

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024-2025

MARK TOMAS REGAN,
Petitioner,

-v.-

COMMONWEALTH OF MASSACHUSETTS
Respondent

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

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QUESTIONS PRESENTED

1. Whether the right to keep and bear arms protected by the Second Amendment, the right guaranteed by the Due Process Clause of the 14th Amendment to be free from conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the charged crime, and the right to be free from multiple prosecutions for the same offense guaranteed by the Double Jeopardy Clause of the Fifth Amendment, prohibit retrial of a defendant on charges of unlawful possession of firearms and ammunition, where the prosecution failed to prove beyond a reasonable doubt the essential element of absence of licensure at the defendant's trial.
2. Whether District of Columbia v. Heller, 554 U.S. 570 (2008), McDonald v. Chicago, 561 U.S. 742 (2010), and the Due Process Clause of the Fourteenth Amendment, demand that licensure is an essential element of unlawful possession of a firearm and ammunition in one's own home, where state law criminalizes possession of a firearm and ammunition without a license.

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Petitioner Mark Tomas Regan respectfully prays that a writ of certiorari issue to review the judgment of the Appeals Court for the Commonwealth of Massachusetts.

CITATIONS TO THE OPINIONS BELOW

The Appeals Court issued a published opinion affirming the defendant's conviction of second degree murder, vacating his convictions of unlawful possession of a firearm and ammunition, and permitting retrial on the firearm and ammunition charges. The judgment and full opinion of the Appeals Court appears at Commonwealth v. Mark Tomas Regan, 104 Mass. App. Ct. 623 (2024) (*Appeals Court Opinion, Commonwealth v. Mark Tomas Regan*, 104 Mass. App. Ct. 623 (2024) attached hereto as *Appendix A*). On September 12, 2024, the petitioner filed Defendant's Application for Further Appellate Review in the Supreme Judicial Court of Massachusetts, seeking further appellate review of the Appeals Court's decision. *Docket Entries, Commonwealth v. Mark Tomas Regan*, Supreme Judicial Court of Massachusetts, No. FAR-30007, attached hereto as *Appendix E*. Defendant's Application for Further Appellate Review was denied by the Supreme Judicial Court of Massachusetts (hereinafter "SJC") on October 16, 2024; the SJC's notice of denial of the petitioner's Application for Further Appellate Review is reported as Commonwealth v. Regan, [Supreme Judicial Court No. FAR-30007,] 494

Mass. 1109 (October 16, 2024) (*Notice of Denial of Application for Further Appellate Review*, attached hereto as *Appendix B*).

STATEMENT OF JURISDICTION

The Supreme Judicial Court of Massachusetts denied Defendant's Application for Further Appellate Review on October 16, 2024. Accordingly, this petition is timely filed pursuant to Supreme Court Rule 13(3). See Docket Entries, Commonwealth v. Regan, Supreme Judicial Court of Massachusetts, No. FAR-30007 (attached hereto as *Appendix E*). 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 Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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 269, section 10(a), (h)

§ 10 Weapons -- Dangerous Weapons – Unlawfully Carrying.

(a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(1) being present in or on his residence or place of business; or

- (2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or
- (3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or
- (4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or
- (5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either:
 - (1) being present in or on his residence or place of business; or
 - (2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or
 - (3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or
 - (4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or
 - (5) having complied with the requirements imposed by section one

hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of not semiautomatic rifles and shotguns; or

(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued

without a finding nor placed on file.

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

.....

(h)

(1) Whoever owns, possesses or transfers a firearm 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.

7. Massachusetts General Laws, chapter 140, section 129B

§ 129B. Firearms — Purchase — Identification Card.

A firearm identification card shall be issued and possessed subject to the following conditions and restrictions:

(a) Any lawful resident 18 years of age or older residing within the jurisdiction of the licensing authority or residing in an area of exclusive federal jurisdiction located within a city or town may submit to the licensing authority an application for a firearm identification card, or renewal of the same, which the licensing authority shall issue pursuant to section 121F if it appears that the applicant is neither a prohibited person nor determined to be unsuitable to be

issued a card as set forth in said section; provided, however, that a person aged 15 years or older, but less than 18 years of age, may submit an application for a firearm identification card and shall be issued the same only if the applicant meets the requirements of said section 121F and submits with the application a certificate of a parent or guardian granting the applicant permission to apply for the card. A person 14 years of age may submit an application for a firearm identification card but the applicant shall not be issued the card until the applicant reaches 15 years of age and at that time meets the standards and requirements under this subsection.

8. Massachusetts General Laws, chapter 140, section 131

§ 131. Firearms — Possession — License to Carry.

The issuance and possession of a license to carry firearms shall be subject to the following conditions and restrictions:

(a) A license shall entitle a holder thereof of a license to purchase, rent, lease, borrow, possess and carry firearms, including large capacity firearms and ammunition therefor. The license shall not entitle a holder thereof to transfer, possess or carry large capacity feeding devices or assault-style firearms unless such transfer, possession or carry is permitted under section 131M.

(b) No license shall be issued under this section unless the applicant submits

with their application a basic firearms safety certificate meeting the requirements of section 131P.

- (c) A license to carry firearms shall be valid to own, possess, purchase and transfer rifles and shotguns that are not large capacity or semi-automatic, consistent with the entitlements conferred by a firearm identification card issued under section 129B.
- (d) A lawful resident 21 years of age or older residing within the jurisdiction of the licensing authority or any law enforcement officer employed by the licensing authority or any person residing in an area of exclusive federal jurisdiction located within a city or town may submit to the licensing authority an application for a license to carry firearms, or renewal of the same, which the licensing authority shall issue as provided under section 121F only if it appears that the applicant is neither a prohibited person nor determined to be unsuitable to be issued a license as set forth in said section 121F, provided that upon an initial application for a license to carry firearms, the licensing authority shall conduct a personal interview with the applicant.
- (e) A license to carry firearms shall be valid, unless revoked or suspended, for a period of not more than 6 years from the date of issue and shall expire on the anniversary of the licensee's date of birth occurring not less than 5 years nor

more than 6 years from the date of issue. Any license issued to an applicant born on February 29 shall expire on March 1.

(f) No person shall be issued a license to carry a machine gun in the commonwealth, except that a licensing authority may issue a machine gun license to: (i) a firearm instructor certified by the municipal police training committee for the sole purpose of firearm instruction to police personnel; or (ii) a bona fide collector of firearms as defined in section 121 upon application or upon application for renewal of such license. Clauses (i) and (ii) of this paragraph shall not apply to automatic devices or automatic parts.

(g) A person issued a license under this section shall report any change of address via the electronic firearm registration system administered by the commissioner of the department of criminal justice information services. Such notification shall be made on said electronic firearms registration system within 30 days of its occurrence. Failure to notify in a timely manner shall be cause for revocation or suspension of said license.

(h) The secretary of the executive office of public safety and security or their designee may promulgate regulations to carry out the purposes of this section.

9. Massachusetts General Laws, chapter 278, section 7

§ 7 Burden on Defendant to Prove Licensing or Authority.

A defendant in a criminal prosecution, relying for his justification upon a license, appointment, admission to practice as an attorney at law, or authority, shall prove the same; and, until so proved, the presumption shall be that he is not so authorized.

10. D.C. Code § 7-2506.01

§ 7-2506.01. Persons permitted to possess ammunition.

- (a) No person shall possess ammunition in the District of Columbia unless:**
 - (1) He is a licensed dealer pursuant to subchapter IV of this unit;**
 - (2) He is an officer, agent, or employee of the District of Columbia or the United States of America, on duty and acting within the scope of his duties when possessing such ammunition;**
 - (3) He is the holder of a valid registration certificate for a firearm pursuant to subchapter II of this chapter; except, that no such person shall possess one or more restricted pistol bullets;**
 - (4) He holds an ammunition collector's certificate on September 24, 1976; or**
 - (5) He temporarily possesses ammunition while participating in a firearms training and safety class conducted by a firearms instructor.**

(b) No person in the District shall knowingly possess, sell, or transfer any ammunition feeding device that is, in fact, a large capacity ammunition feeding device, regardless of whether the device is attached to a firearm.

(c) For the purposes of this section, the term “large capacity ammunition feeding device” means a magazine, belt, drum, feed strip, or similar device that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition. The term “large capacity ammunition feeding device” shall not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition.

RULES

11. Rule 25, Massachusetts Rules of Criminal Procedure

Rule 25. Motion for Required Finding of Not Guilty

(a) Entry by Court. The judge on motion of a defendant or on his own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint or any part thereof after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge. If a defendant’s motion for a required finding of not guilty is made at the close of the Commonwealth’s evidence, it shall be ruled upon at that time. If the motion is denied or allowed only in part by the judge, the defendant may offer

evidence in his defense without having reserved that right.

(b) **Jury Trials.**

(1) *Reservation of Decision on Motion.* If a motion for a required finding of not guilty is made at the close of all the evidence, the judge may reserve decision on the motion, submit the case to the jury, and decide the motion before the jury returns a verdict, after the jury returns a verdict of guilty, or after the jury is discharged without having returned a verdict.

(2) *Motion After Discharge of Jury.* If the motion is denied and the case is submitted to the jury, the motion may be renewed within five days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned, the judge may on motion set aside the verdict and order a new trial, or order the entry of a finding of not guilty, or order the entry of a finding of guilty of any offense included in the offense charged in the indictment or complaint.

(c) **Appeal.**

(1) *Right of Appeal Where Motion for Relief under Subdivision (b) Is Allowed After a Jury Verdict of Guilty.* The Commonwealth shall have the right to appeal to the appropriate appellate court a decision of a judge granting relief under the provisions of subdivisions (b)(1) and (2) of this rule on a motion for required finding of not guilty after the jury has returned a verdict of guilty or on

an order for the entry of a finding of guilt of any offense included in the offense charged in the indictment or complaint.

(2) *Costs Upon Appeal.* If an appeal or application therefor is taken by the Commonwealth, the appellate court, upon the written motion of the defendant supported by affidavit, may determine and approve the payment to the defendant of his costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court upon the entry of the rescript or the denial of the application.

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

RULE 27.1. FURTHER APPELLATE REVIEW

(a) Application; When Filed; Grounds. Within twenty days after the date of the rescript of the Appeals Court any party to the appeal may file an application for leave to obtain further appellate review of the case by the full Supreme Judicial Court. Such application shall be founded upon substantial reasons affecting the public interest or the interests of justice. . . .

(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 of all documents filed in the case.

13. Rule 16(l), Massachusetts Rules of Appellate Procedure

....

(l) Citation of Supplemental Authorities. When pertinent and significant authorities come to the attention of a party after his brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy to all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and shall be similarly limited.

14. 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 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;
(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. . . .

15. Rule 13, 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.

16. 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, unless it is a Saturday, Sunday, federal legal holiday listed in 5 U. S. C. § 6103, or day on which the Court building is closed by order of the Court or the Chief Justice, in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed.

...

STATEMENT OF THE CASE¹

Procedural History

On May 15, 2014, three indictments were returned against Petitioner-Defendant Mark Regan, charging him with first degree murder (G.L. c. 265 §1); possession of a firearm not having been issued a firearm identification card (G.L. c. 269 §10(h)); and possession of ammunition not having been issued a firearm identification card (G.L. c. 269 §10(h). RA/3-5; *Appendix C (Suffolk Superior Court Docket Entries)*.

¹ The defendant's Record Appendix is cited herein as "RA/[page no.]". The trial transcript in the case below is in 12 volumes dated September May 20, 21, 22, 23, 24, 28, 29, 30, 31, and June 3, 4, and 6, 2019, and is cited herein as "Tr/[I-XII]/[page no.]". Defendant's Addendum is cited as "A/[page no.]".

Petitioner was tried before the Hon. Jeffrey A. Locke and a jury on May 20, 21, 22, 23, 24, 28, 29, 30, 31, and June 3 and 4, 2019. On June 4, 2019, Petitioner was convicted of second-degree murder (Mass. Gen. Laws ch. 265 § 1) (jury finds the degree of murder under the statute); unlawful possession of a firearm (Mass. Gen. Laws ch. 269 § 10(h)), and unlawful possession of ammunition (Mass. Gen. Laws ch. 269 § 10(h)). RA/30-31; *Appendix C (Suffolk Superior Court Docket Entries)*. On June 6, 2019, he was sentenced to life imprisonment with the possibility of parole after 15 years on the murder charge; two years imprisonment at the South Bay House of Corrections, from and after the sentence on the murder conviction, on the firearm charge; and one year imprisonment at South Bay House of Corrections, concurrent with the sentence on the firearm charge and from and after the sentence on the murder conviction, on the ammunition charge. RA/31-32; *Appendix A (Suffolk Superior Court Docket Entries)*. Petitioner filed a notice of appeal on June 6, 2019, and his case was entered in the Massachusetts Appeals Court on December 15, 2021. RA/111.

Petitioner filed his Brief in the Massachusetts Appeals Court on October 24, 2022. *Appendix D (Appeals Court Docket Entries)*. During the pendency of his appeal, the Massachusetts Supreme Judicial Court (“SJC”) issued its decisions in Commonwealth v. Guardado (“Guardado I”), 491 Mass. 666 (April

13, 2023) (different results reached on reconsideration by, vacated in part, remanded by Commonwealth v. Guardado, 493 Mass. 1, (Oct. 26, 2023), and Commonwealth v. Guardado (“Guardado II”), 493 Mass. 1 (October 26, 2023) cert denied, Guardado v. Massachusetts, 2024 U.S. LEXIS 2776 (June 24, 2024). In Guardado I, the SJC, relying on this Court’s decision in New York State Rifle & Pistol Ass’n v. Bruen, 142 S. Ct. 2111 (2022), reversed Massachusetts precedent that licensure was an affirmative defense to unlawful possession of a firearm and ammunition under Mass. Gen. Laws ch. 269 § 10 and held that absence of licensure is an essential element of unlawful possession of a firearm and ammunition. Guardado I, 491 Mass. at 687-688, 690 (overruling Commonwealth v. Gouse, 461 Mass. 787 (2012), to the extent that it treated absence of licensure as an affirmative defense to unlawful possession of a firearm and ammunition), citing Bruen, supra, 142 S. Ct. 2111, 2122, 2134, 2135 (2022). The decision in Guardado I ordered the entry of judgments of not guilty on the firearms charges. Guardado I, 491 Mass. at 694. The portion of the decision regarding remedy was reconsidered by the SJC in Guardado II. Guardado II, 493 Mass. at 2-12; Guardado I, 491 Mass. at 694. The SJC ruled in Guardado II that the appropriate remedy was a new trial rather than judgments of acquittal because the evidence regarding licensure was insufficient only in light of the post-trial development of the United States

Supreme Court decision in Bruen. Guardado II, 493 Mass. at 6-7, 12, citing Bruen, 142 S. Ct. at 2122.

Petitioner Regan was convicted of unlawful possession of a firearm and ammunition in his home prior to the decisions in Bruen, Guardado I and Guardado II. Regan, 104 Mass. App. Ct. at 624, 632. *Appendix A (Full Opinion of Appeals Court)*. No evidence regarding licensure was presented at his trial, and the trial judge did not instruct the jury that absence of licensure was an essential element of those offenses. Regan, 104 Mass. App. Ct. at 641 (*Appendix A*). The Appeals Court required Petitioner to address issues related to the Guardado decisions in a Supplemental Memorandum. *Appendix D (Appeals Court Docket Entries, p.3)*.

Petitioner filed said Memorandum on December 5, 2023 and filed his Reply Brief on January 3, 2024, incorporating the arguments raised in the Supplemental Memorandum into his Reply Brief. *Appendix D (Appeals Court Docket Entries, p.3)*. In his Supplemental Memorandum and by incorporation in his Reply Brief, Petitioner argued that because the right to possess a handgun in one's own home was established prior to his trial by District of Columbia v. Heller, 554 U.S. 570 (2008), and McDonald v. Chicago, 561 U.S. 742 (2010), and because no evidence of licensure was presented at his trial, he was convicted of the firearm and ammunition charges on evidence that was

insufficient at the time of his trial, that 14th Amendment due process required that his convictions be vacated, verdicts of not be guilty entered, and that Fifth Amendment double jeopardy principles preclude retrial. *Appendix K (Supplemental Memorandum, pp.7-8; Appendix L (Defendant's Reply Brief, p.14).*

On August 23, 2024, the Appeals Court issued its full opinion published at 102 Mass. App. Ct. 623 (2024) affirming Petitioner's conviction of second degree murder, vacating his convictions of unlawful possession of a firearm and unlawful possession of ammunition, and permitting retrial on the firearm and ammunition charges. Regan, 102 Mass. App. Ct. 623, 632 (2024); *Appendix A*. Petitioner filed an Application for Further Appellate Review in the Massachusetts Supreme Judicial Court on September 12, 2024, again arguing that because the right to possess a handgun in one's own home was established prior to his trial by Heller and McDonald, and because no evidence of licensure was presented at his trial, he was convicted of the firearm and ammunition charges on evidence that was insufficient at the time of his trial, that 14th Amendment due process required that his convictions be vacated, verdicts of not guilty be entered, and that Fifth Amendment double jeopardy principles preclude retrial. *Appendix M (Defendant's Application for Further Appellate Review, pp.13-15)*. The Application for Further Appellate Review was denied

on October 16, 2024. *Appendix E (Supreme Judicial Court Docket); Appendix B (Supreme Judicial Court Order Denying Further Appellate Review).*

Facts Regarding Firearm and Ammunition Charges

At the time of the events underlying the Petitioner's convictions, he was residing with his father, Mark Regan, Sr., who was found deceased, with fatal gunshot wounds, in the home on March 14, 2014, when police entered in response to a wellness check. Regan, 104 Mass. App. Ct. at 625, 627 n.1. A loaded firearm was found in the attic of the home, and ammunition was found in a bedroom. Regan, 104 Mass. App. Ct. at 625-626. Petitioner was charged with murder under Mass. Gen. Laws ch. 265 §1, unlawful possession of a firearm without an firearms identification card ("FID card") under Mass. Gen. Laws ch. 265 §10(h), and unlawful possession of ammunition without an FID card under Mass. Gen. Laws ch. 269 §10(h). *Appendix C (Suffolk Superior Court Docket Entries).*

Petitioner filed a Motion for a Required Finding of Not Guilty at the close of the Commonwealth's evidence, pursuant to Mass. R. Crim. Proc. 25. *Appendix F (Defendant's Motion for Required Finding of Not Guilty).*

Regarding said Motion, Petitioner stated at trial that

... The Commonwealth hasn't met its burden. It shouldn't go to the jury at this point. There is inadequate evidence, even in the light most favorable to the Commonwealth.

TrVII/114; *Appendix G (Oral Presentation of Motion for Required Finding at Trial, TrVII/114)*). The trial judge denied the Motion. TrVII/114; *Appendix F, Appendix G*. The trial judge instructed the jury on the charges of unlawful possession of a firearm, not having been issued an F.I.D. card and unlawful possession of ammunition, not having been issued an F.I.D. card, as follows:

The defendant is next charged under Section 10H of Chapter 269 of our General Laws of knowingly possessing a firearm unlawfully. In order to prove the defendant guilty of this offense, the Commonwealth must prove three elements beyond a reasonable doubt, first, that the defendant possessed a firearm; second, that what the defendant possessed met the legal definition of a firearm; and, third, the defendant knew that he possessed that firearm.

TrVIII/52-53

...
If the Commonwealth has proved each of these elements beyond a reasonable doubt, then you shall find the defendant guilty of unlawful possession of a firearm. If, however, the Commonwealth has failed to prove any one of these elements beyond a reasonable doubt, then you shall find the defendant not guilty.

Now, the defendant is also charged with unlawful possession of ammunition in violation of General Laws, Chapter 269, Section 10H. And this statute provides in part, "Whoever possesses ammunition without complying with the requirements of the law regarding ammunition shall be punished." In order to prove the defendant guilty of this offense, the Commonwealth must prove the following three elements beyond a reasonable doubt, first, that the defendant possessed that item; second, the item meets the legal definition of ammunition; and, third, the defendant knew that he possessed that ammunition.

TrVIII/56

...
If the Commonwealth proves each of these elements beyond a reasonable

doubt, then you should find the defendant guilty of this offense. If, however, the Commonwealth fails to prove any one of these three elements beyond a reasonable doubt, then you shall find the defendant not guilty.

TrVIII/57. Petitioner did not object to the instructions. TrVIII/57. There was no evidence at trial regarding whether Petitioner had been issued a firearms identification card. TrI-VII; Regan, 104 Mass. App. Ct. at 632 (*Appendix A*). Petitioner was convicted of second degree murder under Mass. Gen. Laws 265 § 1 (jury finds the degree of murder under the statute), and he was convicted under G.L. c. 269 §10(h) of unlawful possession of the firearm and ammunition that were found in his home. TrVI/46,53-56; TrVII/151-152; Regan, 104 Mass. App. Ct. at 624; (*Appendix A*); *Appendix C (Suffolk Superior Court Docket Entries)*.

REASONS FOR GRANTING REVIEW

I. The Massachusetts Appeals Court ruling allowing the Commonwealth to retry Petitioner decides important federal questions regarding Due Process and Double Jeopardy in a way that conflicts with relevant decisions of the U.S. Supreme Court. Sup. Ct. Rule 10(c).

The Appeals Court decision permitting re-trial of Mr. Regan on the firearm and ammunition charges violates decisions of the U.S. Supreme Court, namely Burks v. U.S., 437 U.S. 1, 10-11,16-18 (1978) (Double Jeopardy Clause prohibits re-trial where conviction is vacated due to insufficient evidence); In re

Winship, 397 U.S. 358, 364 (1970) (Due Process Clause requires “proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”); Jackson v. Virginia, 443 U.S. 307, 318-319 (1979) (sufficiency of evidence turns on whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt); District of Columbia v. Heller, 554 U.S. 570, 628-629 (2008) (Second Amendment protects the right to possess a firearm in one’s home for self-defense); and McDonald v. City of Chicago, 561 U.S. 742, 767-768, 791 (2010) (Second Amendment right recognized in Heller, *supra*, applies to the states).

Mr. Regan was convicted under Mass. Gen. Laws. ch. 269 § 10(h) of unlawfully possessing a firearm and ammunition, in his home, without a firearm identification card (“FID”) card. The licensing statutes in Massachusetts require, depending on the circumstances, an F.I.D. card to possess a firearm in one’s home, or a license to carry to possess a firearm outside the home. Mass. Gen. Laws ch. 140 §129B (FID card); Mass. Gen. Laws ch. 140 § 131 (license to carry); Gouse, 461 Mass. at 799 n.14 (2012) (“an FID card … allows the holder to own, transfer, or possess a firearm in his residence or place of business”) (overruled on other grounds, stated *supra*, this Petition). Under Mass. Gen. Laws ch. 278 § 7, a defendant relying on licensure to avoid conviction must raise it as an affirmative defense. Mass. Gen. Laws ch. 278 § 7.

While the Massachusetts SJC in the Guardado cases determined, pursuant to the U.S. Supreme Court decision in Bruen, that licensure may no longer be treated as an affirmative defense to unlawful possession of a firearm or ammunition but instead is an essential element of those offenses, the Guardado cases concerned the offense of carrying a firearm and ammunition *outside* the home, not inside the home. Guardado II, 493 Mass. at 3; Guardado I, 491 Mass. at 690-691, citing Bruen, 142 S. Ct. at 2122. This distinction is crucial because, while the right to carry firearms outside the home was recognized in Bruen, 142 S. Ct. 2111 (2022), the right to possess a handgun in the home was recognized in 2008 by District of Columbia v. Heller, 554 U.S. 570 (2008). Bruen, 142 S. Ct. at 2122; Heller, 554 U.S. at 628-629. In 2010, the decision in McDonald v. City of Chicago, 561 U.S. 742 (2010) established that the due process clause incorporates the Second Amendment right recognized in Heller. McDonald, 561 U.S. at 778, 791; Heller, 554 U.S. at 592, 626, 628, 625. The U.S. Supreme Court in Bruen expressly re-affirmed that its prior decisions in Heller and McDonald “recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense.” Bruen, 142 S. Ct. at 2122.

At the defendant’s trial, there was no evidence of whether he possessed an F.I.D. card, and the jury was not instructed that it must find absence of an

F.I.D. card beyond a reasonable doubt. Regan, 104 Mass. App. Ct. at 632 (*Appendix A*). The Due Process Clause prohibits conviction without proof beyond a reasonable doubt of every fact necessary to constitute the charged offense, and it prohibits reallocation of the burden of proof of essential elements of the crime by labelling some elements affirmative defenses. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); Patterson v. New York, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). A state may not allocate burdens of proof in a manner that lessens its burden to prove beyond a reasonable doubt every element of the charged offense. Smith v. United States, 568 U.S. 106, 110 (2013) (state may not allocate burdens of proof in a manner that controversies an element of the offense) (citing Dixon v. United States, 548 U.S. 1, 6 (2006); Mullaney v. Wilbur, 421 U.S. 684, 698 (1975); Patterson, 432 U.S. at 210. Because Heller and McDonald recognized possession of a firearm in one's home as conduct constitutionally protected by the Second Amendment, unlawful possession of a firearm in one's home could not be punished at the time of Petitioner's trial absent proof beyond a reasonable doubt of the essential element of lack of an F.I.D. card. In re Winship, 397 U.S. at 364; Patterson, 432 U.S. at 210. Failure to obtain an F.I.D. card is an essential element of the offense, which the Commonwealth must prove beyond a reasonable doubt. Smith, 568 U.S. at 110 quoting In re

Winship, 397 U.S. at 364. While the SJC recognized in Guardado I and in Guardado II that, pursuant to Bruen, absence of licensure is an essential element of possession of a firearm outside the home, Massachusetts has failed to recognize in its decision in Petitioner's case that absence of licensure was established as an essential element of the offense of unlawful possession of a firearm in one's home by Heller, prior to his 2019 trial. Regan 104 Mass. App. Ct. at 632, further appellate review denied, Commonwealth v. Mark Tomas Regan, 2024 MASS Lexis 429 (October 16, 2024), 494 Mass. 1109 (October 16, 2024) (*Appendix A, Appendix E*). The Appeals Court found that the Commonwealth did not present evidence at trial that Petitioner lacked a license (FID card) for the firearm and ammunition, but expressly permitted re-trial on those charges rather than entering judgements of acquittal, pursuant to Guardado II. Regan, 104 Mass. App. Ct. at 632 (*Appendix A*). The Appeals Court's decision violates Fifth and 14th Amendment protections against double jeopardy. Burks, 437 U.S. at 18; Benton v. Maryland, 395 U.S. 784, 787 (1969) (incorporation). Because Petitioner was convicted on insufficient evidence, the appropriate remedy is judgments of acquittal; retrial is barred by double jeopardy principles. Burks, 437 U.S. at 18 ("Since we hold today that the *Double Jeopardy Clause* precludes a second trial once the reviewing court has found the evidence legally insufficient, the only "just" remedy available for that

court is the direction of a judgment of acquittal”).

II. The Massachusetts Appeals Court ruling allowing the Commonwealth to retry Petitioner decides important federal questions regarding Due Process and Double Jeopardy in a way that conflicts with the D.C. Court of Appeals. Sup. Ct. Rule 10(b).

In 2010, the D.C. Court of Appeals in Herrington v. United States, 6 A.3d 1237 (D.C. 2010), relied on Heller, McDonald, and Winship to hold that it was a violation of due process to convict a defendant of unlawful possession of ammunition *in his home* without a firearm registration certificate without requiring the prosecution to prove absence of a registration certificate beyond a reasonable doubt. Herrington, 6 A.3d at 1239, 1244-1245, nn. 21-22, 26-28; The defendant in Herrington was convicted under a D.C. statute which made possession of ammunition without a firearm registration certificate unlawful, similar to Mass. Gen. Laws ch. 269 §10. Herrington, 6 A.3d at 1240-1241; D.C. Code § 7-2506.01 (2010) (current version codified at D.C. § 7-2506.01(a) (2024)); Mass. Gen. Laws ch. 269 § 10(h).

The D.C. Court of Appeals held in Herrington that applying the D.C. statute in a manner that required the defendant, who was charged with unlawful possession of ammunition in his home, to raise licensure as an affirmative defense violated the Second Amendment’s protection of the right to possess firearms in the home as recognized in Heller and McDonald, and the right under

the Due Process Clause of the 14th Amendment to be free from conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the charged offense. Herrington, 6 A.3d at 1244-1245, nn. 21,22, 26,27,28, citing Heller, 128 S. Ct. at 2818, In re Winship, 397 U.S. at 364, and Patterson, 432 U.S. at 310. The D.C. Court of Appeals determined that the defendant in Herrington, where there was no evidence at trial that he did not have the required firearm registration certificate, had been convicted on “insufficient evidence, for conduct ‘indistinguishable from the mere exercise of [a defendant’s] Second Amendment right’”. Herrington, 6 A. 3d at 1246 (internal quotations omitted).

By refusing to determine in Petitioner’s case that lack of licensure was an essential element of unlawful possession of a firearm and ammunition pursuant to Heller and McDonald, that judgements of acquittal are required, and that due process and 5th Amendment double jeopardy protections preclude retrial, the Massachusetts Appeals Court is in conflict with the D.C. Court of Appeals on the important federal issues of the Fourteenth Amendment due process right to be free from conviction except upon proof beyond a reasonable doubt of every fact necessary for conviction, and the right protected by the Double Jeopardy Clause of the Fifth Amendment to be free multiple prosecutions for the same offense. In re Winship, 397 U.S. at 364; Jackson, 443 U.S. at 318-319; Burks,

437 U.S. at 18; Heller, 554 U.S. at 628-629; McDonald, 561 U.S. at 767-768, 791.

CONCLUSION

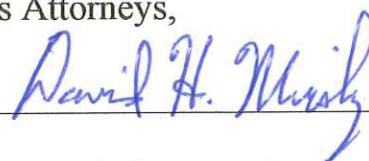
For the foregoing reasons, petitioner respectfully requests that the Court grant this petition for a Writ of Certiorari to the Appeals Court of Massachusetts.

Respectfully submitted,

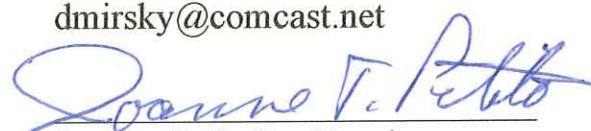
MARK TOMAS REGAN,

By his Attorneys,

Date: January 13, 2025



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