No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024-2025

TIMOTHY R. BROWN,
Petitioner,

-v.-

COMMONWEALTH OF MASSACHUSETTS
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE APPEALS COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

David H. Mirsky, Esquire
(US Supreme Court Bar #246794;
MA BBO #559367; NHBA #9351)
Counsel of Record for Petitioner
Mirsky & Petito, Attorneys at Law
P.O. Box 1063
Exeter, NH 03833
Tel.: 603-580-2132
dmirsky@comcast.net

QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment's Due Process Clause requires a State to apply to the resentencing of a criminal defendant, a rule of law defining an element of a criminal offense that was new with respect to the case when announced in the decision on direct appellate review, but was no longer new at the time of resentencing.

2. Whether, pursuant to the Second Amendment right to possess a handgun and ammunition in one's home, and the Fourteenth Amendment Due Process right against conviction except on proof beyond a reasonable doubt of every fact necessary to convict, precludes convictions for illegal possession of a handgun and illegal possession of ammunition where the prosecution has failed to demonstrate by proof beyond a reasonable doubt that a criminal defendant failed to possess adequate documentation of a legal right to possess such items.

3. Whether conviction as a co-conspirator of the offense of armed home invasion as an individual acting on the "remote outer fringes" of the alleged conspiracy violates Fourteenth Amendment Due Process.

4. Whether, where the prosecution alleges an offense of felony murder based on alleged underlying crimes of armed home invasion and attempted armed robbery, prohibitions against Double Jeopardy under the Fifth and Fourteenth Amendments

preclude separate convictions of armed home invasion and felony murder, where any threatened use of force alleged to have occurred as part of conduct constituting armed home invasion or attempted armed robbery, was part of a shooting that killed a decedent.

5. Whether for purposes of opposing a government assertion of estoppel in an appeal from resentencing in a criminal case, a criminal case remains pending on direct review of a defendant's original convictions and sentence until the conclusion of the appeal from resentencing.

6. Whether an appellate court's determination to permit conviction of a criminal offense to stand regardless of any potential constitutional violation inherent in said conviction solely because the sentence ordered as to such conviction has previously been served violates principles of Fourteenth Amendment Due Process, and principles of Double Jeopardy protected under the Fifth and Fourteenth Amendments.

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Petitioner Timothy R. Brown respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts.

CITATIONS TO THE OPINIONS BELOW

The Appeals Court of Massachusetts affirmed petitioner's convictions and sentence on resentencing in Middlesex Superior Court, which judgment was entered on July 24, 2019. The decision of the Appeals Court affirming these is reported as Commonwealth v. Brown, 2024 Mass. Unpub. LEXIS 349, 104 Mass. App. Ct. 1108, 235 N.E. 3d 330 (May 30, 2024); a copy of which appears at Appendix A. The petitioner filed an application for further appellate review in the Supreme Judicial Court of Massachusetts (SJC) on July 25, 2024; indicated in the SJC docket appearing at Appendix B. The SJC denied further appellate review on September 5, 2024, the decision of which is reported as Commonwealth v. Brown, 2024 Mass. LEXIS 368, 494 Mass. 1106, 241 N.E.3d 1189, and appears at Appendix C. The SJC's decision and order remanding for resentencing is reported as Commonwealth v. Brown, 477 Mass. 805 (2017), and appears at Appendix D. Certiorari was denied by this Court as to that decision and order on October 1, 2018, which is reported as Brown v. Massachusetts, 2018 U.S. LEXIS 4451, 586 U.S. 826, 139 S. Ct. 54 (October 1, 2018), and appears at Appendix E. This petition follows the SJC's denial of

further appellate review on September 5, 2024.

STATEMENT OF JURISDICTION

The Appeals Court of Massachusetts affirmed petitioner's convictions and sentence on resentencing in Middlesex Superior Court, which judgment was entered on July 24, 2019. The decision of the Appeals Court affirming these is reported as Commonwealth v. Brown, 2024 Mass. Unpub. LEXIS 349, 104 Mass. App. Ct. 1108, 235 N.E. 3d 330 (May 30, 2024); a copy of which appears at Appendix A. The petitioner filed an application for further appellate review in the Supreme Judicial Court of Massachusetts (SJC) on July 25, 2024; indicated in the SJC docket appearing at Appendix B. The SJC denied further appellate review on September 5, 2024, which is discretionary. See Rule 27.1(e), Mass. R. App. P. This petition follows the SJC's denial of further appellate review on September 5, 2024. See Sup. Ct. R. 13(1). Jurisdiction in this Court is conferred by 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

CONSTITUTIONAL PROVISIONS

1. Amendment II of the Constitution of the United States

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

2. Amendment V of the Constitution of the United 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 Militias, 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; . . . .

3. Amendment XIV of the Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

STATUTES

4. 28 U.S.C. § 1257(a)

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of

certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. . . .

5. Massachusetts General Laws, chapter 265, section 1.

§ 1. Murder.

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

6. Massachusetts General Laws, chapter 265, section 2.

§ 2. Murder – Penalty.

. . . .

(c) Any person who is found guilty of murder in the second degree shall be punished by imprisonment in the state prison for life and shall be eligible for parole after the term of years fixed by the court pursuant to section 24 of

chapter 279.

7. Massachusetts General Laws, chapter 265, section 17.

§ 17. Robbery --- Penalty in Certain Cases.

Whoever, being armed with a dangerous weapon, assaults another and robs, steals or takes from his person money or other property which may be the subject of larceny shall be punished by imprisonment in the state prison for life or for any term of years; provided, however, that any person who commits any offence described herein while masked or disguised or while having his features artificially distorted shall, for the first offence be sentenced to imprisonment for not less than five years and for any subsequent offence for not less than ten years. Whoever commits any offense described herein while armed with a firearm, shotgun, rifle, machine gun or assault weapon shall be punished by imprisonment in the state prison for not less than five years. Any person who commits a subsequent offense while armed with a firearm, shotgun, rifle, machine gun or assault weapon shall be punished by imprisonment in the state prison for not less than 15 years.

8. Massachusetts General Laws, chapter 265, section 18C.

§ 18C. Home Invasion.

Whoever knowingly enters the dwelling place of another knowing or having reason to know that one or more persons are present within or knowingly enters

the dwelling place of another and remains in such dwelling place knowing or having reason to know that one or more persons are present within while armed with a dangerous weapon, uses force or threatens the imminent use of force upon any person within such dwelling place whether or not injury occurs, or intentionally causes any injury to any person within such dwelling place shall be punished by imprisonment in the state prison for life or for any term of not less than twenty years.

9. Massachusetts General Laws, chapter 269, section 10(h)

§ 10. Weapons -- Dangerous Weapons -- Unlawfully Carrying.

(h) (1) Whoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with the provisions of section 129C of chapter 140 shall be punished by imprisonment in a jail or house of correction for not more than 2 years or by a fine of not more than $500. Whoever commits a second or subsequent violation of this paragraph shall be punished by imprisonment in a house of correction for not more than 2 years or by a fine of not more than $1,000, or both. Any officer authorized to make arrests may arrest without a warrant any person whom the officer has probable cause to believe has violated this paragraph.

10. Massachusetts General Laws, chapter 278, section 33E.

§ 33E. Capital Cases --- Appeals.

In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilty, and remand the case to the superior court for the imposition of sentence. For the purpose of such review a capital case shall mean: (i) a case in which the defendant was tried on an indictment for murder in the first degree and was convicted of murder in the first degree; or (ii) the third conviction of a habitual offender under subsection (b) of section 25 of chapter 279. After entry of the appeal in a capital case and until the filing of the rescript by the supreme judicial court motions for a new trial shall be presented to that court and shall be dealt with by the full court, which may itself hear and determine such motions or remit the same to the trial judge for hearing and determination. If any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court.

11. 18 U.S.C. § 922(g), [felon in possession of a firearm].

§ 922. Unlawful acts

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

12. 18 U.S.C. § 924(a)(2).

§ 924. Penalties

(a) (2) Whoever knowingly violates subsection . . . (g) . . . of section 922 [18 USCS § 922] shall be fined as provided in this title, imprisoned not more than 10 years, or both.

13. 18 U.S.C. § 924(e) (2) (B) (ii)[residual clause, Armed Career Criminal Act of 1984].

§ 924. Penalties

(e) . . . . (2) As used in this subsection -- . . . . (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that-- . . . . (ii) is burglary, arson, or extortion, involves

use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

14. Pennsylvania Statutes Annotated, Title 35, section 6018.401(a).

§ 6018.401. Management of hazardous waste.

(a) No person or municipality shall store, transport, treat, or dispose of hazardous waste within this Commonwealth unless such storage, transportation, treatment, or disposal is authorized by the rules and regulations of the department; no person or municipality shall own or operate a hazardous waste storage, treatment and disposal facility unless such person or municipality has first obtained a permit for the storage, treatment and disposal of hazardous waste from the department; and, no person or municipality shall transport hazardous waste within the Commonwealth unless such person or municipality has first obtained a license for the transportation of hazardous waste from the department.

RULES

15. Rule 27.1(e), Massachusetts Rules of Appellate Procedure.

Rule 27.1. Further Appellate Review

(e) Vote for Further Appellate Review; Certification. If any 3 justices of the Supreme Judicial Court shall vote for further appellate review for substantial

reasons affecting the public interest or the interests of justice, or if a majority of the justices of the Appeals Court deciding the case shall certify that the public interests or the interests of justice make desirable a further appellate review, an order allowing the application or the certificate, as the case may be, shall be transmitted to the clerk of the Appeals Court with notice to the lower court. The clerk of the Appeals Court shall forthwith transmit to the clerk of the full Supreme Judicial Court all documents filed in the case.

16. Rules 10(b) and (c), Rules of the Supreme Court of the United States ["Sup. Ct. R. 10"]

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: . . . . **(b)** a state court of last resort has decided an important question of federal law in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; **(c)** a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. . . .

17. Rule 13(1), Rules of the Supreme Court of the United States. ("Sup. Ct. R. 13(1)")

Rule 13. Review on Certiorari: Time for Petitioning

1. . . . . A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

18. Rule 30(1), Rules of the Supreme Court of the United States. ("Sup. Ct. R. 30(1)")

Rule 30. Computation and Extension of Time

1. In the computation of any period of time prescribed or allowed by these Rules, by order of the Court, or by an applicable statute, the day of the act, event, or default from which the designated period begins to run is not included. The last day of the period shall be included . . . .

STATEMENT OF THE CASE[1] [2]

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[1] Defendant's Record Appendix is hereinafter referred to as "R.A.(page)". Defendant's Addendum is hereinafter referred to as "A.(page)".

[2] The trial transcripts for the case below, Commonwealth v. Brown, No. MICR2009-01511 (No. 0981CR01511), are part of the record of this case as noted on the docket of the SJC appeal in this case, docket no. SJC-11669. (R.A.22) The trial transcripts are hereinafter referred to as "Tr.(date)/(page number)". The resentencing hearing transcripts are referred to as "Tr. (date)/(page number)".

On December 22, 2009, a Middlesex County grand jury returned indictments charging defendant Timothy Brown with first degree murder in the death of Luis Antonio Delgado, G. L. c. 265, § 1 (indictment no. 2009-1511-001), first degree murder in the death of Hector Delgado, G. L. c. 265, § 1 (indictment no. 2009-1511-002), home invasion, G. L. c. 265, § 18[C](indictment no. 2009-1511-003), possession of a firearm, a .380 High Point Model CF380 semi-automatic pistol, Serial Number P854596, without FID card, G. L. c. 269, § 10(h) (indictment no. 2009-1511-004), and possession of ammunition without FID card, G. L. C. 269, § 10(h) (indictment no. 2009-1511-005). (R.A.1-10) On June 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25 and 26, 2013, Brown was tried before the Hon. Sandra L. Hamlin, J., and a jury. (R.A.8,13) On January 25, 2013, he was found guilty: on #001 of first degree felony murder by attempted armed robbery and home invasion; on #002 of first degree felony murder by attempted armed robbery and home invasion; on #003 of home invasion; on #004 of possession of a firearm; and on #005 of possession of ammunition. On June 26, 2013, he was sentenced as to #001, to M.C.I. Cedar Junction for life; as to #002, to M.C.I. Cedar Junction for life, from and after #001; as to #003, to M.C.I. Cedar Junction for 20 years to 20 years and 1 day, concurrent with #001; on #004, to 2 years in the House of Correction, concurrent with #001; as to #005, to 2 years in the House of

Correction, concurrent with #001. (R.A.13-14) On July 3, 2013, Brown filed a notice of appeal in the Superior Court. (R.A.14) The case was entered in the Supreme Judicial Court (SJC) on May 5, 2014. (R.A.23)

On September 20, 2017, the SJC vacated and set aside the verdicts of murder in the first degree, and ordered the matter to be remanded to the Superior Court "where verdicts of guilty of murder in the second degree are to be entered, and the defendant is to be sentenced accordingly." Commonwealth v. Brown, 477 Mass. 805, 1190 (2017). The defendant's remaining convictions were affirmed. Id. In Brown, supra, 477 Mass. 805, the SJC vacated the defendant's two first degree felony murder convictions. See id. (R.A.53) The SJC referenced "two principles of law on which our common law of felony-murder liability rests that we reject elsewhere in our criminal jurisprudence: [(1)] vicarious substantive criminal liability for every act committed by a joint venturer, and [(2)] the conclusive presumption of malice from the intent to commit a dangerous felony," Brown, supra, 477 Mass. at 832. The SJC further held,

> It is time for us to eliminate the last vestige of **these two abandoned principles** and end their application in our common law of felony-murder. Doing so means that criminal liability for murder in the first or second degree will be predicated on proof that the defendant acted with malice or shared the intent of a joint venturer who acted with malice. The sole remaining function of felony-murder will be to elevate what would otherwise be murder in the second degree to murder in the first degree

where the killing occurs during the commission of a life felony (emphasis added).

Brown, supra, 477 Mass. at 832. The SJC ordered that the rule that "a defendant may not be convicted of murder without proof of one of the three prongs of malice" was to be applied prospectively and not retroactively, not even to the pending case of Mr. Brown. Id., 477 Mass. at 807.

Absence of actual malice at trial.

The Commonwealth did not allege or prove actual malice in Timothy Brown's case. Brown was charged as a co-venturer and his role was limited to supplying hoodies and a firearm with ammunition to others, who left Brown's residence and committed armed robbery, murder, and home invasion. At the time of resentencing, the crimes of second degree felony murder proved by constructive malice no longer existed.

On remand for resentencing, Brown was represented by Attorney Victoria Kelleher, who filed a Motion for Resentencing and Memorandum in Support. (R.A.18,73,89; A.67) Hearings were held before the resentencing judge, the Hon. Laurence D. Pierce, on May 10, 2019, and on July 24, 2019. (Tr. 5/10/2019; Tr. 7/24/2019) On July 24, 2019, as to the defendant's Motion for Resentencing and Memorandum in Support, the resentencing judge, the Hon. Laurence D. Pierce, J., issued the following rulings by endorsed order:

> As to the defendant's argument that the home invasion conviction be dismissed as duplicative and his argument that the SJC opinion in his case (477 Mass. 805 (2017) be applied retroactively, defendant's motion is DENIED. In affirming the sentence imposed on the invasion, the SJC has passed on the validity of that conviction. With the respect to the retroactivity argument, the SJC stated that its new rule would apply only to "trials that commence after the date of the opinion in this case." 477 Mass. at 807. The opinion was dated March 10, 2017.[3] The trial in this case was in June 2013.

(R.A.89,101;A.67,79) (Tr. 7/24/2019/7-9) The defendant was resentenced by Pierce, J., on July 24, 2019, as follows: as to #001, to M.C.I. Cedar Junction for life with parole in not less than 15 years, 0 Months, 0 Days; as to #002, to M.C.I. Cedar Junction for life with parole in not less Than 15 Years, 0 Months, 0 Days, to be served concurrently with Charge #001; as to #003, to M.C.I. Cedar Junction for 20 years to 20 years and 1 day, to be served concurrently with #001; on #004, to 2 years in the House of Correction, concurrent with #001; as to #005, to 2 years in a House of Correction, to be served concurrently with #001. (R.A.18-20) On July 31, 2019, Brown filed a notice of appeal from his resentencing in the Superior Court. (R.A.20,105). This case, Brown's appeal from resentencing, was entered in the Appeals Court on June 13, 2022.

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[3] The Superior Court has erred with regard to the date of the SJC's opinion in this case, which was actually September 20, 2017. See Commonwealth v. Brown, 477 Mass. 805 (2017). March 10, 2017, is the date on which the case was argued. See id.

The Guardado/Heller/McDonald firearm and ammunition issue.

The SJC in Commonwealth v. Guardado, 491 Mass. 666 (April 13, 2023) ("Guardado I"), reversing SJC precedent, held, inter alia, that failure of sufficient proof that a defendant did not possess an FID card requires reversal of the convictions of illegal possession of a firearm and illegal possession of ammunition. Guardado I, 491 Mass., at 686-693. In Commonwealth v Guardado, 493 Mass. 1 (October 26, 2023) ("Guardado II"),[4] the SJC held that the remedy for failure of sufficient proof that a defendant did not possess an FID card is remand for a new trial. Id.

There was no evidence at the defendant's trial that he did not possess an FID card for a firearm or for ammunition, and the jury was not instructed on the essential element of absence of licensure for either offense. See, e.g., Tr. 6/25/2013/82-86 (trial judge in final jury instructions defines illegal possession of a firearm and illegal possession of ammunition); Tr. 6/25/2013/85 (in defining illegal possession of a firearm, trial judge instructed, "Now, in this indictment there's some reference made to a firearm's identification card. There is no evidence in this case that the defendant had a firearms ID and no evidence they qualified for one of the legal exemptions that are a substitute for having a

[4] Cert. denied, 144 S. Ct. 2683 (June 24, 2023).

firearms ID card. And for that reason, the issue of a firearms ID card or exemption isn't relevant to your deliberations in this case and you should put it out of your mind."); Tr. 6/25/2013/86 (in defining illegal possession of ammunition, trial judge instructed, "Again, as I've said, there's reference made in the indictment to a firearms identification card. There's no evidence in the case that he had a firearms ID and no evidence that the defendant qualified for one of the legal exceptions that are a substitute for having a firearms ID card. For that reason the issue of a firearms ID card or exemption isn't relevant to your deliberations and you should put it out of your minds.")

The Appeals Court required the defendant to assert his legal rights regarding the firearm and ammunition convictions in court filings other than an amended brief. The defendant chose to address these matters both in documents requested by the Appeals Court and in his resentencing appeal reply brief. See Appendix H (Defendant's Reply Brief, Section II). The Appeals Court denied the defendant's appeal as to all issues. Commonwealth v. Brown, 2024 Mass. Unpub. LEXIS 349, 104 Mass. App. Ct. 1108, 235 N.E.3d 330 (May 30, 2024).

REASONS FOR GRANTING REVIEW

The question of whether a new rule of criminal law defining an element of a criminal offense should apply retroactively to cases pending on direct review is fundamental to how much 14th Amendment Due Process limits

government power to punish an individual. Massachusetts has made a basic error regarding whether the new felony murder rule stated in Commonwealth v. Brown, 477 Mass. 805 (2017), should have been applied retroactively on direct review to Mr. Brown's case. Supreme Court Rule 10(c) indicates this Court will consider granting certiorari in cases where "a state court or United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c). Rule 10(b) indicates the Court will consider granting certiorari in cases where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Sup. Ct. Rule 10(b).

I. The retroactivity ruling in the Brown cases decides an important federal question in a way that conflicts with relevant decisions of the U.S. Supreme Court. Sup. Ct. Rule 10(c).

In Brown, supra, 477 Mass. 805, the SJC announced a new rule that "a defendant may not be convicted of murder without proof of one of the three prongs of malice." Id., at 807. The SJC, in announcing its new felony murder rule in Brown, declared that the new rule was to be applied only to cases tried after September 20, 2017. See Brown, supra, 477 Mass. at 807-808, 832.

In Fiore v. White, 531 U.S. 225 (2001), the U.S. Supreme Court "granted certiorari in part to decide when, or whether, the Federal Due Process Clause

requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." Id., 531 U.S. at 226. The statute, Pa. Stat. Ann. Tit. 35, § 6018(a), made it unlawful to operate a hazardous waste facility without a permit. The "new" interpretation of that statute held that "one who deviated from his permit's terms was not a person *without* a permit; hence, a person who deviated from his permit's terms did not violate the statute." Fiore, 531 U.S. at 226-227. This Court in Fiore determined that Pennsylvania could not convict that petitioner of the crime at issue because, under Jackson v. Virginia, 443 U.S. 307 (1979) and In re Winship, 397 U.S. 358 (1970), the Due Process Clause of the 14th Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt. Fiore, 531 U.S. at 228-229 (citing Jackson and Winship). Brown raised Fiore in his resentencing appeal in the Appeals Court, but the Appeals Court ruled it was bound by the SJC's retroactivity ruling in Brown, 477 Mass. 805, even applying the Federal Constitution. Brown, 2024 Mass. App. Unpub. LEXIS 349, at *6). At the time petitioner was resentenced in Middlesex Superior Court, on July 24, 2019, the new felony murder rule of Brown, 477 Mass. 805, was in effect.

In Bunkley v. Florida, 538 U.S. 835 (2003), this Court stated that in assessing the applicability of a change in the law to a particular criminal defendant, what matters is what law was in effect at the time a conviction is

final. See id., 538 U.S. at 840-842. Brown asserts that 14th Amendment Due Process precludes Massachusetts from denying him the application of the change in the law of felony murder announced in Brown's direct appeal, on September 20, 2017, because his conviction did not actually become final under federal law until he was resentenced on July 24, 2019, see Burton v. Stewart, 549 U.S. 147, 156 (2007) ("Final judgment in a criminal case means sentence. The sentence is the judgment") (quoting Berman v. United States, 302 U.S. 211, 212 (1937)). By the date of resentencing, proof of actual malice was required to convict a person of murder in Massachusetts. It is established that 14th Amendment Due Process prohibits conviction of a crime without proof beyond a reasonable doubt of every fact necessary to convict. See Fiore, 531 U.S. at 226 (citing see Jackson v. Virginia, 443 U.S. 307, 316 (1979)), and In re Winship, 397 U.S. 358, 364 (1970)); Bunkley v. Florida, 538 U.S. at 840-842 (applicability of change in the law to a particular defendant turns on what law was in effect when conviction is final). Here, the Appeals Court relied on the SJC's rulings in Commonwealth v. Martin, 484 Mass. 634, 644 (2020), cert. denied, 2021 U.S. LEXIS 1285 (U.S. March 8, 2021) (construing Fiore v. White, 551 U.S. 225 (2001), as being dispositive. Compare Appeals Court Memo and Order, 2024 Mass. App. Unpub. LEXIS 349, at *6 ("we think that argument, raised by the defendant in Martin, was resolved by Martin . . .").

Brown is distinguished from Martin, because his case remained pending until resentencing. See Burton v. Stewart, 549 U.S. at 156 (2007) (quoting Berman, 302 U.S. at 212); Bunkley v. Florida, 538 U.S. 835, 836-838 (2003) (Fiore indicates a 14th Amendment due process violation where, at the time a person was convicted, "he was convicted of a crime for which he may not be guilty") (finding error in the Florida Supreme Court's failure to apply Fiore without considering whether in L. B. v. State, 700 So.2d 370, 373 (Fla. 2002), the Florida Supreme Court had redefined an element of the crime charged such that at the time petitioner Bunkley's case became final, Bunkley could not have been found guilty of that crime. Bunkley v. Florida, 538 U.S. 835, 836-838.

Clearly established U.S. Supreme Court case law classifies the new rule in Brown, 477 Mass. 805, as a rule of substantive law, imposing the required element of actual malice on the crime of murder, which should be applied retroactively even to cases on collateral review. See Whorton v. Bockting, 549 U.S. 406, 416 (2007) (construing Teague v. Lane, 489 U.S. 288 (1989) and applying Griffith v. Kentucky, 479 U.S. 314 (1987)) (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting Teague, 489 U.S. at 311).

> "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes."

Welch v. United States, 136 S. Ct. 1257, 1264-1265 (2016) (quoting Schriro v.

Summerlin, 542 U.S. 348, 353 (2004)). "'This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish.'" Welch, 136 S. Ct. at 1265 (quoting Schriro, 542 U.S. at 351-352). The scope of a murder offense was narrowed by the SJC in Brown by requiring proof of actual malice.

As stated in Whorton v. Bockting, 549 U.S. 406 (2007),

> Under the Teague[5] framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review. See Griffith v. Kentucky, 479 U.S. 314 . . . (1987). A new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a "watershed rul[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."

Whorton v. Bockting, supra, 549 U.S. at 416 (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting Teague v. Lane, supra, 489 U.S. at 311 (plurality opinion)). Here, the new rule must be applied retroactively because (1) the case was still pending on direct review at the time the new rule was announced; (2) the new rule is substantive as it adds the element of actual malice to the homicide crimes as to which the defendant was convicted in this case; and, in the alternative, (3) if the new rule is procedural, it is a "watershed rul[e] of

[5] Teague v. Lane, 489 U.S. 288 (1989).

criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Whorton v. Bockting, supra, 549 U.S. at 416 (quoting Saffle v. Parks, supra, 494 U.S. at 495 (quoting Teague v. Lane, supra, 489 U.S. at 311 (plurality opinion)).

> Under the Teague framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on **direct review** (emphasis added). See Griffith v. Kentucky, 479 U.S. 314 . . . (1987).

Whorton v. Bockting, supra, 549 U.S. at 416. In Griffith v. Kentucky, supra, in U.S. Supreme Court held "that **a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final**, with no exception for cases in which the new rule constitutes a 'clear break' with the past (emphasis added)." Griffith, 479 U.S. at 328 (applying the new rule of Batson v. Kentucky, 476 U.S. 79 (1986)), for establishing a prima facie case of racial discrimination in jury selection in violation of the Fourteenth Amendment).

The new rule in Brown is substantive. The crime of murder in Massachusetts involves a mandatory punishment of life imprisonment, without parole for first degree murder, and with the possibility of parole for second degree murder. Without a first or second degree murder conviction, Mr. Brown would not face mandatory life imprisonment for his alleged conduct involving

the two deaths at issue. Thus, the new rule in Brown both adds a required element of actual malice to the crime of murder, and eliminates mandatory life imprisonment as the punishment for the conduct of being an accessory or joint venturer to a non-homicide crime that allegedly results in a death. In both of these respects, under U.S. Supreme Court precedent, the new rule in Brown is substantive.

"'A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.'" Welch v. United States, 136 S. Ct. 1257, 1264-1265 (2016) (quoting Schriro v. Summerlin, 542 U.S. 348, 353 (2004)). "'This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish.'" Welch, supra, 136 S. Ct. at 1265 (quoting Summerlin, 542 U.S. at 351-352). Here, the scope of the offense of murder was narrowed by the SJC in Brown by requiring proof of actual malice.

"**New substantive rules generally apply retroactively** (emphasis added). . . . because they 'necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal"'" or faces a punishment that the law cannot impose upon him." Summerlin, 542 U.S. at 351-352 (quoting Bousley v. United States, 523 U.S. 614, 620 (1998) (quoting

Davis v. United States, 417 U.S. 333, 346 (1974)[6]). "'A decision that modifies the elements of an offense is normally substantive rather than procedural.'" Welch, 136 S. Ct. at 1267 (quoting Summerlin, at 354).

In Welch, the United States Supreme Court determined that Johnson v. United States, 135 S. Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C.S. § 924(e) (2) B)(ii),[7] was void for vagueness, was a substantive decision that applied retroactively to a prisoner's case on collateral review. Welch. Just like the determination in Welch that the residual clause of the Armed Career Criminal Act of 1984 was void for vagueness, the actual malice requirement for felony murder enunciated in Brown was a substantive decision, as the scope of the felony murder offense

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[6] "Davis v. United States, 417 U.S. 333, . . . involved a claim that a judgment that was lawful when it was entered should be set aside because of a later development. The subsequent development . . . was a change in the substantive law that established that the conduct for which the petitioner had been convicted and sentenced was lawful. To have refused to vacate his sentence would surely have been a 'complete miscarriage of justice,' since the conviction and sentence were no longer lawful." United States v. Addonzio, 442 U.S. 178, 186-187 (1979).

[7] The "residual clause" of the Armed Career Criminal Act of 1984 increased the sentence for possession of a firearm by a felon, 18 U.S.C. §§ 922(g), 924(a)(2), from a prison term punishable for up to 10 years, to a mandatory sentence of 15 years to life if the offender has three or more prior convictions for a "serious drug offense" or a "violent felony. The definition of "violent felony" includes the so-called "residual clause" covering any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). Welch v. United States, 136 S. Ct. at 1259.

was narrowed by the SJC in Brown by requiring proof of actual malice. Such rules, substantive rules, apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal"" or faces a punishment that the law cannot impose upon him." Summerlin, 542 U.S. at 351-352 (quoting Bousley, 523 U.S. at 620 (quoting Davis, 417 U.S. at 346). In Mr. Brown's case, he now faces punishment of life imprisonment for two convictions of second degree murder without proof of actual malice and thus he is being punished for the crime of murder for conduct that Massachusetts law no longer recognizes as constituting murder. The rule requiring proof of actual malice should be applied to Brown.

II. In upholding Brown's convictions of illegal possession of a firarm and illegal possession of ammunition, Massachusetts decides an important federal question in a way that conflicts with relevant decisions of this Court. Sup. Ct. Rule 10(c).

Timothy Brown's convictions of illegal possession of a firearm and illegal possession of ammunition violate 14th Amendment Due Process and so must be vacated and dismissed. See Winship, 397 U.S. at 358-364; Jackson, 443 U.S. at 318-319. The evidence was insufficient not only under New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022), but also by the law set forth in District of Columbia v. Heller, 554 U.S. 570 (2008); and McDonald v. Chicago, 561 U.S. 742 (2010), which held, prior to Brown's trial, that the

right to possess a handgun in one's own home was protected by the Second Amendment. See also Herrington v. United States, 6 A.2d 1237, 1244-1245 (DC Cir. 2010) (treating noncompliance with registration requirements as an affirmative defense was unconstitutional as applied to charges of unlawful possession of ammunition in the home). Thus, the Commonwealth's trial evidence is insufficient not only under Bruen but also under the law set forth in Heller and McDonald. As the Commonwealth has not proved beyond a reasonable doubt all the required elements of either offense, Brown's motions for required finding of not guilty, see Tr. 6/24/2013/66,79, on the firearm and ammunition charges should be granted; 14th Amendment Due Process requires that those convictions to be vacated and dismissed. See Winship; Jackson; there is no possibility that the Commonwealth lacked a fair opportunity to offer its proof on the firearm and ammunition charges, and the 14th Amendment requires entry of judgments of "not guilty" on those charges. See Winship; Jackson.

III. The retroactivity ruling in Brown conflicts with decisions of other state courts of last resort. Sup. Ct. Rule 10(b).

Other state courts of last resort have applied retroactively a substantive new rule analogous to the substantive new rule announced in Brown:

In Bejarano v. State, 122 Nev. 1066, 146 P.2d 265 (2006), Nevada applied retroactively a new rule of death penalty law in Nevada (the rule in

McConnell v. State, 120 Nev. 1043, 102 P.3d 606 (2004)), which held that it was impermissible under the U.S. and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder was predicated. The new rule of McConnell v. State was held to apply retroactively because, "[a]bsent retroactive application of this rule, there would be a 'significant risk that a defendant . . . faces a punishment that the law cannot impose.'" Bejarano, supra, 122 Nev. at 1078, 1076-1078 (applying Schriro v. Sunderlin, supra, 542 U.S. at 351-352).

In People v. Jean-Baptiste, 11 N.Y.3d 539 (2008), in which the New York State Court of Appeals applied New York law, the mental state requirement of a homicide crime had been changed by the case of People v. Feingold, 7 N.Y.3d 288 (2006), while Jean-Baptiste, supra, was pending on direct review.[8] The new rule of Feingold was applied in Jean-Baptiste, supra, because a conclusion that the new rule was not retroactive "'would result in a

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[8] In People v. Feingold, 7 N.Y.3d 288 (2006), new law was announced changing the mental state requirement for "depraved indifference" murder under New York law. In Feingold, supra, the new law was that proof of subjective mental state of the defendant would replace the prior mental state requirement which looked only to the factual setting in which the defendant's conduct occurred. Feingold, supra, 7 N.Y. at 290-291. The new law was applied to the defendant in Feingold, reducing his conviction of reckless endangerment in the first degree to reckless endangerment in the second degree. Feingold, supra, 7 N.Y.3d at 289-297.

person's guilt even though one of the elements of the crime had not been established.'" Jean-Baptiste, supra, 11 N.Y.3d at 542 (quoting and applying People v. Hill, supra, 85 N.Y.2d 256). The result of applying Feingold to the defendant in Jean-Baptiste was a reduction in the defendant's conviction of depraved indifference murder to manslaughter in the second degree. Jean-Baptiste, supra, 11 N.Y.3d at 541, 544; id., at 540-544. Jean-Baptiste, supra, reflects the need to prevent conviction of an elevated homicide crime in cases pending on direct appeal where a new rule precludes establishment of one of the elements of the crime.

In Jean-Baptiste, the Court of Appeals of New York stated:

> "Under traditional common-law principles, cases on direct appeal are generally decided in accordance with the law as it exists at the time the appellate decision is made" (People v. Vasquez, 88 N.Y.2d 561, 573, 670 N.E2d 1328, 647 N.Y.S.2d 697 [(1996)]). For instance, in People v Hill (85 NY2d 256, 648 N.E.2d 455, 624 NYS2d 79 [(1995)]), we held that our decision in People v Ryan (82 N.Y.2d 497, 626 N.E.2d 51, 605 N.Y.S.2d 235[(1993)])--concluding the term "knowingly" in Penal Law § 220.18 applies not only to the possession of the illicit substance itself but also to the weight of the substance—was applicable to cases pending on direct appeal at the time of the decision. We reasoned that "a conclusion that the Ryan case is not retroactive would result in a person's guilt even though one of the elements of the crime had not been established" (85 N.Y.2d at 263). As such, a finding of guilt would "have rendered the proceeding **fundamentally unfair and a violation of due process** (emphasis added)" (id. at 262). Our reasoning in Hill is applicable to this case.

Jean-Baptiste, supra, 11 N.Y.3d at 542.

In In re Martinez, 3 Cal. 5th 1216 (2017), the Supreme Court of California affirmed a lower appellate court ruling that the new rule of People v. Chiu, 59 Cal. 4th 155 (2014), that a natural and probable consequences theory of liability cannot serve as a basis for a first degree murder conviction, was retroactive. (This determination was not opposed by the State.) In re Martinez, 3 Cal. 5th at 1216-1222. The Supreme Court of California explained its retroactivity determination as follows:

> We have said that **a change in the criminal law will be given retroactive effect when a rule is substantive** rather than procedural (**i.e.,** it alters the range of conduct or the class of persons that the law punishes, or **it modifies the elements of the offense**) or when a judicial decision undertakes to vindicate the original meaning of the statute (emphasis added).

In re Martinez, 3 Cal. 5th at 1222 (citing In re Lopez, 246 Cal. App. 4th 350, 357-359 (2016)). In In re Lopez, supra, the Court of Appeals of California explained its decision to apply retroactively the new rule of People v. Chiu, supra, with reference to Summerlin, 542 U.S. 348, as follows:

> There are two potential tests for determining whether a new rule of law applies retroactively to state court convictions on collateral review. The first test, which might be called the federal test, was set forth in Schriro v. Summerlin, . . . 542 U.S. 348 [(2004).] The issue in Schriro was whether a new federal constitutional rule was substantive or procedural. The United States Supreme Court clarified that the key issue in retroactivity analysis on collateral review is whether the new rule is substantive or procedural. "New *substantive* rules generally apply retroactively" (*id. at p. 351*) while "[n]ew rules of procedure . . . do not apply retroactively" (*id. at p. 352*). "A rule is substantive rather than

> procedural if it alters the range of conduct or the class of persons that the law punishes" (*id. at p. 353*) or "modifies the elements of an offense" (*id. at p. 354*).

In re Lopez, supra, 246 Cal. App. 4th at 357-358.

IV. Questions 3, 4, 5, and 6, are decided in ways that conflict with relevant decisions of this Court. Sup. Ct. Rule 10(c).

Question Presented 3. As the SJC determined that Brown's alleged complicity in the offense of armed home invasion was as an individual acting on the "remote outer fringes" of a conspiracy, Brown cannot be convicted or sentenced on armed home invasion. There was no evidence that Brown was ever "at, or near the scene" or that Brown took any active role in counseling, hiring or otherwise procuring other individuals to engage in the alleged attempted armed robbery or alleged home invasion. Mere presence in a dwelling where others are planning a crime does not confer joint venture liability. Mere acquiescence in a request to produce clothing or a firearm does not confer joint venture liability. See Commonwealth v. Reveron, 75 Mass. App. Ct. 354, 357 (2009) (quoting Commonwealth v. Tavares, 61 Mass. App. Ct. 385, 386-389 (2004)); compare Winship, 397 U.S. at 358-364; Jackson, 443 U.S. at 318-319.

Question Presented 4. Brown's conviction of armed home invasion is duplicative of his convictions of felony murder and so must be vacated and dismissed. A sentence may not be imposed for an underlying felony when a

jury has convicted on the theory of felony-murder. Commonwealth v. Scott, 428 Mass. 363, 369 (1998).

> "[I]n felony-murder the conduct which constitutes the felony must be separate from the acts of personal violence which constitute a necessary part of the homicide itself." Commonwealth v. Gunter, 427 Mass. 259, 272 . . . (1998).

Commonwealth v. Bell, 460 Mass. 294, 300 (2011). Brown's conviction and sentence on armed home invasion must be vacated and dismissed because that alleged offense which allegedly resulted in the victims' deaths is "duplicative" of each of the defendant's convictions of felony murder (Commonwealth v. Doucette, 430 Mass. 461, 462 (1999) (citing Commonwealth v. Scott, 428 Mass. 362, 369-370 (1998); Doucette, 430 Mass. at 461-466)), in violation of the 5th Amendment Double Jeopardy. Any alleged threatened use of force, as part of a home invasion or an attempted armed robbery, was part of a shooting that killed a decedent. See Commonwealth v. Stokes, 440 Mass. 741, 746-747 (2004); Commonwealth v. Joyner, 467 Mass. 176, 187 n. 13 (2014).

Question Presented 5. The Appeals Court has committed reversible error by determining that Brown's insufficiency arguments as to second degree murder and home invasion are barred by direct estoppel. Contra Appeals Court Memo and Order, 2024 Mass. App. Unpub. LEXIS 349, at *3-*4. As an appeal from resentencing, this case remains pending on direct review from his original

convictions and sentence. See Burton, 549 U.S. at 156 ("Final judgment in a criminal case means sentence. The sentence is the judgment.") (quoting Berman, 302 U.S. at 212). Brown's insufficiency arguments are not barred.

Question Presented 6. Mass. G. L. c. 269, § 10(h)(1) punishes up to 2 years in prison for a second or subsequent offense on a firearm or ammunition charge, regardless of whether a sentence has been served. Allowing those convictions to stand because the time has been served violates both 14th Amendment Due Process, and the law against double jeopardy under the 5th and 14th Amendments. See Benton v. Maryland, 395 U.S. 784,787 (1969); Burks v. United States, 437 U.S. 1, 11 (1978).

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Court grant this Petition for a Writ of Certiorari to the Appeals Court for the Commonwealth of Massachusetts.

Respectfully submitted,

TIMOTHY R. BROWN,

By his Attorney,

Dated: December 4, 2024

David H. Mirsky, Esquire
(US Supreme Court Bar #246794;
MA BBO #559367; NHBA #9351)
Counsel of Record for Petitioner
Mirsky & Petito, Attorneys at Law
P.O. Box 1063
Exeter, NH 03833
Tel.: 603-580-2132
dmirsky@comcast.net