DISTRICT OF COLUMBIA COURT OF APPEALS

19-CF-797

ALONZO JESSIE ATKINS

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the Superior Court of the
District of Columbia – Criminal Division
2017-CF2-733

REPLY BRIEF FOR APPELLANT

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Prior to trial in this matter, the court ruled that two sets of statements made by [redacted], a witness who did not testify at trial, were admissible as excited utterances; a 911 call and statements made to officers immediately thereafter. 11/15/18 Tr. 6-7.[1] These statements exculpated Mr. Atkins. As appellee acknowledges, the trial court ruled that the government could only introduce [redacted] later statements, which tended to inculpate Mr. Atkins, if Mr. Atkins introduced any of the excited utterances. *Id.* at 8-10. The prosecutor confirmed that he understood after clarifying the trial court's ruling. *Id.*

[1] "R." refers to the record in this case. "Tr." refers to transcripts, noted by the date of proceeding. "App. Br." refers to appellee's brief.

The government called MPD Detective [redacted] in its case-in-chief. Despite the trial court's clear ruling, Detective [redacted] testified about [redacted] later, inculpatory statement on direct examination:

> Q: All right. Once you got back to the house, what did you do?
> A: I confronted [redacted]
> Q: Okay, without telling us the substance of the conversation, what happened when you talked to her?
> A: She took us to the location of **the weapon that was used**.

11/15/18 Tr. 30 (10-16) (emphasis added).

[redacted] testimony included the inadmissible testimonial hearsay—an assertion that the weapon to which [redacted] led officers was the weapon used to shoot Mr. Atkins, an assertion that immediately followed [redacted] testimony that he had "confronted" [redacted]. The trial court's failure to order the testimony stricken or even give a limiting instruction was error.

The government then repeatedly argued these statements for their truth in closing, stating

> He said, Yeah, we tricked her. We told her that [redacted] told her -- told us what happened. He shot himself in the foot. And she just opened up. She said, We were arguing -- we were arguing, and he picked up the gun. And then she says, No, he had it. And then Detective [redacted] says, It accidentally went off? She says, Yeah. Ladies and gentlemen, he had the gun. There was no struggle. This whole idea of this burglary is completely debunked. There's no evidence to support it. And I'm not asking you to believe this statement in Government's Exhibit 99 **just because** the statement was made.

11/19/18 Tr. 80 (7-20) (emphasis added).

> Well, I'm telling you how the DNA got there. **He had the gun. [redacted] said he had the gun in his hand.**

Id. at 81 (23-25) (emphasis added).

> And I want you to think, again – defense counsel talked about common sense. And common sense in this story -- in this case is very clear. **The defendant shot himself in the foot. He knew he wasn't supposed to have a gun. He had [redacted] hide it.** And when officers came back and tricked the [redacted] and told her, Look, he told us what happened, she was like, Okay. Well, now I can tell them because they already know what's going on. **And she told them the truth.** And the evidence that's with it supports that.

Id. at 83 (11-20).

The trial court's final oral and instructions to the jury reinforced the prosecutor's arguing of the damaging testimonial hearsay for its truth, by telling the jury it ***could not*** consider [redacted] earlier excited utterances, favorable to Mr. Atkins, for their truth, ***but could*** consider her later inculpatory statements for their truth.

> The law treats prior inconsistent statements differently depending on the nature of the statements and the circumstances in which they were made. I will now explain how you should evaluate those statements.
>
> **You have heard evidence that [redacted] made a statement on an earlier occasion and that this statement may be inconsistent with her testimony here at trial -- well, may be inconsistent with what you were told about her statements.**
>
> **It is for you to decide whether the witness made such a statement and whether, in fact, it was inconsistent with the assertions of her -- of her position here. If you find such an inconsistency, you may consider the earlier statement in judging the credibility of the**

> **witness. But you may not consider it as evidence that what was in the earlier statement was true.**
>
> 11/19/18 Tr. 53-54 (20-10) (emphasis added).
>
> You have heard evidence that [redacted] made a statement on an earlier occasion and that this statement may be inconsistent with statements referred to here at trial. It is for you to decide whether the witness made such a statement and whether in fact it was inconsistent with the witness' prior position. **If you find such an inconsistency, you may consider the earlier statement in judging the credibility of the witness, but you may not consider it as evidence that what was said in the earlier statement was true.**
>
> R. 20 at 9.

[redacted] statements—those in the 911 call which exculpated Mr. Atkins and her later hearsay statements which tended to inculpate Mr. Atkins—were unquestionably inconsistent with one another and all were "referred to" at trial because [redacted] did not physically appear at trial. Where the trial court did not instruct the jury as to which statements were the "earlier statements," and where the government argued [redacted] inculpatory statements for their truth, the jury was left to conclude the obvious—that it could consider [redacted] later, inculpatory statements for their truth and that it could not consider her 911 call, made first in time (i.e. earlier) for its truth because it was the "earlier statement."

These errors amounted to the admission of testimonial hearsay against Mr. Atkins.[2] Where he had no prior opportunity to cross-examine the complainant and where there was no showing of unavailability,[3] such errors violated Mr. Atkins' Confrontation Clause rights. Because such errors were plain, violated Mr. Atkins' substantial rights, and seriously affected the fairness of the proceedings, Mr. Atkins' convictions, both of which required proof of possession, must be reversed.

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[2] Appellee's references to *Street v. United States*, 471 U.S. 409, 413-14 (1985), a pre-*Crawford* decision, and *Wilson v. United States*, 995 A.2d 174, 184 (D.C. 2010) are misplaced. *Street* addressed the admissibility of a co-participant's confession for a non-hearsay purpose (to rebut Street's contention that his confession was derived from that of the co-participant by allowing a comparison between the two). *Wilson* addressed, *inter alia*, the admission of a cooperating witness's recorded statements, made in an effort to get Wilson to incriminate himself, but themselves also inculpatory, for a non-hearsay purpose, and Wilson's resulting adoptive admissions. While both are inapposite, Mr. Atkins takes issue not with the trial court's pre-trial ruling, but with what occurred at trial and in the court's instructions and lack thereof. For the same reason, appellee's reliance on *Smith v. United States*, 26 A.3d 248, 260 (D.C. 2011) is misplaced.

[3] Because the admission of testimonial hearsay against the accused violates the Sixth Amendment absent the presence of both a prior opportunity to cross-examine the declarant and a showing of unavailability, the absence of either violates the Sixth Amendment right of the accused to confront witnesses against him. *Hammon v. Indiana*, 547 U.S. 813, 822 (2006). Appellee's argument that [redacted] was unavailable (App. Br. at 10) is misplaced where there is no record evidence that the complainant was unavailable in the constitutional sense for the trial date in question. 11/14/18 Tr. 6 (17-23). Because Mr. Atkins did not have an opportunity to cross-examine the declarant, as appellee concedes, the court need not reach this issue.

a. MPD [redacted] Testified on Direct Examination During the Government's Case-in-Chief That [redacted] Took Officers "to the Location of *the Weapon That Was Used.*"

On direct examination during the government's case-in-chief, Detective [redacted] testified that [redacted] took officers "to the location of the weapon that was used." This statement includes testimonial hearsay prohibited by the trial court's pretrial ruling—that the weapon in the alley to which [redacted] led officers was the gun used to shoot Mr. Atkins.[4] Indeed, no percipient witness properly so testified at trial. Contrary to appellee's assertion,[5] this occurred *before* Mr. Atkins' trial counsel elicited any such statements and violated the trial court's pretrial ruling. The error was compounded when the trial court failed to strike [redacted] statement on this issue. Further, when the government improperly argued this statement and others for their truth in closing, 1) it became clear that the government offered this portion of [redacted] testimony for its truth, and 2) the error was further compounded.

i. *Holmes*, Which Held That Testimony About Events Viewed Through a Live Video Feed Does Not Constitute Hearsay, is not Relevant to the Issue Before the Court.

Appellee's effort to rely on *Holmes v. United States*, 92 A.3d 328 (D.C. 2014)

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[4] Mr. Atkins had not previously elicited [redacted] statements in the government's case-in-chief. *See also Holmon v. District of Columbia*, 202 A.3d 512, 517 (D.C. 2019) (citing *Young v. United States*, 63 A.3d 1033, 1044 (D.C. 2013)).

[5] App. Br. at 4 n.2.

to defend [redacted] [redacted] improper testimony appears to reflect a misunderstanding as to the objectionable portion of [redacted] testimony on direct examination. This court held in *Holmes* that a witness's testimony about events he observed through a surveillance camera system are not hearsay because a surveillance system, through which the events were mediated, is not a person, and therefore cannot make an assertion to the testifying witness. *Id.* at 331. But the objectionable portion of this testimony by [redacted] was not his observation of what he saw [redacted] do, but the assertion that the gun to which [redacted] led officers was the gun used to shoot Mr. Atkins. This out-of-court statement, offered and argued for the truth of the matter asserted, despite the trial court's pretrial ruling, was inadmissible hearsay.

b. Although the Jury is Presumed to Follow the Law, the Trial Court's Instructions Improperly Conveyed to the Jury That it Could Not Consider [redacted] Excited Utterances for Their Truth but Could Consider Her Later Hearsay Statements for Their Truth.

Appellee correctly states that the jury is presumed to follow the law. App. Br. at 20. Appellee's argument, however, that this presumption remedies what Mr. Atkins submits are the government's improper arguments in closing (arguing Ms. Singletary's testimonial hearsay for its truth) is misplaced because the trial court's instructions permitted the jury to do what its pretrial ruling prohibited and prohibited the jury from doing what its pretrial ruling permitted—to consider [redacted]

inculpatory testimonial hearsay for its truth and a prohibition on considering [redacted] excited utterances for their truth. *See* Part I, *supra*.

i. While Mr. Atkins Did Not Object to the Trial Court's Final Instructions, He Did Not Invite the Error, and This Court Reviews for Plain Error, as Made Clear in *Rose*, *Preacher*, and *Clark*.

As a threshold matter, because Mr. Atkins did not object to the trial court's final instructions, this court reviews for plain error. *See Preacher v. United States*, 934 A.2d 363, 368-69 (D.C. 2007); *Carter v. United States*, 475 A.2d 1118 (D.C. 1984). Mr. Atkins did not invite the error, as urged by appellee. Moreover, assuming, *arguendo*, that Mr. Atkins had "invited" the error within the error in the fashion urged by appellee, this court would still review for plain error.

In *Rose v. United States*, 49 A.3d 1252, 1255 (D.C. 2012), defense counsel did not object to the trial court's failure to instruct the jury on simple possession as a lesser-included offense of distribution of a controlled substance. This court declined the government's invitation to apply the doctrine of invited error and applied plain error review. *Id.* n.12.

Similarly, in *Preacher v. United States*, 934 A.2d 363, 368-69 (D.C. 2007), this court noted that "Rule 30's requirement [of objecting to instructions before the jury retires to deliberate] is also applicable to re-instructions, and therefore, any objections or requests must be made before the jury continues deliberations. The

failure to comply with the requirements *results in review under the high standard of plain error*." (internal citations omitted, emphasis added).

Clark v. United States, 51 A.3d 1266, 1271 (D.C. 2012), compels the same conclusion. In *Clark*, the government submitted a sentencing memorandum calling for a sentence twice as long as the length at which it had agreed to cap its allocution. *Id.* After the defense counsel and the court agreed that a new memorandum should be submitted, defense counsel stated in response to the trial court's suggestion that sentencing should proceed the same day, "okay." *Id.* Defense counsel did not object to the sentencing judge continuing to preside over the case or to proceeding to sentencing. *Id.* This court again applied plain error review, noting that "[b]ecause Clark failed to object to anything that the trial judge said or did, or to the prosecutor's subsequent oral allocution, the judgment is subject to our review, if at all, only for plain error affecting substantial rights." *Id.* (citing Super. Ct. Crim. R. 52(b)).

In the instant case, Mr. Atkins did not object to the trial court's oral instructions to the jury regarding the proper use of [redacted] statements. 11/19/18 Tr. 39-40, 53-54. When discussing the final written instructions, after the trial court *sua sponte* proposed a modification to the standard Redbook instruction on prior inconsistent statements and read it to the parties, the following exchange occurred:

> THE COURT: And, obviously -- I don't think we have to call the jury back and read them that instruction. I think we can just give them this edited instruction.
> MR. THOMPSON: The Government [sic] is fine with that.
> THE COURT: Mr. Nicholas?
> MR. NICHOLAS: That's fine
>
> 11/19/18 Tr. 91 (10-15) (emphasis added).

Just as in *Preacher*, *Rose*, and *Clark*, though Mr. Atkins did not object, neither can he be said to have invited the trial court's instructional errors by failing to object. Accordingly, this court applies plain error review. Additionally, Mr. Atkins also notes that the trial court's instructional errors are one component of his larger claim—that [redacted] statements were, on these facts, admitted for their truth in violation of the Confrontation Clause—rather than an isolated, free-standing instructional error.

ii. Despite the Trial Court's Correct Pretrial Ruling on the Admissibility of [redacted] Statements, Both Its Oral and Written Instructions Were Incorrect Statements of Law.

Turning to the merits, the trial court's failure to intercede during [redacted] testimony in the government's case-in-chief, its failure to give a timely limiting instruction following [redacted] testimony in rebuttal, and its failure to intercede when the government argued [redacted] statements in closing for their truth were error. These errors, when combined with the trial court's final instructions, which prohibited the jury from considering [redacted] excited utterances for their truth and improperly permitted the jury to consider her

later inculpatory statements for their truth, amounted to a violation of Mr. Atkins' Sixth Amendment right to confront witnesses against him, an error that was plain, requiring reversal.

As discussed, *supra*, the jury heard two sets of statements made by [redacted]: 1) statements that exculpated Mr. Atkins, made during a 911 call immediately after Mr. Atkins was shot, which the court found were excited utterances, and 2) statements that tended to incriminate Mr. Atkins, made to officers on the scene approximately an hour later, which the court found were inadmissible unless Mr. Atkins introduced [redacted] excited utterances, and there only for purposes of impeachment. Said another way, [redacted] made the 911 call earlier containing the excited utterances earlier than she made statements tending to incriminate Mr. Atkins.

When instructing the jury on the purpose for which it could consider [redacted] various statements, the trial court did not define "prior inconsistent statements" or "earlier statement." 11/19/18 Tr. 53-54; R. 20 at 8-9. Instead, the trial court stated

> You have heard evidence that [redacted] made a statement on an earlier occasion and that this statement may be inconsistent with her testimony here at trial -- well, may be inconsistent with what you were told about her statements.
>
> 11/19/18 Tr. 53-54.

Where the jury was told about *all* of [redacted] statements, since she did not testify at trial, this, at best for appellee, left the jury confused about how to evaluate [redacted] various statement. The trial court then instructed the jury that

> It is for you to decide whether the witness made such a statement and whether, in fact, it was inconsistent with the assertions of her -- of her position here. **If you find such an inconsistency, you may consider the earlier statement in judging the credibility of the witness. But you may not consider it as evidence that what was in the earlier statement was true.**
>
> *Id.* at 54 (emphasis added).

Where [redacted] statements were unquestionably inconsistent, this instruction, repeated in substance in the court's final written instructions, told the jury it *could not* consider [redacted] excited utterances (her 911 call) for their truth. Conversely, it conveyed to the jury that it could consider [redacted] later statements incriminating Mr. Atkins for their truth, contrary to law and the trial court's pretrial ruling, a belief reinforced by hearing the prosecutor argue the statements for their truth in closing. This was error, violating Mr. Atkins' Sixth Amendment right to confront witnesses against him.

Appellee's assertion that the prosecutor's identification of the "prior inconsistent statement" in closing would lead the jury to consider [redacted] statements for their proper purposes; i.e., for impeachment or as substantive evidence; is unavailing. That is, as discussed, *supra*, the trial court did not instruct the jury that it could not consider a "prior inconsistent statement" for its truth, but

instead that it could not consider "the earlier statement" for its truth; appellee's statements in closing argument thus did nothing to alleviate the prejudice to Mr. Atkins. Moreover, as correctly noted by appellee, the jury is presumed to follow the law as instructed by the trial court, not by the arguments of lawyers. Thus, even if the prosecutor had properly stated the law, which he did not, given the terms used in the court's instructions, the jury would have been duty-bound to follow the court's erroneous instructions.

c. The Errors Were Plain.

"An error is plain when it is clear or obvious, rather than subject to reasonable dispute under current law," *Wills v. United States*, 147 A.3d 761, 772 (D.C. 2016) (internal quotation marks omitted). The trial court considered and discussed with the parties on multiple occasions the admissibility of [redacted] statements. The state of the law regarding the defendant's Sixth Amendment right to confront witnesses against him is clear; absent unavailability and a prior opportunity to cross-examine the declarant, the admission of testimonial hearsay against the accused violates that right. *Hammon*, 547 U.S. at 822. [redacted] testimony during the government's case-in-chief, the trial court's failure to intercede, the trial court's failure to give a timely limiting instruction following [redacted] testimony in rebuttal, the trial court's failure to intercede when the prosecutor improperly argued [redacted] testimonial hearsay for its truth in closing, and the trial

court's final instructions were obvious errors, resulting in the violation of Mr. Atkins' Sixth Amendment right to confront [redacted].

d. The Errors Affected Mr. Atkins' Substantial Rights Where No Witness Properly Testified to Mr. Atkins Having Possessed a Gun, Including the Gun Found in the Alley, Where the Trial Court's Instructions Effectively Prohibited the Jury from Considering Mr. Atkins' Theory of the Case, Where the Government's Expert Acknowledged that Mr. Atkins' DNA Could Have Gotten on the Gun in a Manner Consistent With His Theory of the Case, and Where There was No Substantive Evidence That the Gun Found in the Alley was the Gun Used to Shoot Mr. Atkins.

An error affects substantial rights if there is a reasonable probability that it had a prejudicial effect on the outcome of the trial, a standard satisfied here. *Wills*, 147 A.3d at 764. First, where no eyewitness properly testified that Mr. Atkins possessed a firearm, there is a reasonable probability that the jury's consideration of [redacted] statements for improper purposes had a prejudicial effect on the outcome of the trial. Where the trial court's instructions prevented the jury from considering [redacted] 911 call as substantive evidence, the jury could not consider Mr. Atkins' theory at trial, that he was shot during a burglary, there is a reasonable probability that the errors had a prejudicial effect on the outcome of the trial. This is even more troublesome where the government's DNA expert acknowledged that Mr. Atkins' DNA could have gotten on the gun during a struggle[6] consistent with this theory, but where the trial court's instructions prevented the jury

[6] 11/15/18 Tr. 106 (11-15).

from considering this theory. Instead, the jury, following the court's instructions, was left to believe that it could consider [redacted] statement that Mr. Atkins possessed a firearm for its truth, creating a reasonable probability of a prejudicial effect on the outcome of the trial.

e. The Errors Affected the Fairness, Integrity, and Public Reputation of the Proceedings.

In an effort to argue that the errors did not affect the fairness, integrity, and public reputation of the proceedings, appellee argues that because Mr. Atkins elicited on cross-examination of [redacted] that [redacted] told [redacted] that she physically touched the gun" recovered in connection with this case "when she took it outside and hid it," Mr. Atkins should be deemed to have waived his confrontation right. App. Br. at 25 (citing 11/15/18 Tr. 32). Appellee's argument ignores the fact that this *followed* [redacted] improper testimony on direct examination (during the government's case-in-chief) that [redacted] took officers "to the location of the weapon that was used."

Appellee's reliance on *United States v. Cooper*, 243 F.3d 411, 416 (7th Cir. 2001) is misplaced. In *Cooper*, the court first addressed whether the appellant waived an objection to the admission of the substance of an anonymous tip at trial by "manifest[ing]…an intentional choice not to assert the right," or merely forfeited the same through "accidental or negligent omission (or an apparently inadvertent failure to assert a right in a timely fashion)." 243 F.3d at 415-16. The court found

waiver based on Cooper's withdrawal of a motion in limine to exclude the substance of the tip, repeatedly stating that he had no objection to the admission of the tip, declining the court's invitation to be heard on the matter or to require the government to brief the issue, and Cooper's referring to the tip in opening, throughout cross-examination, and in closing. *Id.* at 416.

Mr. Atkins' failure to object through accidental or negligent omission cannot reasonably be compared to the facts of *Cooper*. Because Mr. Atkins did not waive the right to confrontation and because the errors seriously impacted the fairness and public reputation of the proceeding, this court should find plain error and revers Mr. Atkins' convictions.

II. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT EVIDENCE SUFFICIENT TO SUPPORT A CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM (UPF) IN VIOLATION OF D.C. CODE § 22-4503 REQUIRES PROOF THAT THE DEFENDANT KNEW OF HIS PROHIBITED STATUS CONSTITUTES PLAIN ERROR.

The Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019) makes clear that, where the status of the accused triggers a criminal firearm possession statute, the government must prove that the accused had, at a minimum, knowledge of his or her prohibited status. The reasoning underlying the Court's decision in *Rehaif*—principles of statutory interpretation and the common law presumption "that Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise

innocent conduct,"[7]—and this court's consonant decisions requiring a minimum *mens rea* of knowledge for all material elements of an offense make clear that evidence sufficient to support a conviction under D.C. Code § 22-4503(a)(1) requires proof that he, at minimum, knew of his prohibited status. *See McNeely v. United States*, 874 A.2d 371, 388 (D.C. 2005) (reading *mens rea* into act regulating dangerous dogs); *Carrell v. United States*, 165 A.3d 314 (D.C. 2017) (en banc) (misdemeanor threats). The trial court's failure to so instruct the jury in this case was thus plain error, where plainness is measured by the state of the law at the time of appellate review. *Rogers v. United States*, 222 A.3d 1046, 1050 (D.C. 2019).

Appellee urges this court, in short, to conclude that textual differences between the District's statute and 18 U.S.C. § 922(a)(2), (g), a decision of Missouri state court turning on application of a Missouri statute codifying required principles of statutory interpretation, and this court's earlier decisions interpreting D.C. Code § 22-4503(a)(1) suggest a different *mens rea* requirement here. Appellee's arguments are misplaced.

a. D.C. Code § 22-4503 and 18 U.S.C. § 922, Enacted by the Same Legislature, Require the Same *Mens Rea*.

Prior to *Rehaif*, this court held and has reaffirmed that, while D.C. Code § 22-4503 is textually silent on the required mental state, evidence sufficient to support a

[7] *Id.* at 2195 (quoting *United States v. X-Citement Video, Inc.*, 53 U.S. 64, 72 (1994)) (internal punctuation omitted).

conviction for UPF requires proof that the accused knowingly possessed a firearm. *See, e.g.*, *Myers v. United States*, 56 A.3d 1148, 1151-52 (D.C. 2012). But the requirement of a culpable mental state applies to all material elements of an offense, *Rehaif*, 139 S. Ct. at 2195, consistent with this court's decisions in *McNeely* and *Carrell*. This requirement arises from the "longstanding presumption, traceable to the common law, that ***Congress*** intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct." *Id.* at 2195 (quoting *X-Citement Video*, 53 U.S. at 72) (emphasis added). Congress, of course, also enacted D.C. Code § 22-4503.

"Assuming compliance with ordinary licensing requirements, the possession of a gun can be entirely innocent." *Id.* at 2197. Thus, it is the "the defendant's status, and not his conduct alone, that makes the difference. Without knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful." *Id.* Just as the defendant's status is thus a material element under 18 U.S.C. § 922(g), so too is it a material element of § 22-4503, requiring a minimum mens rea of knowledge. The trial court's failure to so instruct the jury was error, and one that is plain in light of *Rehaif*; indeed "[t]he cases in which [the Court] ha[s] emphasized scienter's importance in separating wrongful from innocent acts are legion." *Id.* at 2196.

b. *Staples v. United States* is Consistent with the Reading of D.C. Code § 22-4503 Required by *Rehaif*.

Staples v. United States, 511 U.S. 600 (1994), upon which appellee relies for the argument that different elements of an offense can require different mental states, in fact reinforces that D.C. Code § 22-4503 must be interpreted to require knowledge of prohibited status. In *Staples*, the Court held that under 26 U.S.C. § 5861(d), "the Government should have been required to prove that petitioner knew of the features of his AR-15 that brought it within the scope of the [National Firearms] Act." *Id.* at 619. The Court so held because of "the background rule of the common law favoring mens rea." *Id.* Just as the Court required proof of the accused's knowledge that a machine gun fell within the scope of the Act and was required to be registered to avoid imposing criminal liability for entirely innocent conduct, particularly in light of the long tradition of widespread lawful gun ownership, so too does § 22-4503 require proof that the accused knew of his prohibited status to avoid criminalizing otherwise innocent conduct.

c. *State v. Fikes* is Inapposite Where the Court's Holding Rested Upon a Missouri Statute Governing Statutory Interpretation, Inapplicable Here, and Where the Statutory Language at Issue Differs from That of D.C. Code § 22-4503.

Appellee's reliance on *State v. Fikes*, 597 S.W.3d 330 (Mo. Ct. App. 2019) is misplaced. In *Fikes*, an intermediate Missouri court considered whether the statute below required proof that the accused knows of his prohibited status.

> A person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and: (1) Such person has been convicted of a felony under the laws of this state.
>
> *Id.* at 333.

In Missouri, certain principles of statutory interpretation of the required mental state are codified, including "[i]f the definition of an offense prescribes a culpable mental state with regard to a particular element or elements of that offense, the prescribed culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the offense." *Id.* That court's conclusion that Missouri's "felon in possession" statute does not require proof of knowledge of prohibited status thus simply has no application here.

d. *Myers* and Decisions Prior to *Rehaif*, Axiomatically, are Inconsistent with the Court's Decision in *Rehaif*, Where the Court's Holding Ran Contrary to Decades of Decisions Interpreting 18 U.S.C. § 922(g).

Appellee also makes much of this court's pre-*Rehaif* cases not interpreting UPF to include a knowledge-of-status element. App. Br. at 45-46. But, prior to the Court's decision in *Rehaif*, "no court of appeals had required the Government to establish a defendant's knowledge of his status in the analogous context of felon-in-possession prosecutions." *Rehaif*, 139 S. Ct. at 2195. Just as the Court nonetheless found "no convincing reason to depart from the ordinary presumption in favor of scienter" in interpreting § 922(g), there is no convincing reason to depart from the

presumption here. This court's prior decisions,[8] much like those of the courts of appeals interpreting § 922(g), are not reason to do so.

e. The Error Seriously Affected the Fairness, Integrity, and Public Reputation of the Proceedings.

In arguing that any error did not seriously affect the fairness, integrity, or public reputation of the proceedings,[9] appellee relies on a report prepared by the Pretrial Services Agency (PSA) to argue that Mr. Atkins "must have known that he was a felon." App. Br. at 48.

First, "[a]ny information contained in [PSA's] files, presented in its report, or divulged during the course of any hearing shall not be admissible on the issue of guilt in any judicial proceeding, but such information may be used in proceedings

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[8] Notably, *Washington v. United States*, 53 A.3d 307, 309 (D.C. 2012), a pre-*Rehaif* decision, addressed the issue of whether the Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008) impacted this court *Blockburger* analysis between UPF, carrying a pistol without a license (CPWL) and possession of an unregistered firearm (UF), distinct from the issue presented in the instant case. *Dorsey v. United States*, 154 A.3d 106, 112 (D.C. 2017), involved a challenge to the sufficiency of the evidence, as appellee acknowledges, and was decided before *Rehaif*.

[9] Appellee, in not addressing the third prong of the plain error analysis, appears to implicitly concede that if there was error, such error affected Mr. Atkins' substantial rights. Notably, when considering whether a *Rehaif* instructional error affected an appellant's substantial rights (i.e. when considering the third prong of plain error review), many courts have, in the case of trial verdicts, confined such review to the jury record. *See, e.g.*, *United States v. Maez*, 960 F.3d 949, 962-63 (7th Cir. 2020). Others have declined to decide that narrow issue. *United States v. Miller*, 954 F.3d 551, 560 (2d Cir. 2020). In the instant case, the only evidence in the jury record with respect to Mr. Atkins' prior conviction was a stipulation that he had been convicted of an offense punishable by greater than one year.

under sections 23-1327, 23-1328, and 23-1329, in perjury proceedings, and for the purposes of impeachment in any subsequent proceeding." D.C. Code § 23-1303(d). Accordingly, the PSA report cannot properly be considered for the purpose urged by appellee, even assuming, *arguendo*, its accuracy.

Second, unlike the facts of *Maez*, where the trial court relied on an appellant's failure to challenge a *presentence* report (PSR) as evidence of the reliability of the information contained therein because a defendant has every incentive to challenge inaccuracies in a PSR, given the impact of convictions discussed therein on sentencing guidelines and other matters,[10] Mr. Atkins did not have the same incentive or opportunity to challenge information contained in a PSA report. Unlike the facts of *Maez*, where the Court also relied on Maez's daughter's testimony that she did not have a relationship with her father until she was eighteen because he had been incarcerated for her "whole life" and testimony that Maez was on parole at the time of the offense in question, here the government relies on two asserted convictions in a PSA report, each occurring more than a decade prior to trial in this matter. A jury might well have concluded that Mr. Atkins did not know of his status at the time of his arrest in this matter. Having established error that is plain, and where appellee has not challenged the impact of the error, if any, on Mr. Atkins'

[10] *Maez*, 960 F.3d at 962

substantial rights, this court should, on these facts, exercise its discretion and reverse Mr. Atkins' conviction for UPF.

CONCLUSION

For the foregoing reasons, Mr. Atkins respectfully requests that the judgment of the trial court be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was served upon the Appellate Division of the United States Attorney's Office, 555 Fourth Street, NW, Washington, DC 20530, via the D.C. Court of Appeals e-filing system on this 4th day of November, 2020.

/s/ Adrian Madsen