evans*, 514 U.S. 1, 9-10, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995).

Sosa was entitled to cross examine Leiva's testimony to test its reliability. *Crawford v. Washington*, 541 U.S. 36, 69, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)["the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation"]; see also, *Davis v. Alaska*, 415 U.S. 308, 318-320, 94 S.Ct. 1105, 39 Led.2d 347 (1974); *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). But to protect Leiva's misconceived rights[10], the Rule 3.3(e) protocol was used to strip Petitioner of his principal protections against the use of known perjury to convict him.

Cross examination is the best engine for protect a criminal defendant's right to have the judgments of their jury "rest on truth." "Perjured testimony 'is at war with justice' because it can cause a court to render a 'judgment not resting on truth.'" *United States v. Alvarez*, 567

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This Court has held that no criminal defendant has a federal constitutional right to perjure his testimony, nor to have the assistance of counsel in doing so. *Nix v. Whiteside*, 475 U.S. 157, 173, 106 S.Ct. 998, 89 L. Ed.2d 123 (1986).

U.S. 709, 720-721, 132 S.Ct. 2537, 183 L.Ed2d 574 (2012). The SJC acknowledged in *Leiva* that implementing Rule 3.3(e) in a single defendant trial "creates the risk that judgment will be rendered on false premises" and that "rigorous cross-examination" to assist the jury in discerning the truth. *Commonwealth v. Leiva*, 484 Mass 766, 784 n. 19 146 NE3d 1093 (2022). That was in Petitioner's trial, where he was completely deprived of that safeguard, now on the facile supposition that, as to him, cross-examination on this point was not even material. *Sosa*, 493 Mass at 112, a7.

The SJC's only rationale for approving the complete bar on Petitioner's right to confront Leiva about testifying under Rule 3.3(e) auspices is that the state court could not "accept the notion" that the protocol might encourage perjury by conferring practical impunity on the witness. 493 Mass at 112, a7. This hypothesis of impossibility was substituted for constitutional analysis. It is not credible to posit that, had the jury known the circumstances and conditions under which Leiva testified, that knowledge would have had no effect on their assessment of his credibility.

Given the trial judge's order implementing Rule 3.3(e) and its bar on cross-examination about that protocol, relief from prejudicial joinder was constitutionally required.

## C. SECOND QUESTION PRESENTED

**Is the fact of the maximum penalty for the predicate felony in a Massachusetts felony-murder prosecution an element of the crime of first degree felony-murder?**

### 1. Presentation to the Trial Court.

At the close of the prosecution's case-in-chief and at the close of all the evidence, Petitioner moved for a required finding of not guilty on the murder indictment. That motion was denied on the merits. a25.

### 2. Presentation to the Supreme Judicial Court.

In his opening brief, Petitioner asserted that, because the requirement that the predicate felony for first degree felony-murder be a life felony was a *Winship* element of first degree felony-murder, and because the trial record contained no evidence on which a reasonable juror could find that fact beyond a reasonable doubt, he is entitled as a matter of due process to acquittal on the charge of first degree felony-murder. The Supreme Judicial Court ruled on that claim on its merits. Sosa, 493 Mass

at 119.

At the time Petitioner was convicted, Massachusetts law defined felony-murder in the first degree as an unlawful killing committed in the course of the commission of a felony ["predicate felony" or "underlying felony"] for which the maximum penalty is life imprisonment.[11] *Commonwealth v. Burton*, 450 Mass 55, 57, 876 N.E.2d 411, 414 (2007). Second degree felony-murder was defined identically except that the maximum penalty for the predicate felony had to be less than life imprisonment[12]. *Id.* In *Burton*, the defendant was *convicted* of felony-

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In 2017 the Supreme Judicial Court abrogated the "constructive malice" doctrine that was the foundation of felony-murder in Massachusetts. The court abolished second degree felony-murder and recast felony-murder as an aggravating factor that elevates second degree malice murder to first-degree murder when done in the course of committing a qualifying predicate felony. *Commonwealth v. Brown*, 477 Mass 805, 824-836, 81 N.E. 3d 1173 (2017)[Gants, C.J., concurring].

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> We start with the basic proposition that the predicate offense for a conviction of felony-murder in the first degree must be one "punishable with death or imprisonment for life." G.L. c.265, §1. See *Commonwealth v. Jackson*, 432 Mass. 82, 89, 731 N.E.2d 1066 (2000). See also Model Jury Instructions on Homicide at 15-16 (1999). 2 Homicide committed during the commission or attempted commission of a felony punishable other than by death or life imprisonment is murder in the second degree, provided that the predicate felony is either

murder at a time when the maximum penalty for the predicate felony of armed home invasion was life imprisonment, but established on appeal that, *at the time the killing occurred*, the predicate felony was punishable by a maximum of 20 years imprisonment. The Supreme Judicial Court reversed Burton's first degree felony-murder conviction:

> As the above history makes clear, the defendant's conviction of murder in the first degree is not legally permissible. Given the maximum punishment for armed home invasion with a firearm was twenty years in October, 1999, **the Commonwealth could not show that the homicide occurred in the course of a life felony, and therefore, the conviction was effectively based on insufficient evidence.**

*Id* (emphasis added). The conviction was reduced to second degree felony-murder. *Id.* Under *Burton* the only element that distinguished first from second degree felony murder at the time of Petitioner's trial was the maximum sentence for the predicate felony.

Indisputably, the fact that the predicate crime is a life felony

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> "inherently dangerous" or, if not inherently dangerous, committed so that the circumstances demonstrate "the defendant's conscious disregard of the risk to human life." *Commonwealth v. Matchett*, 386 Mass. 492, 506, 508, 436 N.E.2d 400 (1982).

*Commonwealth v. Burton*, 450 Mass. 55, 57, 876 N.E.2d 411, 414 (2007).

increases the murder penalty from life with parole eligibility to life without parole eligibility.

In Petitioner's trial for first degree felony-murder, the jury was instructed that the alleged predicate felonies were armed robbery or attempted armed robbery, and that these felonies were each a felony punishable by life imprisonment "as a matter of law." No evidence was presented that would support a finding by rational jurors that the maximum punishment for armed robbery or attempted armed robbery had been proved by evidence beyond a reasonable doubt. *Sosa*, 493 Mass at 119, a13.

The jury was instructed that first degree felony-murder required proof beyond a reasonable doubt that the victim was unlawfully killed during the commission of a felony having a maximum sentence of life imprisonment:

> The first element is that the defendant committed or attempted to commit a felony with a maximum sentence of imprisonment for life.
>
> In this case, the Commonwealth is alleging that the defendant was committing or attempting to commit the crime of armed robbery.
>
> I instruct you, as a matter of law, that armed robbery is a felony, with a maximum sentence of life imprisonment. And

> I will be instructing you on the elements of armed robbery in a few moments.

a42-a43. The jury was instructed on felony-murder in the second degree, too. The judge summarized the difference: "All but the first element is the same, as in felony murder in the first degree." a45-a46. Sosa was acquitted of armed robbery but convicted of armed assault with intent to rob.

On direct appeal, Petitioner invoked the principles underlying *Burton* in support of his claim that the maximum sentence for the predicate felony is a *Winship* element that must be proved beyond a reasonable doubt to authorize punishment for felony-murder in the first degree.[13] also citing *Commonwealth v. Fredette*, 480 Mass 75, 87, 101 N.E.3d 277 (2018)[14]; *Commonwealth v. Christian*, 430 Mass 552, 556, 722 N.E.2d (2000); Greaney and Comerford, *The Law of Homicide in Massachusetts*, Flaschner Judicial Institute, 50 (2009).

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In Appellant's brief, *Burton* is misnamed as "*Evans*." Id. The location is correctly identified.

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As in *Burton*, *Fredette* was tried years after the murder occurred. The predicate was aggravated kidnapping, which was a crime by the time of trial but not when the murder occurred. *Fredette*, 480 Mass at 87-88.

In reviewing Petitioner's sufficiency of the evidence claim, the Supreme Judicial Court ignored its own precedents and held that the issue of the maximum penalty for the predicate felony is *not* an element of felony-murder that must be submitted to the jury. The SJC ruled that the issue is to be decided by the trial judge as a matter of state law.

The Supreme Judicial Court did not address or adjudicate Petitioner's separate claim that federal due process principles dictate that this matter of fact be proved by evidence beyond a reasonable doubt:

> The defendant also argues that there was insufficient evidence to support his conviction of felony-murder in the first degree with the attempted commission of armed robbery as the predicate felony.
>
> * * *
>
> We disagree. The penalty for armed robbery, as with other criminal offenses, is set by statute; thus, the maximum sentence allowable for armed robbery is a matter of statutory interpretation – "a pure question of law." *Commonwealth v. Cintolo*, 415 Mass 358, 359, 613 N.E.2d 509 (1993). Accordingly, this question is "for the judge, not the jury." *Commonwealth v. Trotto*, 487 Mass 708, 735, 169 N.E.3d 883 (2021). Here, . . . the trial judge correctly instructed the jury that armed robbery is, as a matter of law, a felony with a maximum sentence of life imprisonment. See G.L.c. 265, §17. Accordingly, the defendant's argument fails.

Sosa, 493 Mass at 119, a.13. This rationale conflates the right to jury trial

and the *Winship* requirement that each element of a crime be proved beyond a reasonable doubt, dispensing entirely with the latter. The Supreme Judicial Court refused to reconsider this ruling. a21.

### 3. REASONS FOR GRANTING THE WRIT ON QUESTION TWO

The Supreme Judicial Court's ruling on this issue directly contrary to this Court's holding in *United States v. Gaudin*, 515 U.S. 506, 519, 115 S.Ct. 2310, 132 L.Ed..2d 444 (1995) that all elements of a crime present questions of fact that must be submitted to the jury. It is directly contrary to this Court's holding in *Vachon v. New Hampshire*, 414 U.S. 478, 480, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974) that, where the record is devoid of evidence on an element of the crime, acquittal is required. And it is contrary to the principles underlying this Court's June 21, 2024 holding in *Erlinger v. United States*, ___ U.S. ___, 219 L.Ed.2d 451, 2024 U.S. LEXIS 2715, 2024 WL 3074427 (2024) that the "occasions" clause in 18 U.S.C. §922(g) describes an elemental issue that must be submitted to the jury and proved beyond a reasonable doubt.

This is an appropriate issue for this Court's review because this error infects a substantial number of past felony-murder convictions in

Massachusetts and may be retroactive on collateral review. A ruling in Petitioner's favor will not create a new rule because it is mandated by this Court's precedents going back at least to *Alleyne v. United States*, 579 U.S. 99, in 2013 or *Apprendi, 532 U.S. 466* in 2000. See *Erlinger,* at 464 ["The principles *Apprendi* and *Alleyne* discussed are so firmly entrenched that we have now overruled several decisions inconsistent with them"].

The error pointed out here pervades Massachusetts felony-murder convictions at least since the Supreme Judicial Court began promulgating standard homicide instructions in 2013, making it a uniform trial court practice. The Massachusetts Appeals Court recently made a similar federal constitutional error grounded on similar mistaken premises in a second degree felony-murder appeal. *Commonwealth v. DaCosta*, 96 Mass. App. Ct. 105, 115-16, 132 N.E.3d 1067, 1079 (2019); cert. denied sub nom, *Rodrigues v. Massachusetts*, 140 S.Ct. 2813, 207 L.Ed.2d 147 (2020); *Rodrigues v. Rodrigues*, 2023 U.S. Dist. LEXIS194925 (2023) [habeas relief denied; application for certificate of appealability pending, *Rodrigues v. Rodrigues*, United States Court of Appeals for the First Circuit, Dkt. No. 23-2012, filed December 6, 2023, pending].

In *Erlinger* the government confessed error in an ACCA case involving a dispute over whether proof of the defendant's criminal history required the sentencing court to impose extra punishment for his conviction for violating 18 U.S.C. §922(g). Defendant Erlinger asserted that he was entitled to a jury determination of whether his criminal history met the statutory criteria for enhanced punishment; the government confessed error:

> The Constitution, it said, 'requires a jury' to decide unanimously and beyond a reasonable doubt whether Mr. Erlinger's ACCA predicates were 'committed on occasions different from one another.' * * * *That conclusion, the government represented, flows directly from this Court's consistent holdings that the Fifth and Sixth Amendments generally guarantee a defendant the right to have a unanimous jury find beyond a reasonable doubt any fact that increases his exposure to punishment.*

219 L.Ed.2d at 460 [emphasis added]. The government supported Erlinger's petition for certiorari, pointing out that several lower federal courts had refused to provide jury trials on this issue and asserting "*this Court's intervention is necessary to ensure that the circuits correctly recognize defendants' constitutional rights in this context.*' *Id.*

This is the principle that the Supreme Judicial Court failed to apply

in Petitioner's direct appeal: "the Fifth and Sixth Amendments generally guarantee a defendant the right to have a unanimous jury find beyond a reasonable doubt any fact that increases his exposure to punishment." That principle, and the holdings of *Vachon v. New Hampshire* , supra, and *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 60 (1979), that a conviction cannot stand, where the record evidence is devoid of evidence that would support a jury finding of guilt beyond a reasonable doubt on an element of the crime, establish that Petitioner is entitled to acquittal of first degree felony-murder as a matter of due process.

In *Erlinger*, the Court noted:

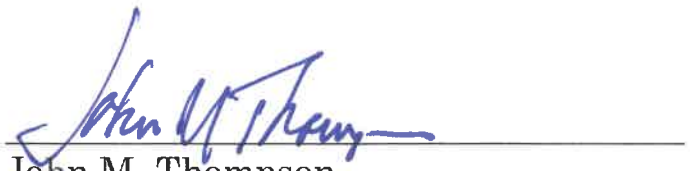
> The principles *Apprendi* and *Alleyne* discussed are so firmly entrenched that we have now overruled several decisions inconsistent with them. See, e.g., See, e.g., *Hurst v. Florida*, 577 U. S. 92, 101-102, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016) (overruling *Hildwin v. Florida*, 490 U. S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989) (per curiam), and *Spaziano v. Florida*, 468 U. S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984)); *Alleyne*, 570 U. S., at 107, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (overruling *Harris v. United States*, 536 U. S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002)); *Ring v. Arizona*, 536 U. S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (overruling *Walton v. Arizona*, 497 U. S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990)).

*Erlinger v. United States*, supra at 464.

The Supreme Judicial Court's ruling in Petitioner's case suffers from the same shortcomings as the lower court decision in *Erlinger*, and should similarly be corrected.

## CONCLUSION

For all of the foregoing reasons, the writ of certiorari should be granted.



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