No. _____

In the Supreme Court of the United States

ROBERTO LOPEZ-ORTIZ,
Petitioner,
v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

Petition for Writ of Certiorari
to the Appeals Court of the Commonwealth of Massachusetts

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QUESTION PRESENTED

Roberto Lopez-Ortiz is serving life in prison for an offense that no longer exists. He fully preserved his challenge to second-degree felony-murder at trial and, while his direct appeal was pending, the state supreme court abolished that offense for the same reasons that he asserted.

Consistent with due process, must this substantive change to the offense apply to him on direct review?

PETITION FOR WRIT OF CERTIORARI

Petitioner Roberto Lopez-Ortiz respectfully prays that this Court issue a writ of certiorari to review the judgment below.

LIST OF ALL PARTIES

The caption of the case contains the names of all the parties.

LIST OF PROCEEDINGS

Supreme Court of the United States:

Lopez-Ortiz v. Massachusetts, No. 25A220 (August 26, 2025) (granting extension of time to file petition)

Supreme Judicial Court of Massachusetts:

Commonwealth v. Lopez-Ortiz, No. FAR-30230 (July 25, 2025) (denial of motion to reconsider denial of further appellate review)

Commonwealth v. Lopez-Ortiz, No. FAR-30230 (June 6, 2025) (further appellate review denied)

Massachusetts Appeals Court:

Commonwealth v. Lopez-Ortiz, No. 2023-P-0295 (February 12, 2025) (conviction affirmed)

Superior Court for Middlesex County:

Commonwealth v. Lopez-Ortiz, No. 1481CR00430 (June 23, 2020) (renewed motion to reduce verdict denied)

Commonwealth v. Lopez-Ortiz, No. 1481CR00430 (May 4, 2017) (motion to reduce verdict denied)

Commonwealth v. Lopez-Ortiz, No. 1481CR00430 (March 22, 2017) (sentencing)

Commonwealth v. Lopez-Ortiz, No. 1481CR00430 (June 23, 2020) (jury verdict)

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Commonwealth v. Lopez-Ortiz, 105 Mass. App. Ct. 1114 (2025) (unpublished).

Commonwealth v. Lopez-Ortiz, 496 Mass. 1103 (2025) (table).

BASIS FOR JURISDICTION

The Massachusetts Appeals Court affirmed Lopez-Ortiz's conviction on February 12, 2025 and he timely sought discretionary review. The Supreme Judicial Court of Massachusetts (SJC) denied review on June 6, 2025 and, upon a timely motion to reconsider, denied review again on July 25, 2025. App.39a–40a. Justice Jackson granted an extension of time to file a petition for a writ of certiorari until December 22, 2025.

This Court has jurisdiction under 28 U.S.C. § 1257(a) because the judgment affirming Petitioner's convictions was "rendered by the highest court of a State in which a decision could be had." Lopez-Ortiz plainly presented his claim that due process and equal protection required that the rule abolishing second-degree felony-murder be applied to his preserved claim on direct appeal. The Massachusetts courts rejected it. *Commonwealth v. Lopez-Ortiz,* 105 Mass. App. Ct. 1114, *2 (2025).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment provides in pertinent part: "No person shall . . . be deprived of life, liberty or property without due process of law."
2. The Fourteenth Amendment provides in pertinent part: "No State shall . . . 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."
3. M.G.L. c. 265, § 1 provides in pertinent part:

   > 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. … The degree of murder shall be found by the jury.

CONCISE STATEMENT OF THE CASE

Facts at trial

In 2016, petitioner Lopez-Ortiz was indicted for first-degree murder, armed home invasion and armed assault with intent to rob. App.26a.[1] On March 17, 2017, the jury acquitted him of each of those charges. Instead, they convicted him of only lesser offenses: second-degree felony-murder with unarmed assault with intent to rob as the predicate offense.[2] App.26a. He was sentenced to life in prison, but with the possibility of parole after fifteen years. App.8a.

Lopez-Ortiz timely appealed. Lopez-Ortiz sets out the facts as recited by the Appeals Court with any additions noted.[3]

> The evidence at trial showed that on December 18, 2013, the defendant, Roberto Lopez-Ortiz, and three others, including Jonathan Rivera and Donte Okowuga, decided to commit a robbery. Okowuga had two guns, one of which he gave to Rivera prior to the attempted robbery. Testimony differed on whether Rivera thereafter gave the gun to the defendant.
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> The four men drove to the victim's building and entered it, encountering the victim in the entrance to his apartment. The men entered the apartment, at which time Okowuga pointed a gun at the

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[1] M.G.L. c 265, § 1, M.G.L. c. 265, § 18C, and M.G.L. c. 265, § 18(b), respectively. Record citations will follow this format: trial transcript "Tr. [volume]:[page]"; final pretrial conference transcript "Tr. 1/24/17:[page]"; Appendix to this petition "App.[page]a."

[2] Tr.12:25-26; M.G.L. c. 265, § 20. His conviction for unarmed assault with intent to rob was dismissed as duplicative. App.36a.

[3] As noted, the Appeals Court issued a published and an unpublished opinion. Only the Appeals Court's published opinion recited the facts.

> victim while the other men, including the defendant, attacked him. The victim managed to get away and ran out of the apartment.
>
> Three of the men thereafter left the building. The victim returned to the building, where the fourth man, who had remained just outside the apartment, shot and killed the victim. The defendant testified that Okowuga was the assailant who stayed behind at the victim's apartment, whereas Rivera and Okowuga testified that the defendant had remained behind.
>
> [In a footnote, the court stated that] … the jury convicted the defendant of felony-murder in the second degree, with the predicate felony being unarmed assault with intent to rob. They acquitted the defendant of murder in the first degree, armed home invasion, and armed assault with intent to rob.

Commonwealth v. Lopez-Ortiz, 105 Mass. App. Ct. 265, 266 & n.2 (2025).

The dissent commented on the majority's recitation of the facts as follows:

> [T]he facts of the crime of which the defendant was convicted are described in part in the body of the majority opinion in a way that may cast him in a false light. To the extent that any of the facts are relevant, the jury in this case concluded that the defendant was <u>not</u> armed and was <u>not</u> the shooter. He was acquitted of murder in the first degree, armed home invasion, and armed assault with intent to rob. *He was convicted, rather, of unarmed assault with intent to rob, and, with that as the predicate crime, felony-murder in the second degree*, a judge-made crime "of questionable origin," that "eroded the relation between criminal liability and moral culpability," and that ceased to exist in this Commonwealth 187 days after the defendant's conviction, but for which he was sentenced to, and is now serving a sentence of, life imprisonment (quotations and citations omitted).

Id. at 283 (Rubin, J. dissenting) (emphasis in original).

Indeed, the basis for the acquittals is Lopez-Ortiz's testimony, which is omitted from the published opinion's recitation. In summary, Lopez-Ortiz testified that he was not the shooter. Donte Okowuga was the shooter. Tr.8:173. Lopez-Ortiz was not aware beforehand that anyone had a gun. Tr.8:153–154, 158–159, 207. He

verbally objected, then tried and failed to physically stop Okowuga from employing a firearm. Tr.8:167–169. Tillis, the fourth man, pushed Lopez-Ortiz and cut him with a knife for intervening, after which Lopez-Ortiz announced "I'm out, I'm leaving" and ran away. Tr.8:167–169, 199–200. When two of the other participants fled, the victim, "Pedro," successfully chased them out of the building. Tr.8:170–172; Tr.4:10; see Tr.4:123, 125; Tr.7:94, 96. But Pedro did not flee the scene entirely. He went back inside. Okowuga then shot him. *Id.*; Tr.8:173.

As noted, the jury appeared to accept Lopez-Ortiz's testimony because they acquitted him of first-degree murder on any theory and they acquitted him of any offense that required proof that he was armed or that he knew others were armed. Tr.12:25–27; App.26a.

The jurors focused on whether Lopez-Ortiz withdrew from the crime. *See* Tr.11:40. They asked whether Lopez-Ortiz was "automatically" responsible for acts that took place after he fled. Tr.12:14–15. The jurors' questions reveal their focus on felony-murder.

Significantly, several jurors wrote to the judge asking for the minimum sentence, suggesting that their concerns paralleled those given by the SJC for abolishing the felony-murder rule: punishment is disproportionate to moral culpability.[4] Tr.13:4, 12–14, 16; see App.7a.

[4] Because the crime occurred after August 2, 2012, Lopez-Ortiz could have been sentenced to a term of up to 25 years to life in prison. Tr.13:3–4; M.G.L. c. 279, § 24; St.2012, c. 192, § 46. The judge imposed the minimum sentence of 15 years to life.

Abolition of second-degree felony-murder during direct appeal

Six months after Lopez-Ortiz's trial, while his direct appeal was pending, the SJC held that the underlying felony should not substitute for malice. *Commonwealth v. Brown*, 477 Mass. 805, 807–808, 825 (2017) (opinion of Gants, C.J.), cert. denied, 586 U.S. 826 (2018).[5] *Brown* held that the prosecution must always prove malice for any murder conviction and that the prosecution could only prove first-degree felony-murder by proving malice and then proving that the killing was committed in the course of a felony punishable by life imprisonment. *Id.*

Central to Lopez-Ortiz's case, the SJC went further and held that its ruling necessarily "entirely eliminate[d] the concept of 'felony-murder in the second degree,'" the offense for which Lopez-Ortiz was convicted. *Id*. at 832 n.4; *Commonwealth v. Fredette*, 480 Mass. 75, 77 n.4 (2018).[6] Lopez-Ortiz's trial jurors convicted him of second-degree felony-murder without being required to find that the prosecution proved malice. Tr.9:64.[7]

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[5] The concurrence of Chief Justice Gants is the majority opinion of the SJC as to its change to the felony-murder doctrine. *Commonwealth v. Shepherd*, 493 Mass. 512, 522 (2024). It will be cited as such in this petition.

[6] There are two reasons for this. First, a killing committed with malice but not committed in the course of a life felony, not committed with deliberate mediation, and not committed with "extreme atrocity or cruelty" was already second-degree murder. *Commonwealth v. Johnson*, 435 Mass. 113, 121 (2001); *Commonwealth v. Miranda*, 492 Mass. 301, 319 (2023). Second, under the former doctrine, second-degree felony-murder convictions could rest only on non-life felonies. *Commonwealth v. Bell*, 460 Mass. 294, 307 (2011). *Brown* required that any first-degree felony-murder predicate be a life felony. *Brown*, 477 Mass. at 832.

[7] The elements of murder in the second degree are (1) an unlawful killing and (2) malice. Malice can be established by proving: (1) the defendant intended to cause the victim's death; (2) the defendant intended to cause grievous bodily harm to the victim; or (3) the defendant committed an intentional act which, in the circumstances known to the defendant, a reasonable person would have understood created a plain and strong likelihood of death. *See*, *e.g., Commonwealth v. Chin,* 97 Mass. App. Ct. 188, 195 (2020).

Lopez-Ortiz explicitly but unsuccessfully argued in post-trial motions and in his direct appeal that his trial objections to felony-murder were correct and that he was entitled to relief. App.7a.

Massachusetts courts refused relief, pointing to *Brown*'s holding that its change in the law was "prospective" only. App.37a. This petition followed.

Lopez-Ortiz properly raised the issue

There is no dispute that Lopez-Ortiz repeatedly preserved his challenge to felony-murder and raised it at each stage of the proceedings. *See*, *e.g.*, Tr.1/24/17:14–23; Tr.3:6–10; Tr.11:19.[8]

The parties agreed below that trial counsel objected that "it is unconstitutional and unjust for the commission of a felony to substitute for malice . . . and [the trial judge] ruled that his rights were saved." Tr.8/3/22:6. Undersigned counsel argued that Lopez-Ortiz was entitled to the benefit of the abolition of second-degree felony-murder in a renewed motion for required finding of not guilty on December 2, 2019. App.7a. The trial judge denied the motion. App.7a. Lopez-Ortiz timely appealed that decision. He squarely raised the issue again in his briefs to the Massachusetts Appeals Court and in his application for further appellate review. App.39a–40a.

[8] The court reporter's equipment malfunctioned during the felony-murder precharge. *See* Tr.3:14. The parties later agreed, Mass. R. App. P. 8, that other objections preserved the issue regardless. Tr.8/3/2022:6.

REASONS FOR ALLOWANCE OF THE WRIT

Summary

When a state entirely eliminates the offense of conviction while direct review is pending, due process should afford relief to the vigilant defendant like Lopez-Ortiz who argued for the elimination of the offense at trial and raised it on direct review and whose conviction is not yet final. Substantive changes to an offense are retroactive. The common law as embodied in the Due Process Clause also makes such changes retroactive. Abolition of offenses applies on direct review because direct review is governed by the currently existing law. Massachusetts may not invoke ad hoc prospectivity in order to refuse relief to defendants affected by such a change. Indeed, at least where Massachusetts has established a system of limited retroactivity on direct appeal for all errors, due process requires that it not change the rules in the middle of direct review.

This case is an excellent vehicle for deciding the issue. Lopez-Ortiz doggedly preserved the issues at trial and squarely raised them in his state appeal. Both the facts of the trial and the procedural facts make the issue dispositive. Finally, the case presents the Court with the opportunity to provide doctrinal clarity to the lower courts, which are in a state of confusion.

I. Substantive changes to an offense are retroactive. While his direct appeal was pending, Massachusetts narrowed the elements of first-degree felony murder and abolished second-degree felony-murder of which Lopez-Ortiz was convicted. That is a substantive change in the offense and it must apply to Lopez-Ortiz.

Substantive changes to an offense are retroactive. *Montgomery v. Louisiana*, 577 U.S. 190, 208–209 (2016). "This includes decisions that narrow the scope of a criminal statute by interpreting its terms." *Schriro v. Summerlin*, 542 U.S. 348, 351–352 (2004). "Such rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* at 352 (internal quotations omitted). So it is with Lopez-Ortiz, convicted of an offense no longer extant.

Here, the Massachusetts Appeals Court flatly stated that *Brown* worked a "substantive change in the law." App.37a. Indeed, the SJC itself announced that *Brown* "narrowed" the scope of liability for first-degree felony-murder. *Brown*, 477 Mass. at 807–808 (opinion of Gaziano, J.). But more importantly, the SJC acknowledged that its decision "entirely eliminate[s] the concept of felony-murder in the second degree." *Id*. at 832 n.4 (citation and quotation marks omitted); *Fredette*, 480 Mass. at 77 n.4 (reiterating that *Brown* eliminated second-degree felony-murder). The change was substantive.

The SJC proclaimed that the change was one of "common law" but also that its decision "limited [felony-murder] to its statutory role." *Brown*, 477 Mass. at 825–826. The reason for Massachusetts' change to felony-murder is irrelevant to

whether the change is substantive. In both *Bunkley v. Florida* and *Fiore v. White*, the state courts relied on decisional law interpreting the elements of a criminal statute. *Bunkley v. Fla.*, 538 U.S. 835, 840–842 (2003); *Fiore v. White*, 528 U.S. 23, 29 (1999) (*Fiore I*), *S.C.*, *Fiore v. White*, 531 U.S. 225, 228–229 (2001) (*Fiore II*). In *Welch*, the void for vagueness doctrine narrowed the reach of the statute. *Welch v. United States*, 578 U.S. 120, 122 (2016).[9] Each decision was substantive due to the effect of the ruling, not its source. *Id.* at 130–131.

> No "case from this Court treats statutory interpretation cases as a special class of decisions that are substantive because they implement the intent of Congress. Instead, decisions that interpret a statute are substantive if and when they meet the normal criteria for a substantive rule: when they 'alte[r] the range of conduct or the class of persons that the law punishes.'"

Welch, 578 U.S. at 134 (quoting *Schriro*, *supra*, at 353). The change is substantive and is therefore applicable to Lopez-Ortiz on direct review.

The case for retroactivity in Lopez-Ortiz's case is significantly stronger than the cases discussed above because his conviction is not final. "A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) (citing *Griffith v. Kentucky*, 479

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[9] *Wainwright v. Stone* does not control for at least three reasons. 414 U.S. 21, 23–24 (1973). First, it appears to conflict with *Welch* in holding that a substantive change to an offense is not retroactive where the change was brought about by a vagueness challenge. *Id.* Second, *Stone* was a habeas corpus petition brought under the former *Linkletter* doctrine while the instant case is on direct review. Third, if *Stone* settled the question, there would have been no reason to grant certiorari in *Fiore* and *Bunkley*.

U.S. 314, 321, n.6 (1987)). *Welch*, *Bunkley*, and *Fiore* were all collateral challenges brought after the convictions became final on direct appeal and the state's interest in finality was much stronger. *Welch*, 578 U.S. at 122; *Bunkley*, 538 U.S. at 838; *Fiore I*, 528 U.S. at 25.

Indeed, the issue is not retroactivity, strictly speaking. *Bunkley*, 538 U.S. at 840; *Fiore II*, 531 U.S. at 226. On direct review, due process requires that Lopez-Ortiz's conviction be evaluated under the elements of the offense at the time of review. *Bunkley*, 538 U.S. at 840 ("proper question under *Fiore* is not whether the law has changed" but what the law required "at the time [the] conviction became final"). *See Fiore II*, 531 U.S. at 228–229 (same).

Fiore unmistakably fixed the relevant legal analysis to the date that the conviction became final on direct review. To determine whether Fiore was entitled to a substantive rule, this Court certified the question to the state court of whether the substantive rule was the "correct interpretation of the law of Pennsylvania at the date Fiore's conviction *became final*." *Fiore I*, 528 U.S. at 29 (emphasis added). When the state court answered that it was the correct interpretation at the time the defendant's conviction became final, this Court again stated that the dispositive issue was whether the state court's "decision interpreting the statute not to apply to conduct like Fiore's was a new interpretation, or whether it was, instead, a correct statement of the law when Fiore's conviction *became final*." *Fiore II*, 531 U.S. at 226 (emphasis added); *see id.* at 228.

After *Fiore*, this Court used inconsistent language in framing the inquiry in *Bunkley*. That appears to have confused or misled the SJC.

Consistent with *Fiore*, the *Bunkley* opinion stated that the proper question was whether the favorable interpretation of the elements of the crime was the law "at the time his conviction became final." *Bunkley*, 538 U.S. at 840. The Court then remanded for the Florida Supreme Court to state what the law was at the time Bunkley's "conviction became final." *Id.* at 842.

But *Bunkley* also used "the time Bunkley was convicted" or "the time he was convicted" as a synonym for "the time conviction became final" five times, muddying the waters. *Id*. at 838 n*, 841–842. This was clearly used as a synonym for the date of finality because *Bunkley* states seven times that 1989 is the operative date for the inquiry. *Id.* at 837, 840–842. "1989" can only refer to the conviction's date of finality after direct review because the date of Bunkley's conviction was "April 23, 1987." *Bunkley v. State*, 833 So. 2d 739, 741 (Fla. 2002) (citation and quotation marks omitted). Bunkley's direct appeal was denied on February 17, 1989. *Bunkley v. State*, 539 So. 2d 477 (Fla. Dist. Ct. App. 1989). He did not seek certiorari and his conviction became final on May 18, 1989. *Bohlen*, 510 U.S. at 390 (convictions become final after time for seeking certiorari expires). Read properly, *Bunkley* articulates the normal rule that the date of finality controls.

Nevertheless, the SJC pointed to *Bunkley*'s references to time of conviction in order to justify departing from the rule articulated in *Fiore*. In *Commonwealth v. Martin*, the SJC claimed a right to not apply *Brown*'s changed substantive law of

first-degree felony-murder in effect during Martin's direct appeal "but rather what [the] law required at [the] time of defendant's conviction." 484 Mass. 634, 645 (2020), cert. denied, — U.S. —, 141 S. Ct. 1519 (2021) (citing *Bunkley*, 538 U.S. at 840).[10]

Granting certiorari would allow the Court to clarify what should be a straightforward inquiry: second-degree felony-murder no longer exists in Massachusetts so Lopez-Ortiz is entitled to that substantive rule on direct review. He was convicted of second-degree murder without the jury finding the required element of malice. *Jackson v. Virginia*, 443 U.S. 307, 318–319 (1979) (each element must be proved beyond a reasonable doubt). He should be entitled to relief.

But because of the ambiguity in *Bunkley*, only this Court can provide the clarity that would lead to relief. That is because 28 U.S.C. § 2254(d)(1) restricts lower courts' habeas review to deciding only whether there has been an "unreasonable application" of this Court's precedents, leaving courts without guidance. Consider the confusion demonstrated by the decision in *Moore v. Helling*, where the en banc Ninth Circuit overruled prior precedent and instead held that,

> It is reasonable to interpret *Fiore II* as establishing that changes in state law must be applied to convictions that are pending on appeal when the change is announced. … [But] a fairminded jurist could [also] conclude that because *Fiore II* did not specifically hold that changes in state law apply to convictions pending on appeal, *Fiore II* cannot clearly establish the principle sufficient to warrant relief under § 2254(d)(1), even if the principles underlying *Fiore II* supported this conclusion.

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[10] Unlike Lopez-Ortiz, Martin did not preserve his claim. Martin admitted that his claim was unpreserved. *Commonwealth v. Martin*, No. SJC-08768, Appellant Martin Brief, available at https://www.ma-appellatecourts.org/pdf/SJC-08768/SJC-08768_01_Appellant_Martin_Brief.pdf (p. 69).

763 F.3d 1011, 1019 (9th Cir. 2014), cert. denied, 575 U.S. 1031 (2015).[11] *See infra* at 24–25 & nn. 28, 29 (cataloging diverging state rules).

Here, Lopez-Ortiz is on direct review. The Court has the power and duty "to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). The Court should do so.

II. Substantive changes to an offense on direct review are retroactive even if they result from a common law decision.

Massachusetts substantively changed the elements of the offense to eliminate the possibility of second-degree felony-murder. However, the SJC claimed authority to refuse to apply the changes to first-degree felony-murder retroactively on the assertion that its substantive change was common law and non-constitutional. *Brown*, 477 Mass. at 834; *Commonwealth v. Shepherd*, 493 Mass. 512, 526 (2024); *Commonwealth v. Tyler*, 493 Mass. 752, 759 (2024). It boldly declares that "[w]here we revise our substantive common law of murder, we are free to declare that our new substantive law shall be applied prospectively." *Martin*, 484 Mass. at 645 (citation omitted). This is wrong.

Even if labelling a substantive change as "common law" could affect the analysis (it cannot), Massachusetts has the common law backwards. "At common law there was no authority for the proposition that judicial decisions made law only

[11] A grant would still likely leave open the question of whether states may depart from *Fiore* and *Bunkley* in collateral challenges where a decision changed the reach of the substantive offense after the conviction became final on direct review. *Bunkley*, 538 U.S. at 841 ("if the 'stages' of § 790.001(13)'s 'evolution' had not sufficiently progressed so that Bunkley's pocketknife was still a weapon in 1989, this case raises the issue left open in *Fiore*").

for the future." *Linkletter v. Walker*, 381 U.S. 618, 622 (1965).[12] Rather, "the common-law rule … [is] 'that a change in law will be given effect while a case is on direct review.'" *United States v. Johnson*, 457 U.S. 537, 543 (1982) (quoting *Linkletter*, 381 U.S. at 627, citing *United States v. Schooner Peggy*, 1 Cranch 103 (1801)).[13]

If the change that abolished Massachusetts second-degree felony-murder was one of common law as asserted, it applies to Lopez-Ortiz on direct review.

Indeed, the established common law at the founding held that the prosecution abated if an offense was abolished (or even altered) either pre-trial or on appeal. *Yeaton v. United States*, 9 U.S. (5 Cranch) 281, 283 (1809); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270–271 (1994); 1 M. Hale, Pleas of the Crown 291 (G. Wilson ed. 1778); W. Hawkins, Pleas of the Crown 73 (8th ed. J. Curwood 1824). This is a common law rule of reason: "if the prosecution continues, the law must continue to vivify it." *United States v. Chambers*, 291 U.S. 217, 226 (1934).[14] If the

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[12] In an accompanying footnote, the Court noted "'I know of no authority in this court to say that, in general, state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years.' *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372, 30 S.Ct. 140, 148, 54 L.Ed. 228 (1910) (dissenting opinion of Holmes, J.)." *Linkletter*, 381 U.S. at 622 n.6. Blackstone explained that under the common law, courts rule "according to the known laws and customs of the land" and did not "pronounce a new law, but … maintain and expound the old one." 1 W. Blackstone, Commentaries *69 (15th ed. 1809). This is why, after canvassing this discussion of common law retroactivity and how it relates to the primary judicial function of deciding cases and controversies, then-Judge Gorsuch wrote "when it comes to the judiciary we know its decisions are presumptively retroactive." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1171 (10th Cir. 2015).

[13] *Linkletter* and *Johnson* propounded a doctrine of selective prospectivity which this Court abandoned for cases involving new rules announced while that case was pending on direct review. *Linkletter*, 381 U.S. at 627; *Johnson*, 457 U.S. at 548; *abrogated by Griffith v. Kentucky*, 479 U.S. 314 (1987).

[14] "[T]he principle that this Court does not disregard current law, when it adjudicates a case pending before it on direct review, applies regardless of the specific characteristics of the particular new rule announced." *Griffith*, 479 U.S. at 326.

law has been deprived of force, then "prosecutions, including proceedings on appeal" cannot continue. *Id.*; *Hamm v. City of Rock Hill*, 379 U.S. 306, 312–313 (1964); *Bell v. State of Md.*, 378 U.S. 226, 230 (1964).

A "saving" statute that applies to prosecutions under statutes repealed by the legislature cannot save this prosecution. *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 660 (1974). According to Massachusetts, the abolition of second-degree felony-murder was common law not statutory. *Brown*, 477 Mass. at 834; *Martin*, 484 Mass. at 645. And Massachusetts second-degree felony-murder was created by common law, not by statute. *Commonwealth v. Rego*, 360 Mass. 385, 395 (1971); *Commonwealth v. Matchett*, 386 Mass. 492, 503–508, 511 (1982). The Massachusetts savings statute applies by its terms only to "repeal of statutes." M.G.L. c. 4, § 6 (ameliorative statute applies to "[t]he repeal of a statute"); *Chambers*, 291 U.S. at 226 (state savings "statutes themselves recognize the principle which would obtain in their absence").[15]

Lopez-Ortiz is entitled to established common law rules of retroactivity. *Erlinger v. United States*, 602 U.S. 821, 830–831 (2024) (due process includes procedural protections for defendants that were well established at common law); *Kahler v. Kansas*, 589 U.S. 271, 279 (2020) (Blackstone held persuasive authority in

[15] "[R]epeal of criminal laws or of a constitutional provision without a saving clause deprives appellate courts of jurisdiction to entertain further proceedings under their sanctions. These instances indicate that the dominant principle is that nisi prius and appellate tribunals alike should conform their orders to the state law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered." *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941) (footnote omitted).

defining due process protections criminal defendants inherit from common law). Even if common law controlled here, it would afford relief to Lopez-Ortiz.

III. Massachusetts established a system of *Griffith*-equivalent limited retroactivity for all preserved errors on direct review. But then it refused to review Lopez-Ortiz's preserved claim on direct review by relying on a newly-invented, standardless rule of ad hoc selective prospectivity. Due process entitled Lopez-Ortiz to review of his preserved claim.

Where normal Massachusetts rules of limited retroactivity would entitle Lopez-Ortiz to relief based on his preserved claim, due process entitles him to the benefit of this change in the law. In three sentences, the Appeals Court demurred that Lopez-Ortiz could not obtain relief because of the SJC's invocation of *ad hoc* prospectivity in *Brown*.[16] App.37a. Massachusetts may not create ad hoc retroactivity rules departing from prior doctrine in order to defeat Lopez-Ortiz's claim.

Once a state has established an appellate system, the system must provide due process and equal protection. *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930) ("The federal guaranty of due process extends to state action through its judicial [branch]"). Arbitrary, ad hoc rulemaking in an appellate system violates those guarantees. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430–432 (1994).[17] A state may not limit appeals arbitrarily and then inoculate that

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[16] "Finally, the defendant argues that he is entitled to the benefit of the common law rule announced in *Commonwealth v. Brown*, 477 Mass 805, 825 (2017) (Gants, C.J.). The Supreme Judicial Court, in *Brown*, made its substantive change in the law prospective only. *Id.* 834. It stated that the rule would not apply to cases like this one where trial was held before the date of the Supreme Judicial Court decision. *Id.*" App.37a.

[17] In *Francis v. Franklin,* this Court rejected a proposed standard of review because it would spawn "an unending stream of cases in which ad hoc decisions will have to be made." 471 U.S. 307, 322 n.8

procedure from claimed error by simply labeling the limitation "discretionary" and "state law." *Evitts v. Lucey,* 469 U.S. 387, 400–401 (1985) (all state action subject to due process guarantee against arbitrariness). *Compare Oberg*, 512 U.S. at 430–432 (state constitutional provision limiting judicial review of punitive damages violated due process). *See Griffin v. Illinois*, 351 U.S. 12, 15, 18 (1956) (state law arbitrarily denying funds for transcripts to raise state law issues held unconstitutional). At a minimum, due process forbids decision by "judicial caprice" and requires judgment that is "*not ad hoc* and episodic." *Rochin v. California*, 342 U.S. 165, 172 (1952) (citation omitted, emphasis added). *See Welch*, 578 U.S. at 129–134 (2016) (rejecting "ad hoc" exception to retroactivity doctrine). Indeed, this Court has long disapproved selective prospectivity, particularly in criminal cases, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537–538 (1991), because it violates "basic norms" of adjudication. *Harper v. Virginia Dep't of Tax'n*, 509 U.S. 86, 97 (1993) (quoting *Griffith*, 479 U.S. at 322).

Treating Lopez-Ortiz's preserved claim as non-cognizable based on a new *ad hoc* carveout from established preserved-error doctrine arbitrarily[18] changed the rules in the middle of the contest, violating due process. *Compare Bouie v. City of Columbia*, 378 U.S. 347, 352–354 (1964) (applying changed definition of offense on

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(1985), *holding modified by Boyde v. California*, 494 U.S. 370 (1990). And in *Lonchar v. Thomas*, this Court disapproved dismissing first habeas corpus petitions "for ad hoc reasons" rather than "formal judicial, statutory, or rules-based doctrines of law." *Lonchar v. Thomas*, 517 U.S. 314, 322–332 (1996) (citation omitted). When ruling on a matter as serious as a first habeas corpus petition (and direct appeals are even more serious), courts may not employ "ad hoc departure from settled rules." *Id*. at 324.

[18] Alexander Hamilton wrote that the function of precedent was to "avoid an arbitrary discretion in the courts." *The Federalist No. 78,* at 510 (Alexander Hamilton) (Modern Library ed., 1938).

appeal to uphold conviction violated due process). Prior to this case, Massachusetts law clearly adopted the doctrine that a defendant like Lopez-Ortiz who preserved his claim was entitled to the benefit of his own objection. Where "the defendant objected at trial and argued for this rule [that changes the law] on direct appeal, he should have the benefit of this decision, which otherwise shall apply only prospectively." *Commonwealth v. Wolfe*, 478 Mass. 142, 150 (2017) (citing *Commonwealth v. Adjutant*, 443 Mass. 649, 667 (2005)). *See also Commonwealth v. Hernandez*, 481 Mass. 582, 602 (2019) (Commonwealth objected below, appealed, and "successfully urged us to abandon and replace that doctrine. … [Commonwealth should] have the benefit of that new rule").

This is hardly surprising. This Court reasoned in *Griffith* that the "nature of judicial review" requires limited retroactivity on direct review. 479 U.S. at 322. And just generally, when a defendant raises preserved structural (or prejudicial) error on direct review, "a new trial generally will be granted as a matter of right." *Weaver v. Massachusetts*, 582 U.S. 286, 305 (2017). Similarly, the SJC told criminal defendants decades ago that if they properly objected, they were "entitled to appellate review 'as of right.'" *Commonwealth v. Kelly*, 417 Mass. 266, 270 n.6 (1994) (quoting *Commonwealth v. Kozec*, 399 Mass. 514, 518 n.8 (1987), in turn citing *Commonwealth v. Bourgeois*, 391 Mass. 869, 884 (1984)).

Massachusetts jurisprudence regarding changes in the elements of murder had adhered to this system until *Brown*'s *ipse dixit*. When the SJC changed the elements of first-degree and second-degree felony-murder in 1982 in *Commonwealth*

v. Matchett, that defendant preserved his claim and he was afforded the benefit of the new rule. 386 Mass. 492, 501–502, 511 (1982) (changing rule to require proof that predicate felonies for second-degree felony-murder were committed with conscious disregard for risk to human life). The SJC then applied the rule to preserved cases "pending on direct appeal." *Commonwealth v. Moran*, 387 Mass. 644, 647, 651 & n.3 (1982) (defendants objected, constitutional objections rejected but common law changes under *Matchett* applied); *Commonwealth v. Parham*, 390 Mass. 833, 845–846 (1984) (benefit of change to felony-murder limited "to those cases on direct appeal ... if the issue was preserved at trial").[19]

Similarly, in *Commonwealth v. Hunter*, the SJC prospectively changed the element of "extreme atrocity or cruelty" so as to limit juror discretion. 416 Mass. 831 (1994). But where the defendant preserved the issue, the SJC reviewed for prejudicial error. *Commonwealth v. Robbins*, 422 Mass. 305, 310–311 (1996); *Commonwealth v. Dahl*, 430 Mass. 813, 825 (2000).

Three years before Lopez-Ortiz's trial, the SJC emphasized its adherence to its system of affording *Griffith* limited retroactivity to preserved claims of error on direct review. *Commonwealth v. Augustine*, 467 Mass. 230, 257–258 & n.41 (2014). It wrote that it had "consistently referenced with implicit approval the principle

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[19] *See also Commonwealth v. Silva*, 388 Mass. 495, 505 & n.5 (1983) (articulating preserved error doctrine); *Commonwealth v. Bellamy*, 391 Mass. 511, 515–516 (1984) (articulating preserved error doctrine as to change in felony-murder rule, issue partially preserved, discretionary relief provided); *Commonwealth v. French*, 462 Mass. 41, 45–46 (2012) (defendant on direct review "entitled" to new rule regarding inconsistent verdicts among joint venturers but applying relaxed standard of review due to lack of objection).

that a new criminal rule applies to 'those cases still pending on direct review.'" *Id.* at 257 n.41 (collecting cases).[20]

Indeed, the SJC's longstanding preserved error doctrine has not been limited to changes affecting elements of the offense or to constitutional claims. In *Commonwealth v. Federico*, because the defendant objected at trial to the common law issue of the scope of expert testimony, the SJC "recognize[d] that ordering a new trial may come with a heavy cost ... [but] we adhere to our view that, on direct appeal, a defendant has the benefit of intervening decisional law." 425 Mass. 844, 852 n.14 (1997) (citation omitted). *Accord Commonwealth v. Pidge*, 400 Mass. 350, 354 (1987) (applying doctrine to change in common law rule of evidence, rejecting distinction that the new rule was not constitutional). *Commonwealth v. Figueroa,* 413 Mass. 193, 202–203 (1992), *S.C.,* 422 Mass. 72 (1996) (common law evidentiary rule); *Commonwealth v. Odgren*, 483 Mass. 41, 49 (2019) (prescient objection to common law presumption of sanity reviewed for preserved error); *Commonwealth v. Waweru*, 480 Mass. 173, 187 (2018) (same).

Limited retroactivity for preserved claims on direct review continued as Massachusetts doctrine after *Brown*. *Wolfe* was decided one month after *Brown* and it still employed its preserved error doctrine for a new rule. *Wolfe*, 478 Mass. at 150. And the SJC employed the doctrine two years later in *Hernandez* to give the

[20] The SJC explicitly adopted this treatment of preserved claims relating to otherwise-prospective rulings in civil cases as well. *Fed. Nat'l Mort. Ass'n* v. *Marroquin*, 477 Mass. 82, 87–88 (2017).

prosecution the benefit of a change in the common law.[21] *Hernandez*, 481 Mass. at 602. The SJC continues to cite *Wolfe* as an example of the correct application of the preserved error doctrine as recently as August 14, 2023. *Commonwealth v. Souza*, 492 Mass. 615, 626–627 (2023).

The decision to refuse review was demonstrably ad hoc and therefore violated due process.[22]

Massachusetts will undoubtedly point to oft-quoted language that "the Federal Constitution has no voice upon the subject" of state retroactivity rules. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932).[23] Massachusetts clings to this even when the substance of a criminal offense changes. *See Martin*, 484 Mass. at 645.

The assertion does not withstand scrutiny. The actual language from *Sunburst Oil* is this:

> We think the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself *between the principle of forward operation and that of relation backward*. It may say that decisions of its highest court,

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[21] One outlier is *Commonwealth v. Castillo*, where there was an objection to the extreme atrocity or cruelty instruction, the Court declared its new rule prospective, but reduced the verdict to second-degree under M.G.L. c. 278, § 33E. 485 Mass. 852, 857, 866–868 (2020). But this is *more* generous treatment than under the normal doctrine which would have permitted a retrial for first-degree. *See, e.g., Matchett*, 386 Mass. at 511.

[22] *See also Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992) (failure to afford preserved error review in favor of selective prospectivity violates due process and equal protection protections in Florida constitution).

[23] *Sunburst* was a 1932 civil case about whether a state court could refuse to order retroactive refunds for payments made on a later-revoked regulatory freight tariff schedule. *Id.* at 360–361. As noted, this Court has since expressed a view of retroactivity on direct review that is more protective of individual liberty in criminal cases. *Beam*, 501 U.S. at 537–538; *Griffith*, 479 U.S. at 322.

> though later overruled, are law none the less for intermediate transactions.

Sunburst Oil, 287 U.S. at 364.

At most, *Sunburst Oil* means that states may choose between principles of adjudication in their jurisprudential doctrine.[24] It does not mean that states are free to engage in adjudication without resort to principles. "A government of laws and not of men," *Cooper v. Aaron*, 358 U.S. 1, 23 (1958), means that even if *Sunburst Oil* permits state courts to develop their own retroactivity rules that are less protective of individual liberty,[25] they must have rules that are both discernible and followed. "[R]evision of [government's] errors must be by orderly process of law." *Aaron*, 358 U.S. at 23 (quoting *United States v. United Mine Workers of Am.*, 330 U.S. 258, 308 (1947) (Frankfurter, J., concurring)).

Due process requires at least this much. "[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417–418 (2003) (citation omitted). Instead of fostering the perception of integrity, *ad hoc* decisions diminish

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[24] *Griffith* rejected selective prospectivity to cases pending on direct review as "unprincipled and inequitable." *Teague v. Lane*, 489 U.S. 288, 304 (1989) (citing *Griffith*, 479 U.S. at 322).

[25] *Contrast Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (states may employ state collateral retroactivity rules that are more protective of federal constitutional rights than *Teague v. Lane*, 489 U.S. 288 (1989)).

"public faith in the judiciary as a source of impersonal and reasoned judgments." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).[26]

Massachusetts may not devise a system affording limited retroactivity on direct review for preserved errors and then withhold that protection.

IV. This case is a good candidate for certiorari review. It cleanly presents the issues, both factually and legally. Lopez-Ortiz preserved the issue. Lopez-Ortiz's conviction stands or falls on the issue presented. The issue presented involves issues left open in prior decisions of this Court, leaving the lower courts split.

The grants of certiorari in *Fiore* and *Bunkley* demonstrate that the question presented is important. But ultimately those cases did not resolve them.

In *Fiore*, the Court "granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." *Fiore I*, 531 U.S. at 226. In *Bunkley*, the Court remanded to the Florida Supreme Court to determine whether Bunkley's knife met the state court's definition of the crime at issue "at the time his conviction became final." *Bunkley*, 538 U.S. at 842. The answer was no and this Court denied certiorari. *Bunkley v. State*, 882 So. 2d 890, 894 (Fla. 2004), cert. denied, 543 U.S. 1079 (2005).

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[26] *See* Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 Harv. J.L. & Pub. Pol'y 811, 873 (2003) ("prospectivity-based approaches, being highly subject to the discretion of the decision-maker, also have a great potential for abuse"); Andrew I. Haddad, *Cruel Timing: Retroactive Application of State Criminal Procedural Rules to Direct Appeals*, 116 Colum. L. Rev. 1259, 1290 n.179 (2016) ("selective prospectivity is incompatible with the judicial role").

As noted, *supra* at 9–13, both *Bunkley* and *Fiore* were collateral challenges implicating finality concerns. In both cases, the resolution of the case turned on the definition of the state offense at the time the conviction became final. *Id.*

Here, the conviction is not yet final and the state has already defined Lopez-Ortiz's offense of conviction out of existence. *Brown*, 477 Mass. at 832 & n.4. But Massachusetts asserts that it is free to restrict the benefit of ameliorative substantive changes to an offense even on direct review. *Martin*, 484 Mass. at 645. *Commonwealth v. Concepcion*, 487 Mass. 77, 83 n.10 (2021); *Commonwealth v. Castillo*, 485 Mass. 852, 867 (2020); *Commonwealth v. Bastos*, 103 Mass. App. Ct. 376, 380, review denied, 493 Mass. 1104 (2023); *Commonwealth v. Ashford*, 486 Mass. 450, 453 (2020) (interpreting new substantive rule, court asserts "[w]here the statutory interpretation at issue is not constitutionally required … we retain some discretion to apply the rule only prospectively").

The inconsistency in language in *Bunkley,* and the unresolved conflict between *Welch* and *Stone,*[27] leads some states to similarly believe that this "discretion" is permissible on direct review even though *Bunkley*, *Welch*, and *Stone* were all collateral challenges.[28] Other states provide limited retroactivity on direct

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[27] *Supra* at n.9.

[28] *People v. Douglas*, 205 A.D.2d 280 (N.Y. App. Div. 1994), *aff'd,* 85 N.Y.2d 961 (1995) (new substantive ruling on element of crime subject to *Linkletter*-like prospectivity inquiry on direct review); *see also People v. Hill*, 648 N.E.2d 455 (N.Y. 1995) (new substantive ruling on element of crime subject to *Linkletter* factors on collateral review); *Taylor v. State*, 10 S.W.3d 673 (Tex. Crim. App. 2000) (*Linkletter*-like prospectivity inquiry regarding preserved, new substantive rule on direct review, collecting cases from other jurisdictions); *State v. Hudson*, 331 N.C. 122, 157–158 (1992) (new substantive rule denied retroactive application on direct review, no rationale articulated).

review for new substantive rules while others provide limited retroactivity for all new rules, but normally require preservation below.[29]

Given *Bunkley*'s inconsistent language, *supra* at 11, the lower federal courts have been rendered powerless to grant relief on this issue given the "unreasonable application" clause of 28 U.S.C. § 2254(d)(1). *See Moore*, 763 F.3d at 1019 (similar issue presented, Court of Appeals pointed to *Bunkley* as not resolving the question). This Court can resolve the question on direct review and say what the law is.

A similar question was presented to this Court in the certiorari petition from the decision in *Commonwealth v. Martin,* 484 Mass. 634 (2020), cert. denied, 141 S. Ct. 1519 (2021) (No. 20-6050). That case was a much worse vehicle for deciding the issue. First, Martin was convicted of first-degree felony-murder, which still exists after *Brown*, albeit in a different form. *Brown*, 477 Mass. at 807–808. Second,

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[29] *Smith v. State*, 598 So.2d 1063 (Fla. 1992) (new rules retroactive to cases pending direct review if preserved); *Howard v. State*, 236 N.E.3d 735 (Ind. 2024) (all new rules retroactive to cases pending on direct review if preserved); *State v. Gomez*, 320 Kan. 3, 9 (2025) (new substantive ruling regarding instruction on elements of felony-murder retroactive on direct review); *State v. Ruiz*, 955 So.2d 81, 84–85 (La. 2007) (all new rules retroactive to cases pending on direct review if preserved, rejecting *Linkletter*); *Richmond v. State*, 118 Nev. 924 (2002) (all new rules given retroactive effect on direct review if preserved); *Nika v. State*, 124 Nev. 1272, 1287 (2008) (error to refuse limited retroactivity on direct appeal to preserved argument for new rule defining elements of murder); *State v. Tierney*, 150 N.H. 339, 344 (2003); *Pailin v. Vose*, 603 A.2d 738, 742 (R.I. 1992) (adopting limited retroactivity for any new rule of criminal procedure for cases pending on direct review); *State v. Tuttle*, 460 N.W.2d 157, 159 & n.* (S.D. 1990) (new state procedural rule granted limited retroactivity on direct review if preserved); *State v. Guard*, 371 P.3d 1, 19 (Utah 2015) (all new rules retroactive to cases pending on direct review if preserved); *State v. Gangwer*, 168 W.Va. 190, 196–197 (1981) (all new rules retroactive to cases pending on direct review if preserved). *See also Chao v. State*, 931 A.2d 1000 (Del. 2007) (new substantive decisions applied retroactively on collateral review when defendant has been convicted for abolished theory of felony-murder); *Rudolfo v. Steward*, 533 P.3d 728 (N.M. 2023) (new substantive rule restricting elements of felony murder applied retroactively on collateral review). *Contrast State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006) (common law substantive rule restricting felony murder predicate offenses granted limited retroactivity on direct review where preserved) with *Nguyen v. State*, 878 N.W.2d 744, 755 (Iowa 2016) (*Heemstra*'s substantive change in law not retroactive on collateral review).

Martin failed to preserve the issue. *Supra* at 12 n.10. [30] Therefore, Massachusetts was free to invoke procedural default to bar the claim regardless of any retroactivity considerations. *Beam*, 501 U.S. at 544; *Powell v. Nevada*, 511 U.S. 79, 85 (1994). Third, the issue was non-prejudicial in *Martin*. Martin himself brandished a gun to rob the victim and shot the victim in the chest at close range while the victim asked him to "wait a minute" with palms out. *Martin*, 484 Mass. at 637. There is almost no chance that Martin's jury would not have found one of the prongs of malice and that the killing occurred during the course of a life felony. *Id*. at 646–648.

Here, this issue went to the heart of Lopez-Ortiz's case. The jury refused to convict Lopez-Ortiz of any life felony. He testified that he opposed the involvement of any firearms, that he attempted to stop the assault by pushing Okowuga away from the victim when Okowuga produced a firearm. Tr.8:153–154, 158, 160, 167–169, 207. He further testified that when he pushed Okowuga again, Tillis cut him and pushed him back down the hall. Tr.8:169, 199–200. He then announced that he was leaving. Tr. 8:169. Lopez-Ortiz's intervention likely allowed the victim to free himself and chase Rivera and Tillis out of the house. Tr.8:170–172.

Unlike Martin, Lopez-Ortiz did not shoot the victim. He tried to prevent the shooting. The question of what law applies makes all the difference.

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[30] The record in *Brown* establishes that Brown also did not object. *Commonwealth v. Brown*, No. MICR2009-0511 (June 24 & 25, 2013) (Tr.8:4, 5, 8, 76, 78; Tr.9:39, 92–95); *see Commonwealth v. Brown*, No. SJC-11669, Appellant Brown Brief, at 48–49 (no assertion that issue was preserved), available at: http://ma-appellatecourts.org/display_docket.php?src=party&dno=SJC-11669; *see* 477 Mass. at 805–842.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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