No. _____

IN THE
Supreme Court of the United States

DASAHN CROWDER,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2012, the Massachusetts Supreme Judicial Court (SJC) upheld the constitutionality of a statutory scheme in which licensure was an affirmative defense to a charge of carrying a firearm without a license, expressly reasoning that the regime did not implicate the Second Amendment where carrying a firearm outside the home was not constitutionally protected conduct. *Commonwealth v. Gouse*, 965 N.E.2d 774, 778, 786 (Mass. 2012). Then, prior to Petitioner Dasahn Crowder's trial, this Court held that such conduct *was* constitutionally protected, pursuant to the Second and Fourteenth Amendments. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 10 (2022).

Crowder was convicted of the offense of carrying a firearm without a license, in violation of Mass. Gen. Laws ch. 269, § 10(a). The SJC did not address *Bruen*'s impact on the essential elements of that offense until after Crowder's trial. The government produced no evidence at trial that he lacked a firearms license. As a result, Crowder was wrongfully convicted solely on evidence that he knowingly possessed a firearm outside the home, *i.e.*, that he engaged in constitutionally protected conduct. *See, e.g.*, *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (criminal statute is "unconstitutionally broad" where "it authorizes the punishment of constitutionally protected conduct").

The questions presented are:

1. Whether it violates the Double Jeopardy Clause to remand a firearm possession case for retrial after the Petitioner's conviction was vacated for the government's failure to present evidence on the essential element of lack of licensure, where, in light of *Bruen*, the government was on notice of its obligation to present evidence of the only fact rendering Petitioner's conduct constitutionally punishable.

2. As a matter of first impression, whether treating a post-trial change in state law that was dictated by a pre-trial decision of this Court as akin to a solely post-trial change in the law unconstitutionally permits states to ignore controlling decisions of this Court until and unless they are interpreted by a state appellate court.

3. Whether and how an individual may now be prosecuted for conduct implicating the Second Amendment where the criminal statutory scheme under which he was charged was unconstitutional in light of *Bruen*, and where the current version of the relevant statutory scheme was enacted after the conduct at issue occurred and therefore its application to such conduct would implicate the Ex Post Facto Clause, U.S. Const. Art. I, § 10.

PARTIES TO THE PROCEEDINGS

Petitioner is Dasahn Crowder. Respondent is the Commonwealth of Massachusetts. No party is a corporation.

RELATED PROCEEDINGS

Malden District Court, Middlesex County, Massachusetts:

Commonwealth v. Crowder, no. 2150CR000019
(Feb. 15, 2023) (entering judgment of conviction after jury trial)
(July 13, 2023) (denying Petitioner's motion for entry of finding of not guilty)

Massachusetts Appeals Court:

Commonwealth v. Crowder, no. 2023-P-0822
(July 19, 2023) (appeal docketed),
(June 11, 2024) (appeal transferred to Supreme Judicial Court on Petitioner's application for direct appellate review)

Massachusetts Supreme Judicial Court:

Commonwealth v. Crowder, no. DAR-29765 (June 11, 2024)
(granting Petitioner's application for direct appellate review)

Commonwealth v. Crowder, no. SJC-13616 (Mar. 25, 2025, rev'd Apr. 11, 2025)
(vacating Petitioner's conviction and remanding for new trial)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dasahn Crowder respectfully seeks a writ of certiorari to review the judgment of the Massachusetts Supreme Judicial Court.

OPINION BELOW

The opinion of the Massachusetts Supreme Judicial Court (SJC) is published at 253 N.E.3d 1207. A copy of the opinion appears in the appendix to this petition at App. 1a-21a.

JURISDICTION

The SJC issued a final judgment on March 25, 2025. App. 1a. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257. The SJC's decision qualifies as a "[f]inal judgment or decree[]" within the meaning of the statute. 28 U.S.C. § 1257. *See*, *e.g.*, *Smith v. Arizona*, 602 U.S. 779, 791-792 (2024) (granting review when state supreme court rejected Confrontation Clause claim and affirmed petitioner's conviction); *Bullington v. Missouri*, 451 U.S. 430, 437 & n.8 (1981)

(granting review where, although further proceedings were to take place in state court, state supreme court's judgment rejecting petitioner's double jeopardy claim was "final" within meaning of 28 U.S.C. § 1257).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 10, of the United States Constitution provides in relevant part:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

Article VI of the United States Constitution provides in relevant part:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Second Amendment to the United States Constitution provides: "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."

The Fifth Amendment to the United States Constitution provides:

> "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."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "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."

Massachusetts General Laws ch. 140, § 131, *as amended by* 2014 Mass. Acts ch. 284 §§ 46, 47, 49, 52, 54 (eff. Jan. 1, 2021 to Aug. 9, 2022), provides in relevant part:

> "The issuance and possession of a license to carry firearms shall be subject to the following conditions and restrictions:
>
> …
>
> "(d) A person residing or having a place of business within the jurisdiction of the licensing authority … may submit to the licensing authority or the colonel of state police an application for a license to carry firearms, or renewal of the same, which the licensing authority or the colonel may issue if it appears that the applicant is not a prohibited person as set forth in this section to be issued a license and that the applicant has good reason to fear injury to the applicant or the applicant's property or for any other reason, including the carrying of firearms for use in sport or target practice only, subject to the restrictions expressed or authorized under this section."

Massachusetts General Laws ch. 269, § 10(a), *as amended by* 2014 Mass. Acts ch. 284, §§ 89-92 (eff. Jan. 1, 2021 to Oct. 1, 2024), provides in relevant part:

> "Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, … without []:
>
> …
>
> "(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty;
>
> …
>
> "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. [Remaining sentencing provisions omitted.]

…
"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 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."

Massachusetts General Laws ch. 278, § 7, provides:

"A defendant in a criminal prosecution, relying for his justification upon a license … shall prove the same; and, until so proved, the presumption shall be that he is not so authorized."

STATEMENT OF THE CASE

1. Introduction. On January 6, 2021, petitioner Dasahn Crowder was a passenger in a car stopped for speeding by a Massachusetts State Police trooper. App. 2a-3a. The trooper decided to tow the car for being unregistered, and therefore removed Crowder and the other occupants from the car. App. 3a. As Crowder stepped out, the trooper saw him turn his body away and touch his jacket pocket. App. 3a. The trooper patfrisked Crowder's pocket, found a firearm, seized it, and took Crowder into custody. App. 3a. Crowder was ultimately convicted of carrying a firearm without a license, in violation of Mass. Gen. Laws ch. 269, § 10(a). App. 2a. The government had not offered any evidence at trial that Crowder lacked a firearms license; the conviction rested solely on proof that he knowingly possessed a firearm. App. 8a, 10a, 24a.

2. Legal developments prior to trial. Massachusetts law provides that it is a crime to "knowingly ha[ve] in [one's] possession; or knowingly ha[ve] under [one's] control in a vehicle; a firearm … without," as relevant here, "having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty[.]" Massachusetts General Laws ch. 269, § 10(a*), as amended by* 2014 Mass. Acts ch. 284, §§ 89-92 (eff. Jan. 1, 2021 to Oct. 1, 2024) (§ 10(a)). The version of the licensing statute in effect on January 6, 2021, provided that a licensing authority "may issue" a firearms license to a qualified applicant. Massachusetts General Laws ch. 140, § 131, *as amended by* 2014 Mass. Acts ch. 284 §§ 46, 47, 49, 52, 54 (eff. Jan. 1, 2021 to Aug. 9, 2022). *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 13-15 (2022) (noting Massachusetts had a "may issue" licensing regime).

A separate Massachusetts statute provides generally that a "defendant in a criminal prosecution, relying for his justification upon a license … shall prove the same; and, until so proved, the presumption shall be that he is not so authorized." Mass. Gen. Laws ch. 278, § 7. The SJC first examined the intersection of this statute with § 10(a) in *Commonwealth v. Jones*, 361 N.E.2d 1308 (Mass. 1977) (abrogation recognized in *Commonwealth v. Crowder*, 253 N.E.3d 1207, 1213 (2025)). The court concluded in *Jones* that where "[t]he holding of a valid license brings the defendant within an exception to the general prohibition against carrying a firearm, and is an affirmative defense[,] … the burden is on the defendant to come

forward with evidence of the defense." 361 N.E.2d at 1311. Within this framework, "[a]bsence of a license is not 'an element of the crime[.]" *Id.*

Over thirty years later, this Court decided *District of Columbia v. Heller*, 554 U.S. 570, 595, 635 (2008), concluding "that the Second Amendment conferred an individual right to keep and bear arms," and holding unconstitutional the District of Columbia's "ban on handgun possession in the home." In *McDonald v. Chicago*, 561 U.S. 742, 750 (2010), this Court further articulated "that the Second Amendment right is fully applicable to the States." Following this Court's decisions in *Heller* and *McDonald*, the SJC revisited the constitutionality of Massachusetts's statutory scheme surrounding prosecutions charging carrying a firearm without a license under § 10(a). *Commonwealth v. Gouse*, 965 N.E.2d 774, 784-86 (Mass. 2012). The defendant argued that requiring him to raise licensure as an affirmative defense contravened the holdings of *McDonald* and *Heller* because such a framework created "a presumption of criminality from constitutionally protected conduct – the possession of a firearm." *Id.* at 786. In rejecting the defendant's argument, the court reasoned that *Heller* and *McDonald* only "articulated a right 'to possess a handgun in the home for the purposes of self-defense.'" *Id.* Since "the defendant was charged with and convicted of possessing a firearm in an automobile, not his home," the SJC concluded that the case did not implicate the Second Amendment right. *Id.*

In 2022, prior to Crowder's trial, this Court held that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense **outside the home**." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597

U.S. 1, 10 (2022) (emphasis added). No Massachusetts appellate decision addressed the impact of *Bruen* on the holding of *Gouse* prior to Crowder's trial. *See* App. 11a.

3. Crowder's trial. Trial commenced on February 14, 2023. App. 4a. The trooper that conducted the traffic stop was the sole witness. App. 4a. As the Commonwealth later conceded, it presented no evidence at trial that Crowder lacked a firearms license. App. 8a, 10a, 24a. At the close of the Commonwealth's case, the court denied Crowder's motion for a required finding of not guilty as to the charge of carrying a firearm without a license. App. 4a, 23a. The motion did not address the government's failure to offer evidence that Crowder lacked a valid firearms license. App. 22a-23a. The jury returned a guilty verdict on February 15, 2023. Crowder timely appealed his conviction. The SJC allowed his motion for direct appellate review in June 2024. App. 4a.

4. Posttrial legal developments and trial court proceedings. While Crowder's case was pending on direct review, the SJC issued a decision in an unrelated case examining *Bruen*'s impact on a conviction for carrying a firearm without a license under § 10(a), in *Commonwealth v. Guardado*, 206 N.E.3d 512 (Mass.) [*Guardado I*], *amended by* 220 N.E.3d 102 (Mass. 2023) [*Guardado II*], *cert. denied*, 144 S. Ct. 2683 (2024) [collectively, *Guardado*]. The SJC concluded that "[i]n the wake of *Bruen*, this court's reasoning in *Gouse*, 965 N.E.2d at 786, is no longer valid. It is now incontrovertible that a general prohibition against carrying a firearm outside the home is unconstitutional." *Guardado I*, 206 N.E.3d at 538. "Because possession of a firearm outside the home is constitutionally protected conduct, it cannot, absent

some extenuating factor, such as failure to comply with licensing requirements, be punished by the Commonwealth." *Id.*

Thus, where "the absence of a license is necessary to render a defendant's possession of a firearm 'punishable,'" the SJC held that such absence is an essential element of the offense of carrying a firearm without a license." *Id.* Under long-established Massachusetts law, this meant the burden of production as to licensure could no longer be shifted to the defendant. *See Id.* at 547; *Commonwealth v. Burke*, 457 N.E.2d 622, 624 (Mass. 1983) (Commonwealth bears burden of production and burden of persuasion on elements of offense). The court noted that its holding was "dictated by the [Supreme] Court's decision in *Bruen*" and therefore applied retroactively to all cases that were active or pending on direct review as of *Bruen*'s issuance. *Guardado I*, 206 N.E.3d at 541. Because the government had introduced no evidence at trial that the defendant lacked a firearms license, the defendant had been "convicted of a crime solely on the ground that he had engaged in the constitutionally protected conduct of possessing a firearm in public." *Id.* at 539. The SJC initially reversed the conviction and ordered that a finding of not guilty enter. *Id.* at 539-541. *Guardado II*, 220 N.E.3d at 106.

Following the SJC's decision in *Guardado I*, Crowder moved the trial court to vacate his conviction and enter a finding of not guilty on the ground that the government had presented no evidence at trial that he lacked a firearms license. The trial court denied the motion without prejudice. App. 4a, 24a-25a.

Meanwhile, the SJC granted the Commonwealth's motion to reconsider the remedy imposed in *Guardado I* —*i.e.*, acquittal rather than retrial. *Guardado II*, 220 N.E.3d 104. After reconsideration, the SJC determined that the case could be retried because "[i]t only was after the defendant's trial that the Supreme Court issued its decision in *Bruen*," meaning "the evidence against the defendant was insufficient only when viewed through the lens of a legal development that occurred after trial." *Id.* at 107, 111. The decision implicitly left untouched the prescribed remedy of acquittal for defendants tried and convicted **after** *Bruen*. *See Burks v. United States*, 437 U.S. 1, 18 (1978).

5. Massachusetts Supreme Judicial Court decision. Here, the SJC allowed Crowder's application for direct appellate review and transferred the case from the Massachusetts Appeals Court. App. 4a. *See* Mass. R. App. P. 11(f) (allowance of an application for direct appellate review results in transfer of an appeal from the Massachusetts Appeals Court to the SJC). Crowder had asked the SJC to answer the question left open in *Guardado II* of the appropriate remedy for those defendants whose trials occurred after this Court's decision in *Bruen* but before the SJC's decision in *Guardado I*. App. 27a-28a. The SJC sought amicus briefs on the following question:

> "Whether the defendant is entitled to be acquitted of carrying a firearm without a license where the Commonwealth did not prove that he lacked a valid firearms license and the case was tried after the United States Supreme Court decided *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2002), or whether the defendant may be retried on that charge."

App. 29a.

The SJC agreed that, in light of *Bruen*, Crowder's conviction could not stand because the government had presented no evidence at trial that he lacked a license for the firearm he was convicted of possessing. App. 2a, 8a, 10a. However, the SJC also held that, despite the government's "failure to offer proof of the defendant's lack of a firearms license at trial," double jeopardy principles did not prohibit retrial.[1] App. 8a, 10a-13a. The SJC reasoned that the legal effect of the government's failure to muster sufficient evidence on an essential element at trial depended on whether the government should have known that it needed to present such evidence. App. 12a. If the government reasonably had no reason to know that lack of licensure was now an essential element of the crime of carrying a firearm without a license, its failure should be treated as ordinary "trial error" for which retrial is permissible. App. 10a. If, on the other hand, the government should have known that *Bruen* had altered the essential elements of the offense, its failure of proof should be treated as insufficient evidence barring retrial. App. 10a.

The SJC acknowledged that "*Bruen* constitutionally enshrined 'an individual's right to carry a handgun for self-defense outside the home.'" App. 10a.

[1] Separate from Crowder's case, Natnael Zemene was also convicted of unlawfully carrying a firearm after this Court's decision in *Bruen* but before the SJC's decision in *Guardado I*. App. 30a. The SJC paired Zemene's appeal with Crowder's for oral argument, and the SJC's decisions in both cases issued on the same date. App. 1a, 29a-30a.The SJC concluded that, for all the reasons it had articulated in *Commonwealth v. Crowder*, App. 1a-21a, double jeopardy did not prevent Zemene's retrial. App. 34a. Zemene has filed a separate petition for certiorari with this Court, raising substantially similar questions as questions 1 and 2 presented by the instant petition. *See* Petition for Writ of Certiorari, Zemene v. Massachusetts, No. 24-7373 (U.S. June 3, 2025). Crowder fully supports Zemene's petition and urges this Court to grant it. Crowder also respectfully requests that this Court consolidate its review of both Zemene's and the instant petition into one proceeding so that this Court can consider the full range of the unconstitutionality of the SJC's decisions.

However, it found significant that *Bruen* "did not address the allocation of the burden of production with respect to criminal violations of a valid licensing scheme, nor did it speak on the requisite elements of such crimes." App. 10a. Thus, the SJC concluded, the government could not have known until its decision in *Guardado I* that a "general prohibition against carrying a firearm" and related presumption of unauthorized possession was unconstitutional. App. 8a, 11a. According to the SJC, where a decision of this Court defined the scope of a federal constitutional right under the Second Amendment but did not directly "address[] or decide[] how the Second Amendment applie[d] to [] particular aspects of State law at issue," the government had no reason to question the constitutionality of its actions in light of this Court's decision. App. 11a-12a.

The SJC had previously noted in *Guardado I* that its holding was not "new" since it was "dictated by [this] Court's decision in *Bruen*." *Guardado I*, 206 N.E.3d at 541. However, in Crowder's case, the SJC explained that *Bruen* only dictated "*Guardado I*s retroactivity under Federal constitutional principles," and not the substantive holding. App. 12a. The SJC reasoned that "*Bruen*, by its own terms, could not have 'dictated' the [substantive] result in *Guardado I* … [because] *Bruen* did not define the elements of criminal violations of firearms licensing schemes or who bears the burden of production on such elements." App. 12a. Since *Guardado I* announced a "new" rule that the government could not have foreseen, the SJC concluded that Crowder could be retried. App. 12a-13a.

REASONS FOR GRANTING THE PETITION

I. The SJC's holding that the Double Jeopardy Clause does not preclude retrial despite its conclusion that the government failed to present any evidence of an essential element of the offense conflicts with this Court's decisions in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), *Burks v. United States*, 437 U.S. 1 (1978), and *In re Winship*, 397 U.S. 359 (1970).

This Court has long held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 359, 364 (1970). Conviction on insufficient evidence "is central to the basic question of guilt or innocence." *Jackson v. Virginia*, 443 U.S. 307, 323 (1979). Thus, "[t]he constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." *Id.*

Additionally, "it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and ... is a bar to a subsequent prosecution for the same offence." *Green v. United States*, 355 U.S. 184, 188 (1957) (internal quotation marks omitted). Where an appellate court reviewing a conviction determines that the evidence at trial was legally insufficient, such determination constitutes a conclusion that there has been "a failure of proof at trial" such that "the government's case was so lacking that it should not have even been *submitted* to the jury." *Burks*, 437 U.S. at 16. Thus, a reversal for insufficient evidence is equivalent to an acquittal for double jeopardy purposes. *Richardson v. United States*, 468 U.S. 317, 325 (1984).

After "the government has failed to prove its case," it should not be afforded "another opportunity to supply evidence which it failed to muster in the first proceeding," or, in other words, it should not be afforded "a 'second bite at the apple." *Burks*, 437 U.S.at 11, 15, 17. Accordingly, this Court has long held that, as with acquittals at trial, "the Double Jeopardy Clause precludes a second trial once [a] reviewing court has found the evidence legally insufficient, [and] the only 'just' remedy available for that court is the direction of a judgment of acquittal."[2] *Id.* at 18.

1. The SJC's decision decided an important federal question and conflicts with numerous decisions of this Court. Here, the SJC concluded that insufficiency of the evidence was an improper framework for analyzing the government's "failure to offer proof" of what the SJC had previously concluded was, as of *Bruen*, an essential element of the crime of which Crowder was convicted. App. 10a. *See Guardado I*, 206 N.E.3d at 537-38 (holding that, based on *Bruen*, "failure to obtain a valid firearms license is now an essential element of unlawful possession of a firearm"); *Guardado II*, 220 N.E.3d at 111 (defendant is entitled to benefit of the "new [constitutional] rule in *Bruen*, … that is, the right to have the Commonwealth prove that he lacked a license"). As such, the SJC held that the government's failure to present any evidence that Crowder lacked a firearms license presented no bar to his retrial pursuant to principles of double jeopardy. App. 10a, 13a-14a. In so holding,

[2] "[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage" and therefore applies to the States through the Fourteenth Amendment." *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

the SJC decided the important federal question of whether, after "the Government had failed to come forward with sufficient proof" as to an element it was required to prove beyond a reasonable doubt, it should be afforded "another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks*, 437 U.S. at 11. And it did so in a way that conflicts with the relevant decisions of this Court concerning a defendant's constitutional rights not to be convicted of a crime except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged and permit punishment, *In re Winship*, 397 U.S. at 364, and not to be twice placed in jeopardy for the same offense after the government mustered legally insufficient evidence at trial, *Burks*, 437 U.S. at 11, 15.

2. The SJC ignored that *Bruen* rendered constitutionally protected the offense conduct as previously defined by the SJC. In so doing, the SJC also answered the important federal question whether this Court's decision in *Bruen* was sufficient to put the government on notice that it could not punish an individual solely on evidence that he had engaged in the conduct of possessing a firearm in public. *See* App. 10a. The SJC's conclusion that it was not, App. 13a, conflicts with this Court's holding in *Bruen* that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home," 597 U.S. at 10, as well as with this Court's long line of decisions establishing that a state may not "punish[] constitutionally protected conduct," *e.g.*, *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

A statute may not "make[] a crime out of what under the Constitution cannot be a crime," *id*. at 616, nor may the government apply an otherwise lawful criminal statute so as to punish conduct which the state has no authority to prohibit, *Cox v. State of Louisiana*, 379 U.S. 536, 545 (1965). *See Norwell v. City of Cincinnati, Ohio*, 414 U.S. 14, 14 (1973) (reversing petitioner's conviction where the criminal "ordinance, as applied to this petitioner on the facts of his case, operated to punish his constitutionally protected speech"). Thus, this Court has made clear that when a criminal prosecution implicates constitutionally protected conduct, such conduct is only punishable as a crime where the government proves some fact that makes it fall "outside the bounds of [constitutional] protection." *Counterman v. Colorado*, 600 U.S. 66, 69 (2023).

This Court's line of precedent holding that a state may not punish a defendant for engaging in constitutionally protected conduct extends beyond the First Amendment context, establishing the principle's applicability to all constitutionally protected conduct. *See*, *e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 566 (2003) (state may not criminalize intimacies of physical relationships between two consenting adults where such conduct is within the scope of the petitioners' right to liberty under the Due Process Clause); *Meyer v. Nebraska*, 262 U.S. 390, 396-97, 400 (1923) (state may not criminalize teaching of foreign language where petitioner's right to teach and parents' right to hire him to teach their children are within scope of right to liberty under the Due Process Clause).

This Court has also specifically applied this principle to a decision of the SJC in the Second Amendment context. *See Caetano v. Massachusetts*, 577 U.S. 411 (2016). The SJC's decision had affirmed the defendant's conviction for possession of a stun gun, holding that her conviction did not violate her Second Amendment rights where "a stun gun is not the type of weapon that is eligible for Second Amendment protection." *Commonwealth v. Caetano*, 26 N.E.3d 688, 689 (Mass. 2015). In vacating the defendant's conviction, this Court explained that the SJC's reasoning for finding the relevant statute constitutional "contradict[ed] this Court's precedent." *Caetano*, 577 U.S. at 412.

That this Court has not yet directly applied this principle to the statute at issue here does not alter the legal landscape, where this Court has stated that the "constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 597 U.S. at 70. *Bruen* defined the scope of the relevant constitutional right and then interpreted it to prohibit the infringement encompassed in New York's discretionary "may-issue" licensing regime. The question here, whether it is constitutionally permissible for a state to punish the exact conduct defined in *Bruen* as constitutionally protected "presents an even easier case" than the constitutionality of a licensing statute addressed in *Bruen*. *Cf. Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 182-83 (2005) (Board was on notice that Title IX prohibits retaliation where this Court's prior decisions "interpreted Title IX's private cause of action broadly to encompass diverse forms of

intentional sex discrimination" and "retaliation presents an even easier case than [the] deliberate indifference" addressed in *Davis v. Monroe County Bd. of Educ*, 526 U.S. 629, 642 (1999)).

Here, the SJC summarized its pre-*Bruen* case law, noting that after this Court's decisions in *Heller*, 554 U.S. 570, and *McDonald*, 561 U.S. 742, the SJC had reaffirmed in *Gouse*, 965 N.E.2d 774, that lack of licensure was not an element of the offense of carrying a firearm without a license. App. 7a. However, the court failed to acknowledge the reason for such reaffirmance: the *Gouse* court's conclusion that carrying a firearm *outside* the home was not conduct that implicated the Second Amendment where, as of that time, this Court had only ever recognized a Second Amendment right to possess firearms *inside* the home. *See* 7a; *Gouse*, 965 N.E.2d at 786 (citing *Heller*, 554 U.S. at 634, and *McDonald*, 561 U.S. at 791). By the time of Crowder's trial, however, carrying a firearm outside the home *was* constitutionally protected. *Bruen*, 597 U.S. at 10.

Thus, because the government proved only that Crowder possessed a firearm in public, *i.e.*, that he engaged in constitutionally protected conduct, "in arresting, convicting, and punishing [him] under the circumstances disclosed by th[e] record," Massachusetts impermissibly "infringed [his] constitutionally protected rights" under the Second Amendment. *See Edwards v. South Carolina*, 372 U.S. 229, 234-235 (1963). Under this Court's precedents, it should have been clear to the government that it could not punish Crowder solely on evidence that he engaged in constitutionally protected conduct – *i.e.*, in the absence of any evidence of a fact

rendering his conduct punishable – and it likewise should have been clear to the SJC that, where the government did so, Crowder's conviction could not stand and the Double Jeopardy Clause prohibited retrial.[3]

3. This Court's intervention is needed. In the wake of *Bruen*, "[c]ourts throughout the country are facing challenges to federal and state gun control laws[.]" *New York v. Garcia*, 230 N.E.3d 1066, 1071 (N.Y. 2023) (Rivera, J., dissenting). In light of these widespread and ongoing challenges, this Court's intervention is needed to resolve the uncertainty created by the SJC's decision regarding the applicability of *In re Winship* and *Burks* to criminal prosecutions implicating an individual's Second Amendment rights as most recently articulated in *Bruen* and to reaffirm that the rights protected by the Second Amendment are not second-class rights subject to different rules than other constitutional rights.

II. The SJC's effective conclusion that the government may ignore a decision of this Court defining an individual's Second Amendment rights until and unless a local appellate court applies it to the particular factual scenario at issue, presents an important and recurring issue as to the obligations of state courts to follow this Court's Second Amendment and other federal constitutional jurisprudence.

The SJC justified its conclusion that the Double Jeopardy Clause does not bar Crowder's retrial by characterizing what it acknowledged was the government's

[3] Moreover, this Court has made clear that, at least in the context of qualified immunity questions, notice of "clearly established law" does "not require a case directly on point." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Instead, "[g]eneral legal principles can constitute clearly established law for purposes of AEDPA as long as they are holdings of this Court." *Andrew v. White*, 145 S. Ct. 75, 82 (2025). Thus, state actors "can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). "It is not necessary, of course, that 'the very action in question has previously been held unlawful.'" *Ziglar v. Abbasi*, 582 U.S. 120, 151 (2017) (internal citation omitted).

"failure to offer proof of the defendant's lack of a firearms license at trial" as mere "trial error" rather than insufficiency of the evidence. App. 10a, 13a. In the court's view, for double jeopardy purposes, Crowder's case was indistinguishable from that of the defendant in *Guardado*; it was of no import that this Court decided *Bruen* after that defendant's trial but before Crowder's. App. 13a. Thus, despite the fact that *Bruen* held **prior** to Crowder's trial that the conduct at issue was constitutionally protected, the SJC concluded that the evidence was only insufficient "when viewed through the lens of a legal development that occurred **after** trial[,] … a posttrial change in the Commonwealth's burden of production." App. 13a (emphasis added). In so concluding, the SJC recharacterized insufficiency of the evidence as to an essential element of a crime as a mere "change in the [government's] burden of production," App. 13a, to avoid "giv[ing] effect to [this Court's] Second Amendment jurisprudence," *see Wilson v. Hawaii*, 145 S. Ct. 18, 21 (2024) (Thomas, J., concurring in denial of cert.). "This Court cannot tolerate 'such blatant defiance' in any constitutional context." *Id.* (quoting *Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020) (mem.) (Thomas, J., dissenting from denial of cert.)).

1. *Bruen* made clear that the relevant statutory framework was unconstitutional. The SJC asserted that *Bruen* provided no guidance as to whether the statutory framework under which Crowder was convicted was unconstitutional, App. 12a, or, in other words, whether a State constitutionally could convict and punish a person solely on evidence that he engaged in the constitutionally protected conduct of possessing a firearm in public. In the SJC's view, until its decision in

Guardado I, the government was "[w]ithout the ability to gaze into the future of [its] and [this] Court's rulings … [and thus] simply had no reason to believe that any evidence concerning licensure would be necessary." App. 12a (quoting *Guardado II*, 220 N.E.3d at 107). What this statement ignored was that the government had no need to "gaze into the future of … [this Court's] rulings" at the time of Crowder's trial. Instead, the government merely needed to gaze into this Court's *past* rulings, which gave them every reason to believe evidence concerning licensure was necessary.

Prior to *Bruen*, the SJC had long interpreted the statute at issue, Mass. Gen. Laws ch. 269, § 10, as "proscrib[ing] certain inherently dangerous acts, [with Mass. Gen. Laws ch.] 278, § 7, allow[ing] the defendant to show that his conduct is within an exception to the proscription." *Commonwealth v. Davis*, 270 N.E.2d 925, 926 (Mass. 1971). Under this now-defunct framework, "the burden [was] on a defendant to come forward with evidence of" a valid firearms license. *Jones*, 361 N.E.2d at 1311. If he did, "the burden [was] on the prosecution to persuade the trier of facts beyond a reasonable doubt that the defense d[id] not exist." *Id.* If the defendant did not, there was "no issue for the jury as to licensing." *Id.*

"As [a] matter of statutory construction, the prohibition [against carrying a firearm outside the home] [was] general, the license [was] exceptional." *Id*. at 1310. The SJC acknowledged in *Guardado I* that *Bruen* made it "incontrovertible that a general prohibition against carrying a firearm outside the home is unconstitutional." *Guardado I*, 206 F.3d at 538. Thus, those earlier SJC decisions

notwithstanding, prior to Crowder's trial, *Bruen* made clear that the general prohibition against carrying a firearm created by the application of Mass. Gen. Laws ch. 278, § 7, to Mass. Gen. Laws ch. 269, § 10, was unconstitutional. *See Id.* *See also Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) ("A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct.").

2. The change in state law as to the burden of production is irrelevant to resolution of the federal question. In framing the issue as one of local evidentiary rules about the burden of production, the SJC attempted to recast the relevant question as one of primarily state law. However, local evidentiary rules about the burden of production, *i.e.*, the state law the SJC says controls, are irrelevant to the Federal question presented by Crowder's appeal.

As discussed in Part I, *supra*, this Court's long line of precedent clearly established that constitutionally protected conduct cannot be punished as criminal. That precedent made *Bruen*'s impact on criminal prosecutions for carrying a firearm outside the home immediately apparent: the Second Amendment requires proof of some fact beyond that a defendant engaged in the constitutionally protected conduct of carrying a firearm outside the home before his conduct may be punished. Thus, the government knew or **should have** known that *Bruen*'s holding meant that it could not punish such conduct but instead could only punish a failure to obtain a firearms license, meaning such failure was an essential element of the crime. *See United States v. Scheuneman*, 712 F.3d 372, 379 (7th Cir. 2013) ("An

essential element of a crime is one whose specification with precise accuracy is necessary to establish the very illegality of the behavior and thus the court's jurisdiction." (internal quotation marks omitted) (internal citation omitted)). *See also*, *e.g.*, *United States v. Prentiss*, 206 F.3d 960, 969 (10th Cir. 2000), *on reh'g en banc*, 256 F.3d 971 (10th Cir. 2001) (where "there can be no federal crime" unless arson occurred "between an Indian and a non-Indian," "the Indian status of the defendant and victim are essential elements of [the] crime").

3. The holding of *Guardado I* was not itself a new rule but merely applied the rule announced in *Bruen* to a new set of facts. "The Supremacy Clause … does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law … cannot extend to their interpretations of federal law." *Harper v. Virginia Dep't of Tax'n*, 509 U.S. 86, 100 (1993) (internal citations omitted). Federal retroactivity doctrine depends on determinations as to (1) whether a rule announced in a case is "new," and, (2) if so, whether it is the type of rule subject to retroactive application. *Teague v. Lane*, 489 U.S. 288, 307 (1989).

Contrary to the SJC's assertion, *see* App. 12a-13a, *Guardado I* did not constitute a post-trial "supervening 'change in the law,'" *see Smith v. Kemp*, 715 F.2d 1459, 1471 (11th Cir. 1983), or, in other words, a "new rule." This is so where *Guardado I* "did not announce any new standards of constitutional law not evident from" *Bruen*. *See Smith*, *supra* (in light of this Court's statement that the principles

of the relevant post-trial decision were evident from a decision pre-dating the defendant's trial, the post-trial decision did not establish "cause" excusing the defendant's failure to raise the issue at trial).

In *Guardado I*, the SJC acknowledged that, under this Court's jurisprudence, a "case 'announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 206 N.E.3d at 541 (internal citation omitted) (emphasis in original). Otherwise, as in *Guardado I*, the rule announced is "old." *Id.* (internal citation omitted). Inexplicably, then, and in direct conflict with decades of this Court's precedent defining when a rule is "new," in *Guardado II* the SJC reversed course and erroneously asserted that the rule announced in *Guardado I* had actually been "a 'new' rule 'dictated by [a] decision' of [this Court.]" *Guardado II*, 220 N.E.3d at 108. But where *Guardado I* "was controlled by" *Bruen*, "it did not announce a new rule." *See Stringer v. Black*, 503 U.S. 222, 229 (1992), *holding modified on other grounds by Brown v. Sanders*, 546 U.S. 212 (2006) (*"Maynard* was, … for purposes of *Teague*, controlled by *Godfrey*, and it did not announce a new rule."). This Court's precedents have "made clear that a case does *not* announce a new rule, [when] it [is] merely an application of the principle that governed a prior decision to a different set of facts." *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013) (quoting *Teague*, 489 U.S. at 307) (internal quotation marks omitted) (emphasis in original). Here, the SJC merely applied the principle that governed this Court's decision in *Bruen* to a new set of facts. Thus, it did not announce a new rule.

4. The SJC characterized the holding of *Guardado I* as a "new rule" to avoid concluding that the government had been bound to follow this Court's decision in *Bruen* since the date of issuance. The SJC concluded that the government should be granted another opportunity to muster evidence it failed to present at Crowder's trial because it could not have foreseen the "new rule" it announced in *Guardado I.* App. 11a-13a. However, Crowder had been entitled to the "the new rule in *Bruen*," *Guardado II*, 220 N.E.3d at 111, which required the government to prove he lacked a license as an essential element of the offense. App. 7a. But because, in the SJC's view, the government had no reason to know about that rule until its decision in *Guardado I*, Crowder was *not* entitled to the ordinary remedy for violations of it: preclusion of retrial under the Double Jeopardy Clause. App. 11a-13a.

The SJC erroneously characterized the holding in *Guardado I* as a new rule, rather than an application of the *Bruen* rule to a new set of facts. App. 10a-11a. And it did so because, if the holding of *Guardado I* were a "new rule," then it was free to conclude that the evidence at Crowder's trial was only insufficient "only when viewed through the lens of a legal development that occurred after trial." App. 13a (quoting *Guardado II*, 220 N.E.3d at 107). And if that were the case, then double jeopardy principles would not bar retrial. App. 13a; *Guardado II*, 220 N.E.3d at 107.

However, because the rule announced in *Guardado I* was not new, the SJC's discussion about the remedy for retroactive application of a new rule is misplaced. This Court's "retroactivity jurisprudence is concerned with whether, as a categorical matter, a new rule is available on direct review as a *potential* ground for relief."

Davis v. United States, 564 U.S. 229, 243 (2011). It does not address the situation here, where the "new rule" announced in *Bruen* pre-dated Crowder's trial and its application to that trial was thus prospective rather than retroactive. In any event, even assuming for argument's sake that a "new" rule from *Guardado I* were being applied retroactively to Crowder's case, that would not answer the question whether the Double Jeopardy Clause mandated a remedy of acquittal rather than a new trial where "[r]emedy is a separate, analytically distinct issue." *Id.* And at least two Circuit Courts have concluded that review for evidentiary insufficiency, including its associated double jeopardy implications, is the appropriate framework to review claims about the government's failure of proof based even on a *post*-trial decision of this Court altering the essential elements of the offense in such a way as to "narrow the scope of ... [the] offense" at issue. *See Steiner v. United States*, 940 F.3d 1282, 1284-85, 1290-91 (11th Cir. 2019) (evidence at trial was sufficient as to element of offense defined by this Court after defendant's trial); *United States v. Skarie*, 971 F.2s 317, 321-322 (9th Cir. 1992) (the evidence at trial was insufficient as to an essential element of the offense defined in a post-trial decision of this Court, such that the Double Jeopardy Clause prohibited retrial).

"'Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials," this Court has required that a new constitutional rule be given complete retroactive effect. *Hankerson v. North Carolina*, 432 U.S. 233, 241 (1977). It has done so despite

any "good-faith reliance by state or federal authorities on prior constitutional law or accepted practice" and the potential "severe impact on the administration of justice." *Id*. The impact on the truth-finding function of criminal trials was not the explicit purpose of the SJC's holding in *Guardado I*. *See* 206 N.E.3d at 538-39. However, that holding effected an earlier "constitutional determination[, by this Court in *Bruen*,] that place[d] particular conduct … covered by the [Massachusetts] statute beyond the State's power to punish." *See Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). As such, *Guardado I* implicitly addressed the fact that *Bruen* had "raise[d] serious questions about the accuracy of guilty verdict in past trials," *Hankerson*, 432 U.S. at 241, namely whether defendants had been convicted solely on evidence they had engaged in constitutionally protected conduct and, relatedly whether they had been convicted of violating unconstitutional statutes, *see Bruen*, 597 U.S. at 15 (identifying seven states with "may-issue" firearms licensing regimes). Thus, the Constitution dictated the "new rule" this Court announced in *Bruen*, which in turn dictated the rule the SJC announced in *Guardado I*, whether characterized as "old" or "new." Therefore, both rules must be given retroactive application, and violations of the rules via insufficient evidence implicate the Double Jeopardy Clause. *See Burks*, 437 U.S. at 18. Massachusetts's "refusal to give the rule[s] retroactive effect is reviewable by this Court." *See Montgomery v. Louisiana*, 577 U.S. 190, 197 (2016).

5. <u>The SJC's decision allowing the government to ignore this Court's precedent until the SJC interpreted it violated the Supremacy Clause</u>. Where this

Court decided *Bruen* before Crowder's trial, the evidence at Crowder's trial was insufficient when viewed through the lens of a pre-trial – not a post-trial – legal development. Thus, the relevant question, about which there can be no real dispute, is whether *Bruen*'s holding that carrying a firearm outside the home – *i.e.*, the conduct at issue in Crowder's case – was constitutionally protected applied *prospectively* to Crowder's post-*Bruen* trial. *See Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (all new rules "must be applied in all future trials"). However, in erroneously treating Crowder as similarly situated to the defendant in *Guardado*, and defining the question in terms of "retroactivity," the SJC's decision effectively gave the government permission to ignore a governing decision of this Court unless and until it was interpreted by the SJC. Such a suggestion contravenes the Supremacy Clause of the United States Constitution. *See* U.S. Const. Art.VI, ¶2.

The federal authority on which the SJC relied for applying the rationale in *Guardado II* to Crowder's case, *see* App. 13a-14a, was inapposite where it all involved defendants similarly situated, not to Crowder, but to the defendant in *Guardado.* In all of the SJC's cited cases, the relevant decisions of both this Court and the Circuit Court post-dated the defendant's trial.[4] The SJC made a similarly

[4] *See United States v. Aiello*, 118 F.4th 291, 296 (2d Cir. 2024) (*Ciminelli v. United States*, 598 U.S. 306 (2023), and *Percoco v. United States*, 598 U.S. 319 (2023), triggering change in Circuit law, was decided after the defendants' trial, as part of the direct appeal of their convictions); *United States v. Reynoso*, 38 F.4th 1083, 1087 (D.C. Cir. 2022) (*Rehaif v. United States*, 588 U.S. 225 (2019), triggering change in Circuit law, was decided on June 21, 2019, *after* Reynoso's conviction); *United States v. Harrington*, 997 F.3d 812, 817-819 (8th Cir. 2021), and *United States v. Harrington*, 617 F.3d 1063, 1064-1065 (8th Cir. 2010) (per curiam) (*Burrage v. United States*, 571 U.S. 204 (2014), triggering change in Circuit law, was decided several years after Harrington's 2009 conviction); *United States v. Weems*, 49 F.3d 528, 530-531 (9th Cir. 1995), Docket, United States v. Weems, 2:92-cr-00020-JET (W.D. Wash.) (*Ratzlaf v. United States*, 510 U.S. 135 (1994), triggering change in

inapposite conclusion that *Lockhart v. Nelson*, 488 U.S. 33, 42 (1988), supported the proposition that double jeopardy principles did not bar Crowder's retrial where "[p]ermitting retrial in this instance is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed," App. 13a-14a. In *Lockhart*, this Court concluded that the Double Jeopardy Clause did not preclude retrial "where the evidence offered by the State and admitted by the trial court-whether erroneously or not – would have been *sufficient* to sustain a guilty verdict." *Lcokhart*, 488 U.S. at 42. (emphasis added). Here, the evidence offered by the government and admitted by the trial court was *insufficient*. Thus, contrary to the SJC's conclusion, *Lockhart*'s holding was inapplicable to Crowder's case.

Despite the distinction that this Court issued the relevant decision *before* Crowder's trial, the SJC misapplied federal case law to erroneously conclude that "the evidence against [him] was insufficient only when viewed through the lens of a legal development that occurred after trial." App. 13a-14a. The SJC did so to avoid the direct application of *Bruen* to Crowder's case where, as discussed in Part I, *supra*, such application would require holding that the Double Jeopardy Clause precludes Crowder's retrial. However, as the SJC acknowledged, *see* App. 11a, "like any other state or federal court, [the SJC] is bound by this Court's interpretation of federal law." *James v. City of Boise, Idaho*, 577 U.S. 306, 307 (2016). Thus, "[a]s this Court has explained: 'If a precedent of this Court has direct application in a case,' … a lower court 'should follow the case which directly controls[.]" *Mallory v. Norfolk S.*

Circuit law, was decided *after* Weems's September 1993 trial); *United States v. Kim*, 65 F.3d 123 (9th Cir. 1995) (same).

Ry. Co., 600 U.S. 122, 136 (2023). This Court has held that this rule applies "even if the lower court thinks the precedent is in tension with 'some other line of decisions' of this Court." *Id.* Where this Court has instructed lower courts to apply its most recent precedent in the face of tension with *its* other potentially conflicting decisions, it follows that, consistent with the Supremacy Clause, lower courts are also bound to apply such precedent in the face of tension between this Court's decision and any decisions of a lower court. The SJC's conclusion to the contrary was wrong.

6. This Court's intervention is needed. The SJC may not insulate from this Court's review its holding that the Double Jeopardy Clause did not preclude Crowder's retrial despite the government's failure to present legally sufficient evidence at trial of an essential element of the offense, which constituted an interpretation of federal constitutional law. Moreover, the SJC may not permit the government to continue to rely on state law that has been abrogated by this Court's federal constitutional precedent, until and unless a state court interprets the that precedent. *See* App. 12a. It is this Court's "interpretations of federal law" that bind the states, not those of state courts. *See James*, 577 U.S. 307. Without needing to wait for any decision of the SJC, this Court's decision in *Bruen* established the relevant rule prior to Crowder's trial: carrying a firearm outside the home is constitutionally protected conduct under the Second Amendment and, therefore, that core conduct cannot itself be punished as criminal. Any rationale which, as

here, functions to permit state actors to ignore this or any other federal constitutional rule as defined by this Court, is invalid. *See Wilson*, 145 S. Ct. at 18.

Crowder does not dispute that "the Legislature's concern for gun safety" is a legitimate concern. *See Commonwealth v. Fleury*, 183 N.E.3d 1145, 1153 (Mass. 2022). Nor does he dispute the state's power, in acting on such concern, to require individuals to obtain a firearms license. However, a state may not presumptively prohibit that which this Court has clearly established is presumptively protected under the United States Constitution. *See Bruen*, 597 U.S. at 17 (internal citation omitted) ("[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct[,]" and the government bears the burden of demonstrating that its challenged firearm regulation passes constitutional muster such that takes an individual's conduct "outside the Second Amendment's 'unqualified command.'"). And a state judiciary may not bless the application of an unconstitutional state law by attempting to recast the issue presented as merely a question of state evidentiary burdens, rather than a question of the applicability of the federal Constitutional rules surrounding double jeopardy to a conviction obtained in violation of both a defendant's due process and Second Amendment Rights. *Cf. Meyer*, 262 U.S. at 402. Thus, "this Court's intervention clearly [is] imperative, given" the "important and recurring" issue of "lower courts' continued insistence on treating the Second Amendment 'right so cavalierly'" and to reaffirm that Second Amendment rights are treated as

equally important as all other rights enshrined in the Bill of Rights. *Wilson*, 145 S. Ct. at 18, 20-21 (citation omitted).

III. The Supreme Judicial Court's decision is wrong because the Double Jeopardy Clause prohibits retrial where the government presented no evidence of any fact taking Petitioner's conduct outside the scope of constitutional protections, which scope was defined by this Court prior to trial.

As discussed, the SJC has held that, "because possession of a firearm outside of the home is constitutionally protected conduct post-*Bruen*, 'the absence of a license is an essential element of the offense of unlawful possession of a firearm pursuant to [Mass. Gen. Laws ch.] 269, § 10(a).'" App. 7a (quoting *Guardado I*, 206 N.E.3d at 538). However, the government failed to present any evidence at Crowder's trial that he lacked a firearms license. Where the SJC previously acknowledged that even the defendant in *Guardado* was "entitled to the benefit of the new rule [in *Bruen*]; that is, the right to have the Commonwealth prove that he lacked a license[,] *Guardado II*, 220 N.E.3d at 111, Crowder was also entitled to it.

The SJC expressly reversed Crowder's conviction because of the government's "failure to offer proof of the defendant's lack of a firearms license at trial[.]" App. 10a, 21a. Therefore, the reversal of Crowder's conviction constituted an acquittal for double jeopardy purposes, *Richardson*, 468 U.S. at 325, and the Double Jeopardy Clause precludes a second trial, *Burks*, 437 U.S. at 18. This is so where this Court's "cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." *Evans v. Michigan*,

568 U.S. 313, 318 (2013). "[L]abels do not control our analysis in this context; rather, the substance of [the ruling] does." *Id*. at 322.

It is irrelevant whether the government "could not have known that it was required to prove [Crowder] did not possess a valid firearms license," App. 13a. Any belief, post-*Bruen*, that the government could convict Crowder without proof that he lacked a valid firearms license, was legally erroneous. *See Guardado II*, 220 N.E.3d at 111; App. 7a. That the government relied on such error of law at Crowder's trial does not render its evidence sufficient or otherwise insulate Crowder's case from the application of the Double Jeopardy Clause.

This Court has previously addressed the impact of the government's reliance on an error of law to a claim that the Double Jeopardy Clause prohibits imposition of the death penalty following a sentence of life imprisonment. *See Arizona v. Rumsey*, 467 U.S. 203, 209 (1984). As an initial matter, this Court determined that Arizona's capital sentencing proceedings were akin to a trial for double jeopardy purposes. *Id.* As a result, a sentence of life imprisonment constitutes "an acquittal on the merits of the central issue in the proceeding – whether death was the appropriate punishment for the respondent's offense." *Id. at 211.* Thus, where both reversal of a conviction on an appellate court's determination that the evidence at trial was insufficient and a sentence to life imprisonment in the capital sentencing context constitute acquittals for double jeopardy purposes, ordinary double jeopardy principles apply to both. In *Rumsey*, this Court stated that "the fact that [an] acquittal may result from … erroneous interpretations of governing legal principles

… [may] affect the accuracy of that determination, but it does not alter its essential character." *Id.* "Thus, this Court's cases hold that an acquittal on the merits" – or its constitutional equivalent – "bars retrial even if based on legal error." *Id.*

This precedent instructs that, here, the government's "[r]eliance on an error of law[] does not change the double jeopardy effects of" reversal for a finding that the government failed to prove an essential element of the crime at trial, which for purposes of the Double Jeopardy Clause constitutes "a judgment that amounts to an acquittal on the merits." *Cf. id.* Thus, the SJC erred in holding that the government avoided the application of the Double Jeopardy Clause to its "failure to offer proof of [Crowder's] lack of a firearms license at trial" because the government "could not have known that it was required to prove [Crowder] did not possess a valid firearms license," App. 13a. Whether or not the government relied on an error of law to present legally insufficient evidence, the Double Jeopardy Clause precludes Crowder's retrial. The SJC's conclusion to the contrary was wrong.

IV. The SJC's decision is additionally constitutionally infirm where the effect of its determination that Crowder may be retried is to subject him to trial either under an unconstitutional licensing regime or an ex post facto law.

As discussed in Part II, *supra*, the statutory scheme under which Crowder was convicted unconstitutionally rendered the issue of licensure – and therefore the application of the licensing statute to the case – presumptively irrelevant. Prior to *Bruen*, the statute Crowder was convicted of violating created a general prohibition against carrying a firearm by criminalizing such conduct. *Jones*, 361 N.E.2d at 1311; Mass. Gen. Laws ch. 269, § 10(a). Where Crowder did not present any

evidence with respect to licensure, there was "no issue for the jury as to licensing." *Jones*, 361 N.E.2d at 1311. Now that Crowder's conviction solely for engaging in the conduct of possessing a firearm outside the home has rightly been vacated, he cannot be retried either on a charge that he violated what is undoubtedly an unconstitutional licensing regime or on a charge that, *ex post facto*, he violated the licensing regime as revised after this Court's decision in *Bruen*.

1. The version of the Massachusetts firearms licensing regime in effect at the time of the events at issue is unconstitutional. That the licensing scheme in effect at the time of the events at issue in Crowder's trial was unconstitutional is not fairly subject to dispute. *See Bruen*, 597 U.S. at 15. This is so despite the SJC's erroneous statement below to the contrary. App. 10a (stating that *Bruen* "did not address the allocation of the burden of production with respect to criminal violations of a **valid** firearms licensing scheme, nor did it speak on the requisite elements of such crimes" (emphasis added)). Indeed, as one of the concurrences in *Wilson*, 145 S. Ct. at 18, noted, this Court in *Bruen* singled out Hawaii's firearms-licensing regime as analogous to New York's unconstitutional regime. So too did this Court single out Massachusetts's then-existing firearms-licensing regime as "analog[ous] to the New York regime [] held [to be] unconstitutional." *Bruen*, 597 U.S. at 15. And as with Hawaii's legislature, the Massachusetts legislature revised its firearms-licensing regime "[s]hortly after *Bruen*, and in light thereof[.]" *Commonwealth v. Donnell*, 252 N.E.3d 475, 481 (Mass. 2025); Mass. Gen. Laws ch. 140, § 131, *as amended by* 2022 Mass. Acts ch. 175, §§ 4-17A (eff. Aug. 10, 2022 to Oct. 1, 2024). Where the events at

issue here occurred on January 6, 2021, App. 2a-3a, more than a year before this Court's 2022 decision in *Bruen*, those events also pre-dated the subsequent revision to the Massachusetts firearms licensing regime. As with the Hawaii Supreme Court, had the SJC "followed the legislature's lead and tried to give effect to [this Court's] Second Amendment jurisprudence, it would have found the licensing regime at issue unconstitutional[.]" *Wilson*, 145 S. Ct. at 21.

It was constitutionally indefensible for the SJC to suggest below, after this Court's decision in *Bruen*, that the relevant version of Massachusetts's firearms licensing scheme was constitutionally "valid." And yet the SJC did so as part of its analysis as to why the government had no reason to believe it needed to present evidence regarding licensure and, therefore, as to why Crowder could be retried. *See* App. 10a. However, *this* Court's federal constitutional jurisprudence has made clear both (1) that the version of the licensing scheme in effect in January 2021 was unconstitutional*, Bruen*, 597 U.S. at 14-15, 71, and (2) that Crowder may not be prosecuted, at a new trial or otherwise, for violating an unconstitutional statute, *e.g.*, *Lawrence*, 539 U.S. at 579 (reversing petitioner's criminal conviction for violating an unconstitutional statute). Crowder's now-vacated conviction for possessing a firearm in public violated his Second Amendment rights. To prosecute him now for violating an unconstitutional firearms licensing statute would be to violate his Second Amendment rights yet again.

2. Application of the current version of the firearms licensing statute would violate the Ex Post Facto Clause. The Ex Post Facto Clause of the United States

Constitution prohibits "any [law] which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed[.]" *Dobbert v. Florida*, 432 U.S. 282, 292 (1977) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925); U.S. Const. Art. I, § 10. "The *ex post facto* prohibition also upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." *Weaver v. Graham*, 450 U.S. 24, 29 n.10 (1981). Thus, this Court's decisions have identified "that two critical elements must be present for a criminal or penal law to be *ex post facto:* it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Id*. at 29. A "law need not impair a 'vested right' to violate the *ex post facto* prohibition." *Id.* On the contrary, even "seemingly procedural" changes in the law may implicate the Ex Post Facto Clause where they alter "a substantial right." *Id*. at 31 n.12.

Here, the application to Crowder's conduct on January 6, 2021, of the firearms licensing scheme as revised after *Bruen* would violate the Ex Post Facto Clause. First, as noted, the statute was amended after the underlying events occurred on January 6, 2021. *See* App. 2a-3a; Mass. Gen. Laws ch. 140, § 131, *as amended by* 2022 Mass. Acts ch. 175, §§ 4-17A (eff. Aug. 10, 2022 to Oct. 1, 2024). It has since been amended again. *See* Mass. Gen. Laws ch. 140, § 131, *as amended by*

2024 Mass. Acts ch. 135, § 49 (eff. Oct. 2, 2024). Thus, application of the current version of the statute – or any version enacted after January 6, 2021 – to Crowder's conduct would be retrospective. *Weaver*, 450 U.S. at 29. Second, its application would deprive Crowder of the defense that the statute at issue is unconstitutional because it criminalizes protected conduct. Thus, it would "disadvantage" him, *id.,* by "depriv[ing]" him "of a[] defense available according to law at the time when the act was committed," *Dobbert*, 432 U.S. at 292.

3. This Court's intervention is warranted. The SJC should have recognized, based on this Court's decision in *Bruen*, 597 U.S. at 14-15, 71, that the relevant version of the Massachusetts firearms-licensing scheme was unconstitutional. Instead, the SJC ignored the clear impact of *Bruen* on that statute. And where, as the SJC has recognized, the Massachusetts Legislature effected an overhaul of Massachusetts's firearms "licensing laws in the wake of *Bruen*, … to conform with that decision," *Donnell*, 252 N.E.3d at 481, the SJC also should have recognized that the presently effective version of the statute could not be applied to Crowder's January 2021 conduct without violating the Ex Post Facto Clause, U.S. Const. Art. I, § 10. Instead, it ignored any impact that such revisions would have on Crowder's case by erroneously stating the prior version of the statute was "valid." The SJC rightly concluded that Crowder may not be retried for possessing a firearm outside the home. But they wrongly concluded that he could be newly convicted for violating an unconstitutional version of the Massachusetts firearms licensing regime or, *ex post facto*, for violating a version of that regime that was not enacted until **after** the

underlying conduct at issue. This Court should address this claim where the SJC's decision below necessarily implicitly "passed upon" it and raised the important and recurring issue as to whether and how individuals now may be prosecuted for conduct implicating the Second Amendment when it has since been made clear by this Court's decision in *Bruen* that the relevant criminal statute is unconstitutional. *See Lebron v. National R.R. Passenger Corp*., 513 U.S. 374, 379 (1995). *See also*, *e.g.*, Wilson, 145 S. Ct. at 18, 21.

V. This case is an ideal vehicle for resolving the questions presented.

This case presents the ideal vehicle for this Court to address the questions presented and resolve the issue of state actors taking the liberty to ignore constitutional decisions of this Court. As an initial matter, the underlying facts are undisputed and this case comes to this Court on direct appeal under the broadest standard of review and free of any procedural constraints. Crowder moved in the trial court to vacate his conviction for insufficient evidence and preserved the issue on appeal. App, 4a, 10a. The SJC substantively addressed and decided Crowder's claims, App. 8a-14a, all of which are properly presented for this Court's review. The effect of the SJC's decision also gives rise to additional federal constitutional violations which warrant review by this Court.

This case also squarely raises the questions presented. The SJC's earlier holding that lack of a firearms license constitutes an essential element of the crime of carrying a firearm without a license was dictated by this Court's decision in *Bruen*. *Guardado I*, 206 N.E.3d at 538, 541. In Crowder's case, however, the SJC

attempted to minimize the import of *Bruen*, holding that, despite the absence of proof as to the essential element of licensure at Crowder's trial, the Double Jeopardy Clause did not prohibit retrial. App. 13a. Further, the SJC erroneously treated the rule announced in *Guardado I* – that lack of a licensure is an essential element of the offense at issue – as "new" so it could characterize it as a "posttrial change" in the law. App. 12a-14a. Despite the fact that *Bruen* was a binding and directly applicable precedent of this Court, and despite the SJC's definitive statement in *Guardado I*, 206 N.E.3d at 541, that "[t]he rule we announce today *is* dictated by the [Supreme] Court's decision in *Bruen*[,]" here the SJC stated that *Bruen* "could not have 'dictated' the [substantive] result in *Guardado I*. App. 12a. Instead, the SJC concluded that, as of the date of Crowder's trial, his case was governed by the statutory framework which *Bruen* had already made clear was unconstitutional. App. 12a.

Moreover, the SJC's decision presents the important and recurring issue of lower courts' failure to respect critical federal constitutional rules when they derive from the Second Amendment. The SJC's multiple failures in this respect, as discussed *supra*, are part of a string of "example[s] of a lower court 'fail[ing] to afford the Second Amendment the respect due an enumerated constitutional right[,]'" by "resist[ing this Court's] decisions" concerning the same. *Wilson*, 145 S. Ct. at 20-21. Finally, this case avoids the pitfall posed by *Guardado*, where the defendant in that case was tried **before** this Court's decision in *Bruen*. *See* Petition for a Writ of Certiorari, Massachusetts v. Guardado, No. 23-886 (U.S. Feb. 14,

2024). Thus, this case will enable this Court to decide the questions presented concerning *Bruen*'s impact on state prosecutions for conduct protected by the Second Amendment where this Court decided *Bruen* prior to Crowder's trial.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his petition for a writ of certiorari, as well as the petition filed in Zemene v. Massachusetts, No. 24-7373 (U.S. June 3, 2025), and consolidate both petitions for consideration of the merits.

Respectfully submitted,

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