No. 15-6063

In the
Supreme Court of the United States

AARON POWELL,
Petitioner,
v.
STEVEN TOMPKINS,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For the First Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did it contravene clearly-established federal law under the Anti-terrorism and Effective Death Penalty Act (AEDPA), or was it inconsistent with the retroactivity principles established in *Teague vs. Lane*, 489 U.S. 288 (1989), for the First Circuit Court of Appeals to deny relief to Petitioner on his claim that Massachusetts violated his rights under the Second and Fourteenth Amendments by placing on him the burden to produce evidence in support of the affirmative defense of authorization, where he had been charged with unlawfully possessing or carrying a firearm?

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The opinion of the United States Court of Appeals for the First Circuit is reported at 783 F.3d 332 (1st Cir. 2015) (Pet. App. 1). The opinion of the United States District Court is reported at 926 F. Supp. 2d 367 (D. Mass. 2013) (Pet. App. 25). The underlying opinion of the Supreme Judicial Court of Massachusetts is reported at 459 Mass. 572, 946 N.E.2d 114 (2011) (Pet. App. 47).

STATEMENT

1. Petitioner was tried without a jury in the Roxbury Division of the Boston Municipal Court on January 30, 2009 for possession of a firearm without a firearm identification ("FID") card, in violation of M.G.L. c. 269, § 10(h); carrying a loaded firearm without a license, in violation of M.G.L. c. 269, § 10(n); resisting arrest, in violation of M.G.L. c. 268, § 32B; and carrying a firearm without a license, in violation of M.G.L. c. 269, § 10(a). (Pet. App. 47, 51). Justice Michael Coyne found Petitioner guilty of all charges. (Pet. App. 51). Justice Coyne sentenced Petitioner to eighteen months in the house of correction for the conviction for carrying a firearm without a license, concurrent sentences of six months for the resisting arrest and possession of a firearm without an FID card convictions, and a consecutive three-year term of probation for the conviction for carrying a loaded firearm. (Pet. App. 30).

2. Petitioner initially appealed his convictions to the Massachusetts Appeals Court, but subsequent to this Court's opinion in *McDonald v. City of Chicago*, 561

U.S. 742 (2010), the Massachusetts Supreme Judicial Court ("SJC") took the appeal *sua sponte*. (Pet. App. 30).

The SJC issued a decision in the case on April 28, 2011. (Pet. App. 47). As relevant here, the SJC held that Petitioner's convictions for unlawful possession of a firearm did not violate the Due Process Clause. (Pet. App. 55). Under Massachusetts state law, the absence of a license is not an element of the crime; rather, possession of a license is an affirmative defense. (Pet. App. 55). Therefore, requiring the defendant to produce evidence that he has a valid license or FID card does not create an unconstitutional presumption or shift to the defendant the burden of proof on an essential element of the crime, the court reasoned. (Pet. App. 55).[1]

3. Petitioner filed a petition for writ of certiorari in this Court on September 24, 2011 (No. 11-6580), which was denied. *Powell v. Massachusetts*, 132 S. Ct. 1739 (2012).

4. Petitioner then filed a habeas corpus petition in the United States District Court on April 23, 2012, raising, as relevant here, two claims. The first was that his due process rights to the presumption of innocence and not to be convicted except upon proof beyond a reasonable doubt on each and every element of the crimes were

[1] The SJC also rejected Petitioner's claims that the Massachusetts firearms statutes violate the Second Amendment and equal protection guarantees because the statutes prohibit eighteen- to twenty-year-olds from possessing firearms. The court held that Petitioner lacked standing to raise the claims because Petitioner did not contend that he had ever applied for an FID card or firearm license, and therefore could not show that he had been denied a card or license. (Pet. App. 58-59).

violated by shifting to Petitioner the burden of showing he had a license and registration card for the firearm. The second was that defining the crimes under the applicable statute and state cases as simple possession or carrying of a firearm, without any additional element of non-authorization, violates the Second Amendment right to keep and bear arms.[2] (Pet. App. 62-76).

The district court (Young, D.J.) denied the habeas petition on February 28, 2013, rejecting the two claims at issue in this petition. First, the court held that the placement of the burden of production on a defendant to provide evidence of a license did not violate due process. Second, the court considered the Second Amendment claim under de novo review and held that the imposition of licensure as a predicate to possessing and carrying a firearm in Massachusetts did not violate Petitioner's Second Amendment rights. (Pet. App. 32-36). The district court granted a certificate of appealability on all of the issues raised in the habeas petition.

5. The First Circuit affirmed the denial of habeas relief on April 15, 2015. First, the court deferred to the SJC's determination that the Massachusetts firearms laws create a general prohibition with licensure as an affirmative defense

[2] Petitioner also raised two additional claims that are not at issue in this petition: a claim of ineffective assistance of counsel for failing to file a motion to suppress Petitioner's statements, which was denied by the district court and later found to be waived by the First Circuit Court of Appeals (Pet. App. 16), and a claim that the Massachusetts firearms statute violates the Second Amendment and Equal Protection Clause because it bans all 18-20-year-olds from carrying handguns outside the home, which was also rejected by the district court (Pet. App. 38-46). The First Circuit declined to reach this second issue based on the procedural default rule (Pet. App. 12-13).

and held that the SJC's determination that such laws did not violate due process was not objectively unreasonable under AEDPA. As the First Circuit explained, "the Supreme Court's precedent has developed significantly in the field of state law affirmative defenses that fully satisfy the *Winship*[3] baseline demand. This precedent on affirmative defenses provides ready support for concluding that the SJC's due process ruling in [Petitioner's] direct appeal is not objectively unreasonable." (Pet. App. 11 (citations omitted)).

Second, reviewing the Second Amendment claim de novo because the SJC was silent on this constitutional claim, the court found that it was "nothing more than a hollow recapitulation of [Petitioner's] procedural due process claim in Second Amendment garb. And its fate is the same." (Pet. App. 13). The court rejected Petitioner's claim, "[w]here [this Court] has yet to hold that publicly carrying a firearm unconnected to hearth and home and unconnected to militia service is a definitive right of private citizens protected under the Second Amendment." (Pet. App. 14-15). The court also rejected Petitioner's request to hold that the Second Amendment rights articulated in *District of Columbia v. Heller*, 554 U.S. 570 (2008), extend outside the home, because the issue was waived due to insufficient briefing. (Pet. App. 15).

[3] *See In re Winship*, 397 U.S. 358, 364 (1970) (holding that a criminal defendant may not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

ARGUMENT

I. There Is No Split of Authority on the Federal Question Presented by Petitioner.

Petitioner has not identified any split among the U.S. courts of appeals or state courts of last resort, nor does one exist, regarding the question of whether *Winship* principles are violated by a state's choice to define the existence of a license as an affirmative defense in criminal gun possession cases. The cases to which he cites simply recite the settled elements under various state laws or are readily distinguishable.[4] Rather, in urging this Court to accept this case on certiorari review, Petitioner alleges that there is a "conflict" between states that require the prosecution to prove beyond a reasonable doubt that a defendant lacks a firearm license, and states—similar to Massachusetts—that define authorization (or existence of a license) as an affirmative defense and place the burden of production

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[4] *Lively v. State*, 427 A.2d 882 (Del. 1981), merely acknowledged the fact that states define the crime of unlawful possession of a firearm differently (as is their right under this Court's cases cited, *supra*). In *Johnson v. Wright*, 509 F.2d 828, 830 (5th Cir. 1975), the Fifth Circuit granted habeas relief based on a jury instruction that allowed jurors to infer that a firearm was unlicensed and placed the burden of *proving* the existence of a license on the defendant (unlike Massachusetts' scheme, which merely imposes a burden of production, at which point the burden shifts to the prosecution to prove lack of authorization). In *United States v. Garcia*, 555 F.2d 708, 711 (9th Cir. 1977), the defendant was charged under a federal statute with possession of a firearm during the commission of a felony. The unlawfulness of the possession was to be determined by federal or state law. The government relied on a California statute which required the prosecution to *prove* that the defendant did not have a firearm license. Where no such evidence was presented, the Ninth Circuit held that the government failed to sustain its burden of proving all of the underlying elements. Again, this statute differs from the Massachusetts statute which shifts only the burden of *production* to the defendant to show evidence of a license.

or proof regarding that defense on the defendant.[5] (Pet. 24-26). Thus, rather than describing a split on a federal constitutional issue, as contemplated by S. Ct. R. 10(a), Petitioner describes differences among state criminal laws regarding the burden of proving affirmative defenses, differences that the federal constitution permits. *See Gilmore v. Taylor*, 508 U.S. 333, 341 (1993) ("states must prove guilt beyond a reasonable doubt with respect to every element of the offense charged, but they may place on defendants the burden of proving affirmative defenses").

This Court has emphasized "the preeminent role of the States in preventing and dealing with crime and the reluctance of th[is] Court to disturb a State's decision with respect to the definition of criminal conduct and the procedures by which the criminal laws are to be enforced in the courts, including the burden of producing evidence and allocating the burden of persuasion." *Martin v. Ohio*, 480 U.S. 228, 232 (1987) (citing *Patterson v. New York*, 432 U.S. 197, 201-202 (1977) (Court should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual states)). In fact, a state's decision does not violate the Due Process Clause in this regard unless "'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina v. California*, 505 U.S. 437, 445-46 (1992) (quoting *Patterson*, 432 U.S. at 201–202 (citations omitted)).

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[5] Petitioner does identify a circuit split on another lurking, subsidiary Second Amendment issue, *i.e.*, whether the Second Amendment's core protections apply outside the home. (Pet. at 27). This issue is addressed, *infra*, Sections II and III.

Petitioner's assertions boil down to an argument that a decision in his favor on the federal question would be of national importance, given the number of states that currently define lack of a license as an affirmative defense. Leaving aside the lack of a split on the question presented, the fact that twenty-six states have similar statutory schemes to Massachusetts indicates that, should this Court wish to reach the question now or in the future, there will be other opportunities for this Court to do so without the procedural difficulties inherent in this case arising under AEDPA and *Teague v. Lane*, 489 U.S. 288 (1989). *See* Section II, *infra*. *See also United States v. Mendoza*, 464 U.S. 154, 160 (1984) (granting certiorari at this stage would "deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question ").

II. This Case Is A Poor Vehicle for Deciding Whether the Massachusetts Firearms Statutes Violate Due Process or the Second Amendment.

Even if this Court wished to decide whether the Massachusetts firearms statutes violate Due Process or the Second Amendment, this case is a poor vehicle for doing so. The First Circuit found that Petitioner's central *Winship* claim is governed by AEDPA, meaning that, even if this Court were to rule in his favor, it is unlikely that he could obtain relief. (Pet. App. 7). Although the First Circuit did not directly invoke the restrictions found in *Teague, supra*, its analysis of Petitioner's Second Amendment claim recognized the limitations of applying new rules on collateral review. (Pet. App. 13-15). Moreover, nested in his *Winship* claim, and necessary for Petitioner to obtain relief, is a further Second Amendment

claim, with respect to which the First Circuit below found Petitioner's briefing so deficient as to amount to waiver on appeal. (Pet. App. 15).

As noted above, this case was brought under AEDPA, 28 U.S.C. § 2254, and, as the First Circuit found, AEDPA applies to his claim at least insofar as it is a due process claim. *See* Pet. App. 10. Under AEDPA, Petitioner cannot obtain relief on a claim adjudicated on the merits by the SJC, unless he demonstrates that the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).[6] "In this context, clearly established law signifies the holdings, as opposed to the dicta, of th[e] [Supreme] Court's decisions," *Howes v. Fields*, 132 S. Ct. 1181, 1187 (2012) (quotations omitted), and refers only to precedents in effect "as of the time the state court renders its decision." *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011) (emphasis and internal quotations omitted) (citing *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), and *Lockyer v. Andrade,* 538 U.S. 63, 71–72 (2003)). Under § 2254(d)(1), a state court unreasonably applies clearly established Supreme Court precedent "if it correctly identifies the governing legal rule but applies that rule unreasonably to the facts of a particular prisoner's case." *White v. Woodall*, 134 S. Ct. 1697, 1706, *r'hrg denied*, 134 S. Ct. 2835 (2014). However, a state court does not unreasonably apply clearly established Supreme

[6] A petitioner may also obtain relief under AEDPA if the state's adjudication of a federal issue "resulted in a decision that was based on an unreasonable application of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Petitioner does not invoke § 2254(d)(2) here.

Court precedent by failing to extend that precedent to a new area. *Id.* Thus, to the extent Petitioner seeks to expand the *Winship* precedent to create a more restrictive due process analysis for firearm regulations, or to extend *Heller* and *McDonald* with respect to any one of the ancillary Second Amendment questions implicated in such a ruling (discussed *infra*), he is unable to do so under AEDPA.

The First Circuit applied de novo review to the Second Amendment aspects of his *Winship* claim, *see* Pet. App. 13, but the restrictions on collateral review set forth in *Teague* and its progeny would still limit this Court's ability to announce a new rule of law or to grant Petitioner relief on a principle of law not previously clearly established, unless one of *Teague*'s "narrow" exceptions applies.[7] *See Saffle v. Parks*, 494 U.S. 484, 487-488 (1990) (reinforcing that on collateral review, if the "the relief sought would create a new rule under our holdings in *Teague*[, 489 U.S. at 299-301,] and *Penry* [*v. Lynaugh*, 492 U.S. 302, 313 (1989),] . . . [this Court] will neither announce nor apply the new rule sought by [the petitioner] unless it would fall into one of two narrow exceptions"). It is unclear whether the exception where a new rule places "conduct beyond the power of the criminal law-making authority to proscribe," *Teague*, 489 U.S. at 307 (citations omitted), would apply if this Court ruled in Petitioner's favor, which would raise an additional issue with which this Court would have to grapple. Notably, the petition does not even acknowledge the

[7] The exceptions to the general rule of non-retroactivity for cases on collateral review are 1) if the new rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" and 2) if the new rule "requires the observance of those procedures that are implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 307 (citations omitted).

limitations of *Teague*, let alone mount any argument that either *Teague* exception applies here. (Pet. 11-32).

Nested in the question presented is an additional question that further complicates this petition. Although the petition does not so acknowledge in its list of questions presented, *see* Pet. ii, Petitioner tacitly admits (by briefing the question, *see* Pet. 27-32), that he cannot obtain relief unless this Court resolves the further question whether, and to what extent, the Second Amendment's core protections, precluding a general ban on possession of handguns by "law-abiding, responsible citizens" "for defense of hearth and home," as established in *Heller,* 554 U.S. at 635, and *McDonald*, 561 U.S. at 886, extend to regulations on gun possession outside the home. Yet the First Circuit found that Petitioner's "slight advocacy" on this issue constituted appellate waiver. (Pet. App. 15). Thus, this Court would have to excuse this procedural ruling before reaching the underlying Second Amendment question.

This procedural complexity—wherein different aspects or subsidiary questions implicated by Petitioner's request for relief are possibly subject to different standards of review—weighs against a grant of certiorari, as does the sheer number of subsidiary questions lurking in the question presented as posed by Petitioner. To recap, it appears that this Court would need to resolve at least five distinct questions of federal law in order for Petitioner to be entitled to relief.

II. The First Circuit's Decision Was Correct.

Certiorari should also be denied in this case because the First Circuit's decision was correct. As set forth, *supra*, AEDPA requires a habeas court to determine whether a state court's decision was contrary to or an unreasonable application of clearly established Supreme Court caselaw. Moreover, when AEDPA does not apply, retroactivity principles under *Teague* restrict the application of new rules on collateral review.

In applying the AEDPA standard to Petitioner's due process claim, the First Circuit recognized that it must assess the claim through the lens of Massachusetts law. (Pet. App. 7). The Massachusetts SJC has firmly established that firearm offenses under M.G.L. c. 269, § 10 comprise a general prohibition[8] with certain exceptions and exemptions. One of these exceptions, possession of a firearm license, has been defined as an affirmative defense, for which a defendant has the burden of production. M.G.L. c. 278, § 7. In reading these two statutes together, the SJC has long held that absence of a license is not an element of the unlawful possession offense, and that once the defendant comes forward with evidence of a license, the

[8] As the First Circuit correctly held, the Massachusetts firearm statutes may create a "general prohibition" for *Winship* purposes and yet allow for exemptions and exceptions, such that, in effect, they do not constitute an impermissible general ban on firearm possession, as that term was used in *Heller* and *McDonald*. (Pet. App. 13) ("Nowhere in its dual decisions did the Supreme Court impugn legislative designs that comprise so-called general prohibition or public welfare regulations aimed at addressing perceived inherent dangers and risks surrounding the public possession of loaded, operable firearms. Rather, the Court attended to legislative substance and endorsed the continuing viability of a range of state firearms regulations without endeavoring to draw Second Amendment lines for state legislative architecture.").

burden returns to the prosecution to persuade the trier of fact beyond a reasonable doubt that the defense does not exist. (Pet. App. 8-9). *Commonwealth v. Jones*, 372 Mass. 403, 406, 361 N.E.2d 1308 (1977).

The First Circuit rightly rejected Petitioner's due process claim under AEDPA, because prevailing Supreme Court precedent at the time of the SJC's decision held that it is the duty of a state court to construe the meaning of state statutes (Pet. App. 9). *See Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). As the court found, the SJC's decision was not objectively unreasonable, based on this Court's well-developed precedent "in the field of state law affirmative defenses that fully satisfy the *Winship* baseline demand." (Pet. App. 11). *See e.g.*, *Gilmore v. Taylor*, 508 U.S. at 341. The First Circuit properly found that the SJC's rejection of Petitioner's constitutional challenges based on its interpretation of state firearms statutes involved a reasonable application of this Court's clearly-established precedent under AEDPA.[9]

The First Circuit's conclusion that Petitioner's Second Amendment challenge fails was also proper. Applying de novo review, the court rejected Petitioner's assertion that this Court had clearly established the right to keep and bear arms outside the home in *Heller* and *McDonald* (Pet. App. 14). Instead, the court

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[9] Distinguishing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), on which Petitioner heavily relies, the First Circuit noted that the *Apprendi* court did not consider whether a State has the power to rely on a presumption or to define as an affirmative defense some of the elements of traditional crimes. (Pet. App. 10). Therefore, the *Apprendi* line of cases did not change the legal principles regarding affirmative defenses.

recognized that this Court has "endorsed the continuing viability of a range of state firearms regulations without endeavoring to draw Second Amendment lines for state legislative architecture," and that "states have historically executed firearms regulations through general public safety laws." (Pet. App. 13). The court further rejected Petitioner's invitation to hold that the limited Second Amendment right as articulated in *Heller* extends outside of the home because it was insufficiently briefed by Petitioner, making the issue "a proper candidate for appellate waiver." (Pet. App. 15.) Where this Court has yet to decide whether "publicly carrying a firearm unconnected to defense of hearth and home and unconnected to militia service is a definitive right of private citizens protected under the Second Amendment" (Pet. App. 14-15), the First Circuit properly denied habeas relief, and certiorari review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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