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Appeal No. 23-CF-828

DISTRICT OF COLUMBIA COURT OF APPEALS

ANDRE MILLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

BRIEF FOR APPELLANT

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DISCLOSURE STATEMENT

The appellant, Andre Miller, was represented in the Superior Court by Kevin O'Sullivan of the Public Defender Service. Anna Forgie and Megan McFadden were counsel for the United States. On appeal, Mr. Miller is represented by Victoria Hall-Palerm, Alice Wang, and Samia Fam, also of the Public Defender Service. Appellate counsel for the government is Chrisellen Kolb.

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ISSUES PRESENTED

I. Whether the trial court erred in ruling that the "plain view" doctrine justified the warrantless seizure of a handgun magazine from Mr. Miller's car, where the government presented no evidence that the magazine's illegal capacity was "immediately apparent" to the officer who saw it.

II. Whether the government presented insufficient evidence to prove beyond a reasonable doubt that Mr. Miller knew the magazine in his car could hold more than 10 rounds of ammunition, where the prosecution introduced no evidence that the magazine's capacity was obvious from its appearance, or that Mr. Miller ever used, loaded, inspected, or even touched the magazine.

III. Whether the trial court plainly erred in failing to instruct the jury that, in order to convict Mr. Miller of possessing a large capacity ammunition feeding device, it was required to find beyond a reasonable doubt that he knew the magazine in his car could hold more than 10 rounds of ammunition.

IV. Whether Mr. Miller's conviction for possessing a 17-round magazine violates the Second Amendment, where magazines capable of holding more than 10 rounds of ammunition are "instruments that facilitate armed self-defense" and are "in common use today."

STATEMENT OF THE CASE AND JURISDICTION

On February 23, 2023, a grand jury returned a six-count indictment charging Mr. Miller with one count of unlawfully possessing a firearm having been convicted of a felony (D.C. Code § 22-4503(a)(1), (b)(1)); one count of carrying a pistol without a license (D.C. Code § 22-4504(a)(2)); two counts of possessing a large capacity ammunition feeding device ("PLCFD") (D.C. Code § 7-2506.01(b)); one count of possessing an unregistered firearm (D.C. Code § 7-2502.01(a)); and one count of unlawfully possessing ammunition ("UA") (D.C. Code § 7-2506.01(a)(3)). R. 34.[1] One of the PLCFD charges (Count 4) and the UA charge (Count 6) related to a loaded magazine found in Mr. Miller's car, while the remaining four charges related to a gun and extended magazine found underneath a red SUV parked across the street. R. 92.

The Honorable Jason Park presided over a jury trial that began on July 17, 2023. On July 19, 2023, the defense moved for a judgment of acquittal on all counts, which the court denied. 7/19/23 at 95. The jury returned a verdict on July 21, 2023, acquitting Mr. Miller of all four counts related to the gun and extended magazine found underneath the red SUV, and convicting of him of the two counts related to the magazine found in his car. R. 92. On September 29, 2023, Judge Park sentenced Mr. Miller to 24 months of incarceration for PLCFD and one year of incarceration for UA, to run concurrently, followed by three years of supervised release. R. 105.

[1] All citations to "R. *" refer to the number assigned to a particular trial court filing by the Appeals Coordinator in compiling the record on appeal. All citations to "**/**/** at **" designate a particular month, day, year, and page from the transcripts generated during the trial court proceedings.

Mr. Miller timely filed his notice of appeal on October 3, 2023. R. 106. This Court has jurisdiction under D.C. Code § 11-721(a)(1).

STATEMENT OF FACTS

Overview

On the night of October 28, 2022, Andre Miller lost control of his car and crashed into a parked car belonging to Los Stroud. After being confronted by Los and his father Charles, Mr. Miller fled the scene, dropping a zipped backpack near a red SUV parked across the street. Police later found a gun with a 40-round extended magazine hidden underneath the red SUV. Although Charles Stroud claimed to have seen Mr. Miller holding a gun in his car, and although forensic DNA analysis indicated that Mr. Miller was likely one of three contributors to the DNA mixture found on the gun, the jury acquitted Mr. Miller of all charges related to possessing the gun and the 40-round extended magazine.

Police also found a separate 17-round magazine wedged between the driver's seat and door frame of Mr. Miller's car. In contrast to the evidence of Mr. Miller's actual possession of the gun with the extended magazine (which the jury apparently rejected), the government presented no evidence that Mr. Miller ever physically handled the 17-round magazine found in the car. No witness claimed to have seen him with a magazine, and no forensic evidence tied Mr. Miller to the magazine or the ammunition inside it. Indeed, in urging the jury to convict on the PLCFD and UA charges for the 17-round magazine, the government expressly disavowed any theory of actual possession: "We don't know whether Mr. Miller had that magazine in his hand at any point, whether he had it in his pocket, whether he was carrying it

on his person. But we do know it was found in his car, next to the driver's seat where he was sitting, and in a place where he . . . showed the intent and the ability to exercise control. He was in constructive possession of that magazine." 7/20/23 at 12 (government's closing argument). Likewise, the government presented no evidence or argument that Mr. Miller actually knew the magazine was capable of holding more than 10 rounds of ammunition. In contrast to the testimony about the distinctively large size of the 40-round extended magazine, which protruded beyond the grip of the gun found underneath the red SUV, no witness testified that the 17-round magazine found in Mr. Miller's car was unusually large or that its capacity would have been obvious to anyone sitting in the driver's seat. Nor was the jury even instructed that knowledge of the magazine's capacity to hold more than 10 rounds of ammunition was an essential element of PLCFD.

After sending two deadlock notes and deliberating for eight hours—as long as the testimony and argument took—the jury convicted Mr. Miller on only the two counts related to the 17-round magazine found inside his car (PLCFD and UA).

The Suppression Hearing

Prior to trial, Mr. Miller moved to suppress the 17-round magazine,[2] arguing that it was the fruit of an illegal search of his car. R. 21 at 4. In its opposition to the suppression motion, the government argued that the warrantless search of the car and seizure of the magazine were justified under the "plain view" exception to the

[2] Mr. Miller also moved to suppress the gun and 40-round magazine as the fruits of his illegal seizure, R. 21 at 2–4, but because he was ultimately acquitted on all counts related to those items, the following discussion of the suppression hearing is limited to the 17-round magazine.

warrant requirement. R. 29 at 8–9 ("Under the plain view exception, if police officers are lawfully in a position from which they view an object, its incriminating character is immediately apparent, and the officers have a right of access to the object, they may seize it without a warrant.").

Officer Ethan Way testified at the suppression hearing that, after the police responded to the scene of the car crash, Officer Michael Strong conducted "a plain-view search of the defendant's vehicle," which "revealed a magazine in the doorway." 5/11/23 at 36–37. Because Officer Way did not personally observe the search, *id.* at 37, and indeed was "about a block away" when Officer Strong said he saw a magazine inside the car, *id.* at 95, Officer Way's testimony about the "plain-view search" was based solely on his review of video footage from Officer Strong's body-worn camera ("BWC"), *id.* at 37, a brief clip of which was introduced at the suppression hearing as Government Exhibit 12, *id.* at 132; *see* App'x A.[3]

Based on his review of the BWC footage, Officer Way testified that, while standing "next to the driver's side door" of Mr. Miller's car, Officer Strong "shine[d] his flashlight through the window" and "saw [a] magazine inside the defendant's car." 5/11/23 at 37–38. Although the BWC footage showed Officer Strong approaching the car, looking inside, and saying, "It's a mag in here," the footage itself did not actually show a magazine inside the car. App'x A at 21:47:19–:22. Instead, to show where inside the car the magazine was located before the police

[3] Mr. Miller is filing a contemporaneous motion to supplement the record with the government exhibits cited in this brief. Citations to "**:**:**" refer to the hour, minute, and second at which the events occurred, according to the BWC timestamp.

seized it, the government introduced as Government Exhibit 3 a photograph depicting a close-up view of the magazine wedged between the driver's seat and door frame, taken with the car door open. *See* App'x B (Gov. Ex. 3); 5/11/23 at 39. Although Officer Way testified that Exhibit 3 was "a fair and accurate representation of the magazine inside the defendant's car," 5/11/23 at 39, he could not say how it resembled or differed from what Officer Strong saw through the car window, as the photograph was taken from a different vantage point, with the car door open, and Officer Way had no "personal knowledge of what Officer Strong" saw through the car window, *id.* at 94–95. Indeed, as Officer Way acknowledged, two other officers (Officers Deloach and Smiley) had previously shined their flashlights through the car window and did not see the magazine inside the car. *Id.* at 91–94.

Similarly, although Officer Way testified at the suppression hearing that he could tell from the "little hole[s]" in the magazine that it was "fully loaded," *id.* at 41, he could not say what portions or features of the magazine were immediately apparent to Officer Strong when he saw it through the car window. As Officer Way conceded, at no point in the BWC footage did Officer Strong ever describe the magazine or comment on its size or capacity. *Id.* at 96.

At the close of the evidence, Mr. Miller argued that the government had failed to meet its burden to prove the requirements of the plain view exception. 5/12/23 at 5. Because the government had not called Officer Strong to testify about what he saw, Mr. Miller argued, the court had no factual basis to conclude that Officer Strong immediately recognized the magazine as contraband when he saw it in "plain view." *Id.* at 8–10; *see also id.* at 12 ("[T]here's nothing in the record that when he said, it's

a mag in here, that Officer Strong was even referring to something immediately apparent as contraband."); *id.* at 23 ("[H]e just says, it's a mag. He doesn't describe it at all."). Although the government argued that Exhibit 3 showed that the magazine was "very clearly loaded with at least 15 bullets" and thus "apparently contraband," *id.* at 21, Mr. Miller pointed out that "there's nothing in the record tha[t] what's in that picture is what Officer Strong was looking at," *id.* at 22.

The court denied Mr. Miller's suppression motion. The court explained that the BWC footage showing Officer Strong approaching the car, shining his flashlight into the car window, and saying, "it's a mag in there; I see it," provided evidence that Officer Strong indeed saw the magazine in "plain view" prior to opening the car door and seizing the magazine without a warrant. *Id.* at 33–35. The court noted that "it's not surprising that the two officers who looked before did not see it," given that the magazine was "wedged against the driver's seat and the door." *Id.* at 34.

Although the court concluded that the "incriminating . . . nature" of the magazine was "immediately apparent to Officer Strong," the court did not find that Officer Strong had any reason to believe that the magazine was a large capacity magazine or other type of contraband. *Id.* Instead, the court found only that "[f]rom the way that the magazine was positioned face up," as shown in Exhibit 3, "it was very clear that it was a gun magazine." *Id.* Based on that finding alone, the court ruled that the government had satisfied the requirements of the plain view exception. *Id.* at 34–35.

The Evidence at Trial

1. The Gun and 40-Round Magazine

Charles Stroud testified at trial that, on the night of October 28, 2022, he and his son Los Stroud were watching TV inside his house, located at 4010 9th Street Southeast, when they heard a crash outside.[4] 7/17/23 at 74–76. Los ran out to where his car had been parked in front of the house, and Charles ran behind him. *Id.* at 76–77. Los's car, a black Crown Victoria, had been "pushed up onto the curb" by Mr. Miller's silver Toyota. *Id.* at 77–78. Los, angry at the damage to his car, confronted Mr. Miller and claimed that Mr. Miller had a gun. *Id.* at 92–93, 116–17. Charles proceeded to use his cell phone to film a video of Mr. Miller inside his car. *Id.* at 79, 117–18. The video showed a woman standing behind Charles yelling and cursing at Mr. Miller, calling him a "bitch ass" and "the N word." *Id.* at 114. Charles likewise "cussed [Mr. Miller] out." *Id.* at 78.

Charles initially testified on direct examination that Mr. Miller reached for a gun in the center console of his car, "lifted the gun up," and "said he was going to shoot me," *id.* at 82–83, but he later conceded on cross-examination that Mr. Miller never pointed a gun at him or threatened to shoot him, and that he had lied to the police about Mr. Miller pointing a gun at him in order to back up his son's account, *id.* at 105–06.[5] Likewise, although Los told police that Mr. Miller had pointed a gun

[4] For clarity, this brief refers to the Strouds by their first names throughout.

[5] Charles claimed that, when Mr. Miller reached for the gun and lifted it up, Charles stopped filming the video and asked if Mr. Miller was "trying to shoot [him]," to which Mr. Miller "said no." *Id.* at 78, 82, 118.

at him and threatened to "bust his ass," and that his father "got it all on camera," *id.* at 93–94, 97, 100, Charles admitted at trial that he never saw Mr. Miller point a gun at anyone, *id.* at 78, and that the video he filmed with his cell phone did not show Mr. Miller holding a gun or making any threats, *id.* at 103–05.[6] When asked to describe the gun that he claimed to have seen Mr. Miller holding, Charles stated that it was black, *id.* at 83, but that he did not see an "extended magazine sticking out the bottom of that gun"—a feature that he "wouldn't have missed" because he was "familiar with guns" and had "held guns before," *id.* at 116.

Police arrived on the scene around 9:45 p.m. 7/18/23 at 161. By that point, a crowd of neighbors had gathered outside, and "everybody was like TV . . . a whole lot of screeching and everything, people running." 7/17/23 at 84. Officer Way testified at trial that, when he arrived on the scene, he saw Mr. Miller get out of his car, cross the street holding a backpack in his hands, and drop the backpack next to a red SUV. 7/18/23 at 27–29, 42. Although Officer Way could see Mr. Miller's hands as he crossed the street with the backpack, *id.* at 29, he "never saw Mr. Miller with a gun anywhere on his body that night," *id.* at 51–52. Nor did he see anything fall out of the backpack or hear anything hit the ground. *Id.* at 52–53. He also did not see Mr. Miller reach into the backpack, open or close the backpack, or reach underneath the red SUV. *Id.* at 53, 56.

After Mr. Miller dropped the backpack, he ran down 9th Street toward Bellevue Street. *Id.* at 32. Officer Way and two other officers chased Mr. Miller

[6] Los was arrested after refusing to appear before the grand jury, and he did not testify at trial. *Id.* at 107.

around the corner, where he surrendered. *Id.* at 33. The officers handcuffed Mr. Miller and patted him down, finding nothing of interest. *Id.* at 85–86, 90. The officers also searched Mr. Miller's backpack, which was zipped closed, and discovered only "personal belongings, like a book of crossword puzzles." *Id.* at 55–56.

After arresting Mr. Miller, the police found a 9mm Glock handgun underneath the red SUV, hidden behind the front passenger wheel. 7/17/23 at 145–48; 7/18/23 at 89, 164–66.[7] To see the gun, the officers had to crouch or kneel down and shine a flashlight underneath the car. 7/18/23 at 70–71, 163–65. Officer Way admitted that, while he and the other officers were chasing Mr. Miller, no officer was watching the red SUV, and that he did not know how the gun got underneath the red SUV. *Id.* at 65–66. Officer Way also testified that the area around the 4000 block of 9th Street Southeast is "known for having a high level of gun violence," that "people stash or hide guns," and that it is "not uncommon" for police to recover stashed guns in that area. *Id.* at 68–69, 76.

Crime scene analyst Edward Shymansky testified that the gun recovered from the scene was equipped with an "extended magazine" capable of holding 40 rounds of ammunition. 7/17/23 at 147, 161, 169–70.[8] Mr. Shymansky explained that he could tell from "looking at [the magazine]" that it could hold "an extra large amount

[7] Officer Way testified that a Glock is a common type of handgun, that 9mm is a common caliber of ammunition, and that every officer in the Metropolitan Police Department carries a 9mm Glock on duty. 7/18/23 at 89–90.

[8] Mr. Shymansky noted that the last hole on the magazine was "labeled with the number 40," 7/17/23 at 161, and that he recovered 39 cartridges from the magazine and one cartridge from the chamber of the gun, *id.* at 169–70.

of ammunition" because it "protrude[d] past the grip of the firearm," *id.* at 147–48—a "very distinctive" feature of the gun that he noticed "right away," 7/18/23 at 13. Officer Way likewise testified that, when he first saw the gun underneath the red SUV, he immediately noticed its distinctively large extended magazine. *Id.* at 60, 71. The government did not ask Charles Stroud to identify this gun as the gun he claimed to have seen in Mr. Miller's car.

2. The 17-Round Magazine

Officer Strong testified that, when he arrived on the scene, he immediately approached the silver car involved in the crash. *Id.* at 161–62. When he shined a flashlight onto the driver's seat of the car, he saw a magazine wedged in between the driver's seat and the door frame. *Id.* at 162. The car door was unlocked, and no other contraband was found inside the car. *Id.* at 81–82, 173.[9] Officer Strong and Officer Way both admitted that they did not know who placed the magazine in the car or how long it had been there. *Id.* at 80, 178. Officer Way further acknowledged that no officer was watching Mr. Miller's car while he and the other officers were chasing Mr. Miller down 9th Street. *Id.* at 82.

When asked whether he noticed "anything in particular about the magazine," Officer Strong testified that the magazine "appeared to be loaded" because he could see "[t]he shine of the bullets" from his flashlight. *Id.* at 162. Crime scene analyst

[9] Although Charles Stroud claimed that the center console was open when he saw Mr. Miller reaching for a gun, 7/17/23 at 82, Officer Strong testified that the center console and all other storage compartments in the car were closed when he looked inside the car, 7/18/23 at 177–78.

Shymansky likewise testified that he could tell the magazine was loaded because he could see the cartridges "in the counts," meaning "the holes that are visible on the magazine." 7/17/23 at 153.[10] Mr. Shymansky further explained that, when processing the magazine at the scene, he unloaded the magazine and recovered 17 cartridges. *Id.* at 162. But in contrast to the police testimony about the distinctive appearance of the 40-round extended magazine in the gun, no witness testified that the 17-round magazine found in Mr. Miller's car appeared to be an extended magazine or that its capacity was obvious from its appearance. *Id.* at 153. A photograph of the magazine inside the car, introduced at trial as Government Exhibit 9 and included at App'x C, is reproduced below.

[10] According to Mr. Shymansky, the magazine was a 9mm Glock magazine with a 17-round capacity. *Id.* at 152, 162.

3. The Forensic Evidence

On the morning of October 29, 2022, Officer Eric Hampton processed the gun and the two magazines for fingerprints and DNA, swabbing each item thoroughly "to collect as much DNA as possible." 7/19/23 at 11, 19. Mr. Miller's fingerprints were not on any of the items. *Id.* at 20. Although Officer Hampton conceded that loading ammunition into a magazine could leave behind fingerprints and DNA on the bullets, he made no attempt to recover fingerprints or DNA from the ammunition in either magazine. *Id.* at 21–22.

Forensic DNA analyst Ruben Ramos explained the process of DNA testing and analysis, including the factors that affect how much DNA an individual might leave behind on an item. *Id.* at 44–45. He explained, for example, that a person is more likely to leave DNA on an item if they are "holding [it] for a long time and gripping it very hard." *Id.* at 45–46.

Mr. Ramos testified that he analyzed the DNA samples obtained from the gun and the two magazines in this case and compared them against the DNA sample obtained from Mr. Miller. *Id.* at 48–49, 69. According to Mr. Ramos, the DNA samples obtained from both magazines were "insufficient for comparisons to any reference samples, and so no further conclusions were drawn." *Id.* at 69–70. Although Mr. Ramos concluded that the DNA sample obtained from the gun was "interpreted as a mixture of three individuals," one of whom was very likely Mr. Miller, *id.* at 70–71, he could not conclude from such evidence that Mr. Miller "ever touched that gun," *id.* at 90. Mr. Ramos acknowledged that, based on the amount of Mr. Miller's DNA in the three-person mixture, there was a "fair possibility" that Mr.

Miller's DNA was accidentally transferred to the gun from other items collected at the crime scene—a process known as "secondary transfer." *Id.* at 84–88. Mr. Ramos also acknowledged that he was not asked to compare the DNA in the three-person mixture against the DNA profile of anyone other than Mr. Miller. *Id.* at 74–76.

Officer Chanita Ransom-Craig testified that Mr. Miller did not have a firearm registration certificate or a license to carry a pistol in the District of Columbia. 7/18/23 at 197.

Acquittal Motion, Jury Instructions, and Closing Arguments

At the close of the evidence, Mr. Miller moved for a judgment of acquittal on all six counts, which the trial court denied. 7/19/23 at 94–96. The trial court then instructed the jury on the elements of the charged offenses. *Id.* at 172–77. With respect to each of the charges for which "possession" of an item was an element, including PLCFD, the court instructed the jury on the "two ways" a person can "possess" an item: "First, the person may have physical possession of [the item] by holding it in his or her hand, or by carrying it in or on his or her body or person. This is called actual possession. Second, a person may exercise control over property not in his or her physical possession if that person has the power and the intent at a given time to control the property. This is called constructive possession." 7/19/23 at 175; *see also id.* at 173, 176, 177.

With respect to the PLCFD charges in particular, the court instructed the jury that the offense had only two elements:

1. Andre Miller possessed a large capacity ammunition feeding device; and
2. He did so voluntarily and on purpose, and not by mistake or accident.

Id. at 175. The court instructed the jury that "[t]he term large capacity ammunition feeding device means any magazine, belt, drum, feed strip, or similar device which has a capacity of, or that can readily be restored or converted to accept, more than 10 rounds of ammunition." *Id.* The court did not instruct the jury that Mr. Miller's knowledge of the magazine's capacity to hold more than 10 rounds of ammunition was an element of the offense. Mr. Miller did not object to this instruction.

The government's closing argument, like its opening statement and its trial evidence, focused primarily on the gun with the extended magazine, which gave rise to four of the six charges. Based on the DNA evidence and the testimony of Charles Stroud and Officer Way, the government urged the jury to find that Mr. Miller reached for a gun in the center console of his car (just as Charles Stroud stopped filming him), got out of his car and crossed the street carrying a backpack in one hand and the gun in the other hand (the latter of which Officer Way did not see), and dropped the backpack next to the red SUV while "at that moment" also placing the gun underneath the red SUV (the latter of which Officer Way also did not see). 7/20/23 at 6. Based on that evidence, the government argued, the jury could conclude that Mr. Miller physically possessed and carried the gun with the 40-round extended magazine that was found underneath the red SUV. *Id.* at 9–10.

With respect to the magazine found in Mr. Miller's car, the government argued that, while there was no evidence that Mr. Miller ever physically possessed

or carried that magazine, its presence in his car—in a place that was visible and accessible from the driver's seat where he was sitting—established constructive possession: "We don't know whether Mr. Miller had that magazine in his hand at any point, whether he had it in his pocket, whether he was carrying it on his person. But we do know it was found in his car next to the driver's seat where he was sitting, and in a place where he had—showed the intent and the ability to exercise control. He was in constructive possession of that magazine." *Id.* at 12. In arguing that the magazine was capable of holding more than 10 rounds of ammunition, the government noted only that the magazine was "loaded with 17 rounds." *Id.* at 11.[11] It did not argue that Mr. Miller loaded the magazine himself or point to any evidence from which the jury could infer that Mr. Miller knew the capacity of the magazine.

Defense counsel argued that the government's evidence was too scant and unreliable to prove guilt beyond a reasonable doubt. Despite watching Mr. Miller from the moment he got out of his car until the moment he was arrested by the police, Officer Way never saw Mr. Miller holding a gun, dropping a gun, or reaching underneath the red SUV. *Id.* at 37. The only witness who claimed to have seen Mr. Miller with a gun was Charles Stroud, who admittedly lied to the police about Mr. Miller pointing a gun at him, and who did not see an extended magazine—the most noticeable feature of the gun found underneath the red SUV. *Id.* at 21, 28–29. Defense counsel posited that the gun could have been hidden underneath the red

[11] Likewise, in arguing that the extended magazine attached to the gun was capable of holding more than 10 rounds of ammunition, the government noted only that it "was loaded with 39 [rounds]" and made no argument about Mr. Miller's knowledge of that fact. *Id.* at 11.

SUV hours or days earlier by someone else in the neighborhood, where it was "not uncommon" for police to recover stashed guns, *id.* at 37–38, and that Mr. Miller's DNA could have been accidentally transferred to the gun by the police after they searched him and his backpack, which Mr. Ramos conceded was a "fair possibility," *id.* at 29–35. Similarly, given that the car was left unlocked and unguarded while the police were chasing Mr. Miller, and Mr. Miller's DNA and fingerprints were not on the magazine, the jury could not be confident that Mr. Miller was the one who placed the magazine there. *Id.* at 42.

Jury Deliberation and Verdict

The jury began its deliberations at noon on July 20, 2023. 7/20/23 at 63. The next morning, at 10:46 a.m., the jury sent a note stating that it was "at an impasse on all six counts." 7/21/23 at 2; R. 95. The trial court noted that the jury had been deliberating for about five hours and instructed the jury to deliberate further and try to reach a unanimous decision. 7/21/23 at 5–6. At 2:35 p.m., the jury sent another note stating that, while it had reached a verdict on two counts, it remained at an impasse on four counts, and "further discussion of these issues will not change the mind of some jurors." *Id.* at 9; R. 94. Noting that the presentation of evidence and argument in the case had taken eight hours, 7/21/23 at 10, the court took a partial verdict at that time, and the jury returned a verdict of guilty as to Counts 4 and 6—the two charges related to the 17-round magazine found inside Mr. Miller's car, *id.* at 12–15. The court then gave the jury a *Winters* anti-deadlock instruction[12] and sent

[12] *See Winters v. United States*, 317 A.2d 530, 534 (D.C. 1974) (en banc).

the jury back to continue deliberating on the remaining four counts. *Id.* at 15–17. At 3:26 p.m., the jury announced that it had reached a verdict on those counts. *Id.* at 18; R. 97. The jury returned a unanimous verdict of not guilty on the four counts related to the gun with the extended magazine. 7/21/23 at 18–19; R. 92.

The court sentenced Mr. Miller to 24 months of imprisonment for PLCFD and one year of imprisonment for UA, to run concurrently. R. 105. This appeal followed.

SUMMARY OF ARGUMENT

Mr. Miller was convicted of PLCFD based on the fact that police found a 17-round magazine wedged between the driver's seat and door frame of his car. That conviction must be reversed for four independent reasons. First, the trial court erred in ruling that the search of Mr. Miller's car and seizure of the magazine without a warrant were justified under the "plain view" exception to the warrant requirement.[13] The plain view exception does not apply in this case because the government failed to prove—and the trial court did not find—that the "incriminating character" of the magazine was "immediately apparent" to Officer Strong when he saw it through the car window. *Maddox v. United States*, 745 A.2d 284, 290 (D.C. 2000). Because a firearm magazine, without more, is not "contraband or evidence of a crime," *id.* at 291, the mere fact that Officer Strong saw "a gun magazine" inside Mr. Miller's car, 5/12/23 at 34, was insufficient to satisfy the requirements of the plain view doctrine.

Second, the evidence at trial was insufficient to prove beyond a reasonable doubt that Mr. Miller knew the magazine could hold more than 10 rounds of

[13] Mr. Miller's UA conviction must be reversed for this same reason.

ammunition—an essential element of PLCFD under *Bruce v. United States*, 305 A.3d 381, 399 (D.C. 2023). Unlike the police testimony about the 40-round extended magazine found underneath the red SUV, no witness testified that the illegal capacity of the 17-round magazine found inside Mr. Miller's car was obvious from its size or appearance. Nor did the government present any evidence that Mr. Miller had ever used, loaded, or even touched the magazine, or that he ever had any reason or opportunity to inspect the magazine and learn its capacity. Because knowledge of the magazine's capacity cannot be inferred solely from possession of the magazine or even knowledge that the magazine was loaded, *see id.*, the lack of any other evidence on the knowledge element requires reversal.

Third, even if this Court finds the evidence legally sufficient to support a finding beyond a reasonable doubt that Mr. Miller knew the magazine could hold more than 10 rounds, reversal is nonetheless required because the trial court's failure to instruct the jury on this essential element of PLCFD was plain error. The error affected Mr. Miller's "substantial rights" because the government's evidence on the knowledge element was neither "overwhelming" nor "uncontroverted," and "it is reasonably probable that the jury—already struggling with whether to find [him] guilty of [PLCFD] without having to find" his knowledge of the magazine's capacity—"'would have harbored a reasonable doubt about [his] guilt if it had been properly instructed on the *mens rea* element.'" *Malloy v. United States*, 186 A.3d 802, 820 (D.C. 2018) (quoting *Perry v. United States*, 36 A.3d 799, 819 (D.C. 2011)). And because the prejudicial omission of an essential element of the offense from the jury instructions "necessarily affects the integrity of [the] proceeding,"

reversal is necessary to avoid a "miscarriage of justice." *Id.* at 820, 822 (citations omitted).

Finally, Mr. Miller's PLCFD conviction must be reversed as a violation of the Second Amendment. Magazines capable of holding more than 10 rounds of ammunition are "instruments that facilitate armed self-defense" that are "in common use today," and the government cannot meet its burden to show that their total prohibition is "consistent with the Nation's historical tradition of firearm regulation." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24, 28 (2022).

ARGUMENT

I. THE TRIAL COURT ERRED IN APPLYING THE "PLAIN VIEW" DOCTRINE BECAUSE THE GOVERNMENT FAILED TO PROVE THAT THE ILLEGAL CAPACITY OF THE MAGAZINE WAS "IMMEDIATELY APPARENT" TO OFFICER STRONG.

A warrantless search or seizure is "per se unreasonable under the Fourth Amendment," unless the government meets its burden to prove that it falls within one of "a few well delineated exceptions" to the warrant requirement. *Christmas v. United States*, 314 A.2d 473, 475 (D.C. 1974); *see Bennett v. United States*, 26 A.3d 745, 751 (D.C. 2011) ("Where a defendant shows that a warrantless search or seizure produced evidence that the government seeks to introduce at trial, . . . the burden is on the government to justify the search based on facts that could bring it within certain recognized, limited exceptions to the warrant requirement." (cleaned up)). One of those exceptions is the plain view doctrine, which allows "the warrantless seizure of evidence observed in plain sight when: (1) an officer does not 'violate the Fourth Amendment in arriving at the place from which the evidence could be plainly

viewed'; (2) the evidence's 'incriminating character' is 'immediately apparent'; and (3) the officer has 'a lawful right of access to the object itself.'" *Umanzor v. United States*, 803 A.2d 983, 998–99 (D.C. 2002) (quoting *Horton v. California*, 496 U.S. 128, 136–37 (1990)). For the "incriminating character" of an item to be "immediately apparent," "[a]n officer must possess probable cause that the item is contraband or evidence of a crime." *Maddox*, 745 A.2d at 291 (quoting *Dickerson v. United States*, 677 A.2d 509, 513 n.5 (D.C. 1996)). "If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—*i.e.*, if its incriminating character is not immediately apparent—the plain-view doctrine cannot justify its seizure." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) (cleaned up); *see, e.g.*, *Christmas*, 314 A.2d at 476 (holding that plain view exception did not authorize warrantless seizure of a medicine vial containing illegal drugs because "all that [the officer] saw was [] a plastic vial," and "the officer did not have, prior to the seizure, probable cause for a belief that the medicine vial contained a prohibited drug").

Here, the trial court erred in ruling that the warrantless search and seizure in this case were justified under the plain view doctrine, because the government failed to prove that the illegality of the magazine was "immediately apparent" to Officer Strong when he saw it through the car window. As the trial court found, the BWC footage introduced at the suppression hearing showed that, while standing outside Mr. Miller's car and shining a flashlight into the driver's side window, Officer Strong looked into the car and said, "it's a mag in there; I see it." 5/12/23 at 33; App'x A at 21:47:19–:22. Based on that footage, along with a photograph showing

the magazine "positioned face up" in the car, the trial court found that "it was very clear" to Officer Strong that the object he saw "was a gun magazine." 5/12/23 at 34. But "a gun magazine," without more, is neither contraband nor evidence of a crime. While "large capacity" magazines capable of holding more than 10 rounds of ammunition are prohibited under the District's PLCFD statute, D.C. Code § 7-2506.01(b), magazines that lack such capacity are perfectly lawful and have no inherently "incriminating character." *Dickerson*, 508 U.S. at 375. Likewise, after the Supreme Court and the D.C. Circuit found the District's longstanding restrictions on handgun registration and licensure by ordinary citizens invalid under the Second Amendment, *see District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017), it is no longer presumptively unlawful to possess and carry a handgun and ammunition in the District of Columbia, *see* D.C. Code §§ 7-2502.02(a)(4), 7-2506.01(a)(3); D.C. Mun. Reg. § 24-2332. Thus, without probable cause to believe that a magazine is capable of holding more than 10 rounds, or is evidence of *unlawful* possession of a firearm or ammunition, police may not seize the magazine without a warrant under the plain view doctrine.

In analogous circumstances, courts across the country have held that, because there is nothing inherently incriminating about possessing a gun, police may not seize a gun under the plain view doctrine unless they first have probable cause to believe that the gun is illegally possessed, stolen, or connected to a particular crime. *See, e.g.*, *United States v. Szymkowiak*, 727 F.2d 95, 98–99 (6th Cir. 1984) (plain view exception did not justify warrantless seizure of automatic firearm because the

officer "could not say *at the time* that he examined the weapon whether it was an automatic firearm (emphasis in original) (quotation marks omitted)); *United States v. Dart*, 747 F.2d 263, 269 & n.5 (4th Cir. 1984) (plain view exception did not justify warrantless seizure of handgun because "it was not immediately apparent to [the officer] that the handgun was stolen or illegally possessed"); *United States v. Lewis*, 864 F.3d 937, 944 (8th Cir. 2017) (warrantless seizure of handgun did not fall within plain view exception because, although appellant "admitted to being a felon," "that admission came *after* the seizure—not 'at that moment' it was seized," and thus the "incriminating character" of the handgun "was not immediately apparent" (emphasis in original)); *United States v. Gray*, 484 F.2d 352, 355 (6th Cir. 1973) (plain view exception did not justify warrantless seizure of stolen rifles because "it was only after [the officer] had seized the weapons" that "he learned that they were stolen and hence incriminating"); *United States v. Hale*, 108 F. App'x 488, 489–90 (9th Cir. 2004) ("Because the police did not know that appellee had no legal right to possess a firearm, the [weapon's] mere presence did not indicate its connection to a crime.").

The same is true of gun magazines. In jurisdictions where "large capacity" magazines are prohibited, courts have applied the plain view exception to the warrant requirement where the officer testified about "the unique appearance" and "very significant" size of an "extended magazine," *Commonwealth v. Smith*, 285 A.3d 328, 334 (Pa. Super. Ct. 2022), or where the officer testified that "he could tell by visual inspection how many rounds each magazine could hold," *Cincinnati v. Langan*, 640 N.E.2d 200, 203, 205 (Ohio Ct. App. 1994) (upholding warrantless seizure of two 50-round magazines and three 30-round magazines). But where "the

record is silent as to whether the officers could recognize the illegality of these magazines simply by viewing them," a warrantless search or seizure cannot be justified under the plain view doctrine. *State v. Harris*, 50 A.3d 15, 30 (N.J. 2012).

Here, the government adduced no evidence—and the trial court made no finding—that Officer Strong immediately recognized the illegal capacity of the 17-round magazine when he looked through the car window with a flashlight. As the trial court found, Officer Strong's BWC footage captured him saying, "it's a mag in there, I see it." 5/12/23 at 22; App'x A at 21:47:19–:22. But Officer Strong did not say anything about the magazine's size or capacity, either on the scene or at trial.[14] Nor did the BWC footage actually show the magazine. Although Officer Strong testified at trial that he could tell the magazine was loaded because he could see the "shine of the bullets" through the holes in the magazine, 7/18/23 at 162–63, he did not say how many bullets he saw. Nor did he testify that the illegal capacity of the magazine was immediately apparent to him when he looked through the car window.

Because the government presented no evidence of how the magazine appeared to Officer Strong when he saw it through the car window, the trial court could draw no inference about what features of the magazine were immediately apparent to Officer Strong. Although the government argued at the suppression hearing that Exhibit 3 showed that the magazine was "very clearly loaded with at least 15 bullets," 5/12/23 at 21, that argument was based on the prosecutor's own description

[14] By contrast, both Mr. Shymansky and Officer Way testified that they immediately noticed the "distinctive" size of the 40-round extended magazine found underneath the red SUV. 5/11/23 at 44; 7/18/23 at 13, 60, 71.

of the photograph rather than any of the testimony presented at the hearing. More fundamentally, as Mr. Miller pointed out, the government presented no evidence that Exhibit 3 was a fair and accurate representation of what Officer Strong actually saw from his vantage point of standing outside the car and looking through the car window. *See id.* at 22. To the contrary, it is obvious from the photograph itself that it was taken from a different vantage point, with the car door open and the view zoomed in to capture the details of the magazine and the VIN number printed on the door frame. App'x B; 5/11/23 at 39–40 (Officer Way's testimony that the VIN number was visible in Exhibit 3). As the trial court itself observed, the magazine's particular position inside the car—"wedged against the driver's seat and the door"—made the magazine difficult to see with the car door closed, and thus it was "not surprising that the two officers who looked before did not see it." 5/12/23 at 34. Thus, even if the trial court could find that it was "very clear" from Exhibit 3 that the magazine was "loaded with at least 15 bullets"—a finding the court did not make—the record lacked any evidence that would support a finding that it was "immediately apparent" *to Officer Strong* that the magazine was loaded with at least 15 bullets. Nor did the trial court make any such finding.

Because "the record is silent as to whether [Officer Strong] could recognize the illegality" of the magazine "simply by viewing" it, *Harris*, 50 A.3d at 30, the evidence was insufficient to establish the requirements of the plain view doctrine, and the trial court erred in denying Mr. Miller's motion to suppress the fruits of the

illegal search of his car.[15] His PLCFD and UA convictions should therefore be reversed.

II. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. MILLER KNEW THE MAGAZINE COULD HOLD MORE THAN 10 ROUNDS OF AMMUNITION.

At the time of Mr. Miller's alleged conduct in this case, D.C. Code § 7-2506.01(b) provided: "No person in the District shall possess . . . any large capacity ammunition feeding device regardless of whether the device is attached to a firearm. For the purposes of this subsection, the term 'large capacity ammunition feeding device' means a magazine . . . that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition." D.C. Code § 7-2506.01(b) (2023).[16] "Finding no clear statement in either the statute or its legislative history to overcome the presumption in favor of a scienter requirement," this Court held for the first time in *Bruce v. United States*, 305 A.3d 381 (D.C. 2023), that "the government [is] required to prove that [the defendant] knew that the magazine could hold more than 10 round of ammunition in order to convict him under § 7-

[15] The trial court did not deny the suppression motion on any basis other than the plain view doctrine, and the government presented no evidence or argument to support doing so.

[16] The statute was recently amended and now reads: "No person in the District shall knowingly possess, sell, or transfer any ammunition feeding device that is, in fact, a large capacity ammunition feeding device." Act 25-411, Secure DC Omnibus Amendment Act of 2024, 71 D.C. Reg. 2732, 2745 (Mar. 15, 2024). The Act is currently awaiting Congressional review.

2506.[0]1(b)." *Id.* at 399.[17] "Because the government failed to do so" in *Bruce*, this Court reversed the appellant's PLCFD conviction. *Id.* The same is required here.[18]

In *Bruce*, police officers executing a search warrant at an apartment saw Mr. Bruce emerge from the apartment's kitchen, where they found a pistol equipped with a fully loaded 12-round magazine propped up in plain view on a shelf. *Id.* at 388. DNA analysis concluded that Mr. Bruce was very likely one of the three individuals who contributed to the DNA mixture found on the gun, but the DNA found on the magazine was "insufficient for any comparisons." *Id.* A table adjacent to the kitchen was covered with what appeared to be crack and powder cocaine (amounting to an estimated street value of $4,400), digital scales, plastic sandwich bags, a money pouch, baking soda, Pyrex containers, and a microwave. *Id.* A security camera was also pointed directly at the table. *Id.* Mr. Bruce's shoes were found under the table, and roughly $5,000 in cash and the keys to the apartment were found in Mr. Bruce's jacket pocket. *Id.* at 388–89. Police testified at trial that the items found in the apartment were consistent with drug dealing, and that "it was common for drug dealers to keep guns and other weapons to protect their operations." *Id.* at 389. Based

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[17] *Bruce* was decided several months after Mr. Miller's trial in this case.

[18] This Court reviews the sufficiency of the evidence de novo. *See Mills v. District of Columbia*, 259 A.3d 750, 756 (D.C. 2021). This Court must assess whether "the evidence in a criminal prosecution [was] strong enough that a jury behaving rationally really could find it persuasive beyond a reasonable doubt." *Rivas v. United States*, 783 A.2d 125, 134 (D.C. 2001) (en banc). Reversal is required "if, in order to convict, the jury is required to cross the bounds of permissible inference and enter the forbidden territory of conjecture and speculation," as when the jury verdict rests on "[s]light evidence" or a "mere modicum" of evidence. *Id.* (citations omitted).

on this evidence, Mr. Bruce was convicted of one count of attempted possession of cocaine with intent to distribute ("PWID"),[19] two counts related to possessing the gun, one count of PLCFD for possessing the 12-round magazine, and one count of UA for possessing the ammunition inside the magazine. *Id.* at 387.

On appeal, Mr. Bruce challenged the sufficiency of the evidence on all counts, and this Court affirmed his convictions on all counts but PLCFD. *Id.* at 387, 392. The Court first found the evidence sufficient to prove that Mr. Bruce possessed the gun and drugs in the apartment, citing Mr. Bruce's DNA on the gun, his presence in the kitchen where the gun was found in plain view, his shoes under the table where the drugs and drug paraphernalia were found in plain view, and the apartment keys and cash found in his jacket pocket. *Id.* at 393–95, 399. The Court also found the evidence sufficient to prove that Mr. Bruce possessed the ammunition inside the gun, holding that a jury could reasonably infer from the evidence of drug dealing that Mr. Bruce "knew the gun was loaded" and "intended the gun to be loaded," given that "a loaded firearm obviously would be more useful than an empty one" for protecting the drugs and money in the apartment. *Id.* at 395.

This Court reversed Mr. Bruce's conviction for PLCFD, however, holding that "the government was required to prove that [Mr.] Bruce knew that the magazine could hold more than 10 rounds of ammunition," but it "failed to do so." *Id.* at 399. In defending the sufficiency of the evidence on this element, the government argued that if a jury could reasonably infer from the evidence that Mr. Bruce knew the gun

[19] Because no chemist testified at trial that the substance found in the apartment was cocaine, the government proceeded with a charge of attempted PWID. *Id.* at 387 n.1.

was loaded, then surely it could draw the further inference that he knew it was fully loaded with 12 rounds of ammunition. *See* Brief for Appellee, *Bruce*, 305 A.3d 381 (No. 22-CF-463), 2023 WL 3303670, at *20–21 (D.C. Mar. 3, 2023). This Court disagreed, noting that a "magazine's capacity [is] a characteristic that is not always readily visible." 305 A.3d at 397. Despite finding the evidence sufficient to prove that Mr. Bruce both possessed the gun *and* knew the magazine was loaded, the Court held that the evidence was insufficient to prove Mr. Bruce's knowledge of the magazine's capacity to hold more than 10 rounds of ammunition, and reversed the PLCFD conviction. *Id.* at 399.

Additional guidance can be found in the case law of Massachusetts, where a conviction for possessing a large capacity feeding device likewise requires proof that the defendant knew the magazine was capable of holding more than 10 rounds of ammunition. *Commonwealth v. Cassidy*, 96 N.E.3d 691, 694–95, 699 (Mass. 2018), *cert. denied*, 139 S. Ct. 276 (2018).[20] In *Cassidy*, where this knowledge requirement was first announced, the Supreme Judicial Court of Massachusetts held that, while there was "no direct evidence" that Mr. Cassidy knew that the gun and the 30-round magazines found in his home were capable of holding more than 10 rounds of ammunition, the jury could reasonably infer such knowledge from the following circumstantial evidence presented at trial: (1) Mr. Cassidy's admission that he had owned the gun and magazines "for a significant period of time," having purchased

[20] Like the District of Columbia, Massachusetts prohibits the possession of a "large capacity feeding device," Mass. Gen. Laws Ann. ch. 269, § 10(m), defined as a magazine or other ammunition feeding device capable of holding more than 10 rounds of ammunition, *id.* ch. 140, § 121.

them legally in Texas several years earlier; (2) Mr. Cassidy's statements that he had fired the gun in the past and was "familiar with firearms more generally," having "owned other firearms in the past," and having "been hunting since he was eight years old"; (3) Mr. Cassidy's explanation that "he did not *fully* load the magazine so that he would not wear out the spring," indicating his understanding of the magazine's capacity; and (4) the "obvious large size" of the 30-round magazines, which were "noticeably larger than a magazine that holds ten rounds." *Id.* at 700–01 (emphasis added).

Courts applying *Cassidy* have reversed PLCFD convictions for insufficient evidence where the magazine was not "obviously large," and where the government presented no evidence "that the defendant had owned the firearm for a significant period of time" or "that he knew anything in particular about firearms or magazines." *Commonwealth v. Resende*, 113 N.E.3d 347, 354 (Mass. App. Ct. 2018); *see also, e.g.*, *United States v. Franklin*, 560 F. Supp. 3d 398, 403 n.4 (D. Mass. 2021) (reversing PLCFD conviction because government "did not . . . provide evidence supporting [the] required knowledge element, such as whether defendant was seen loading the gun or whether he was familiar with that type of weapon and its capacity"), *aff'd* 51 F.4th 391 (1st Cir. 2022); *Commonwealth v. Thompson*, 168 N.E.3d 386, 2021 WL 2010821, at *2 (Mass. App. Ct. 2021) (unpub.) (reversing PLCFD conviction for insufficient evidence where "[n]o evidence was presented with respect to the defendant's ownership history of the firearm," "the size of the magazine would not be apparent," "there was no evidence that the defendant was particularly familiar with firearms and firearm magazines," and "[t]here was no

evidence presented that the defendant loaded the firearm himself" (citation omitted)); *Commonwealth v. Cintron*, 119 N.E.3d 357, 2018 WL 6816193, at *2 (Mass. App. Ct. 2018) (unpub.) (similar).

The evidence in this case falls woefully short of the evidence that the court found sufficient in *Cassidy*, and is even scantier than the evidence that this Court found insufficient in *Bruce*. Unlike the 30-round magazines in *Cassidy*, and like the 15-round magazine in *Resende*, the 17-round magazine in this case was not "obviously large," and the government presented no evidence that it was "noticeably larger than a [10-round] magazine." *Cassidy*, 96 N.E.3d at 700; *see* App'x C (Gov't Ex. 9). Indeed, whereas the witnesses who saw the gun underneath the red SUV in this case commented on the "very distinctive" and "extremely large" size of the 40-round extended magazine that visibly protruded past the grip of the gun, 7/18/23 at 13, 60, 71, none of the witnesses who saw the 17-round magazine in Mr. Miller's car observed anything remarkable about its size.

Also unlike in *Cassidy*, where the evidence established that the defendant had owned the gun and magazines for several years and had personally loaded one of the magazines and fired the gun, 96 N.E.3d at 700–01, here the government presented no evidence that Mr. Miller ever owned, loaded, or even touched the magazine found in his car. No witness claimed to have seen Mr. Miller with the magazine, and the magazine contained no trace of Mr. Miller's fingerprints or DNA. Instead, as the government itself conceded in closing argument: "We don't know whether Mr. Miller had that magazine in his hand at any point, whether he had it in his pocket, whether he was carrying it on his person." 7/20/23 at 12. Rather, by the government's

own admission, the fact that the magazine was found inside Mr. Miller's car, right "next to the driver's seat where he was sitting" that night, showed only his "intent and . . . ability to exercise control" over the magazine, *id.*, and not that he ever physically handled it or owned it.

Without any evidence that Mr. Miller had purchased the magazine or owned it for any period of time, much less a "significant period of time," *Cassidy*, 96 N.E.3d at 700; *Resende*, 113 N.E.3d at 354, and without any evidence that Mr. Miller had ever loaded the magazine or even touched it, the jury could only speculate about his knowledge of its capacity. *See Rivas*, 783 A.2d at 134. Although both Officer Strong and Mr. Shymansky testified that they could tell by looking at the magazine that it was loaded,[21] even they—who are presumably more familiar with guns and ammunition than the average citizen—did not claim that they could ascertain the magazine's *capacity* simply by looking at it. Officer Strong did not testify about the capacity at all. Although Mr. Shymansky testified that the magazine held 17 rounds

[21] Officer Strong, who like all MPD officers carried a Glock pistol equipped with a 9mm magazine, *see supra* note 7, testified that he could tell the magazine was loaded because he could see "[t]he shine of the bullets" through the holes in the magazine when he shined his flashlight directly at the driver's seat while standing outside the car, 7/18/23 at 162–63. Crime scene analyst Shymansky—who had served as a police officer for 25 years and was specifically trained to recover firearms and magazines from crime scenes, 7/17/23 at 137–38—similarly testified that he could see the cartridges through the holes in the magazine that were visible in Government Exhibit 9, *id.* at 152–53. The government presented no evidence that Mr. Miller would have had the same view of the magazine while sitting inside a dark car that night, or that he knew enough about guns and ammunition that he would have recognized the holes in the magazine as being filled with cartridges.

of ammunition, he did not explain how he learned that fact other than by unloading the magazine and recovering 17 cartridges. 7/17/23 at 162, 180, 184.

Because the government presented no evidence that Mr. Miller ever loaded or unloaded the magazine himself, Mr. Shymansky's testimony about how he knew the magazine's capacity said nothing about whether Mr. Miller knew the magazine's capacity. And the government presented no other evidence of how Mr. Miller, an average citizen sitting in the driver's seat next to the magazine wedged in between the seat and the door frame, would know from simply looking at the magazine that it was capable of holding more than 10 rounds of ammunition. Unlike in *Cassidy*, where the defendant was very "familiar with firearms more generally," having owned, loaded, and fired firearms in the past, and having "been hunting since he was eight years old," 96 N.E.3d at 700, here the government presented no evidence that Mr. Miller "knew anything in particular about firearms or magazines," *Resende*, 113 N.E.3d at 354.

Indeed, the evidence of Mr. Miller's familiarity with the magazine in this case was even weaker than the evidence that this Court found insufficient in *Bruce*. In *Bruce*, the government presented evidence that Mr. Bruce possessed a gun to protect his drug dealing operation from robbers, and that he "knew the gun was loaded" and "intended the gun to be loaded" because "a loaded firearm obviously would be more useful than an empty one" for protecting drugs and money from robbers. 305 A.3d at 395. Even so, this Court held that Mr. Bruce's knowing possession of the ammunition inside the magazine did not by itself establish his knowledge of how many rounds were inside the magazine. *Id.* at 399. Here, there was even less: the

government presented no evidence that Mr. Miller possessed the magazine in connection with drug dealing or any other crime that would give him a reason to know the magazine was loaded. Whereas a drug dealer possessing a gun to protect his drugs and money from robbers would have good reason to keep the gun loaded—and at least arguably some reason to know how many rounds it contained (though this Court found even that argument too speculative in *Bruce*)—here the government presented no evidence whatsoever about Mr. Miller's reason for constructively possessing the magazine inside his car. Here, as in *Bruce*, the government simply "failed to" prove that Mr. Miller knew the capacity of the magazine, and his conviction for PLCFD must be reversed. *Id.*

III. THE TRIAL COURT PLAINLY ERRED IN FAILING TO INSTRUCT THE JURY ON THE KNOWLEDGE ELEMENT OF PLCFD.

Even if this Court were to conclude that the evidence was sufficient to prove Mr. Miller's knowledge of the magazine's capacity, the PLCFD conviction should nonetheless be reversed because the trial court plainly erred in failing to instruct the jury on this essential element of the offense. Because Mr. Miller did not object to the jury instructions on PLCFD, his claim of instructional error is subject to plain error review: "For reversal, there must be [1] 'error' that is [2] 'plain' (meaning clear' or 'obvious'), that [3] 'affects substantial rights,' and that, if not corrected, [4] would result in a 'miscarriage of justice' (meaning conviction of an innocent defendant) or otherwise would 'seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings.'" *Malloy v. United States*, 186 A.3d 802, 814 (D.C. 2018) (brackets in original) (citations omitted).

This case is on all fours with *Malloy*, where this Court reversed a threats conviction on plain error review based on the trial court's failure to instruct the jury on a scienter requirement that this Court subsequently announced in *Carrell v. United States*, 165 A.3d 314 (D.C. 2017) (en banc). *Malloy*, 186 A.3d at 814–23. In *Malloy*, the government presented evidence that, after accusing the complainant of being "'hot' (meaning a snitch)," Mr. Malloy asked the complainant, "What if I shoot your car?" "What if I shoot you?", and then pointed a gun at the complainant. *Id.* at 807. The jury acquitted Mr. Malloy of all counts related to pointing the gun, but convicted him of felony threats. *Id.* at 809. Consistent with the standard Redbook instructions at the time of trial, the trial court instructed the jury that the elements of threats were: "[1] that the defendant spoke words heard by [the complainant]; [2] [that] the words the defendant spoke would cause a person reasonably to believe that [the complainant] would be seriously harmed; and [3] that the defendant intended to make the communications which constituted the threat." *Id.* at 814. Mr. Malloy did not object to this jury instruction at trial. *Id.* This Court, sitting en banc, subsequently held in *Carrell* that, to convict a defendant of threats, the government must prove that the defendant not only intended to utter the threatening words, but also "acted with the purpose to threaten or with knowledge that his words would be perceived as a threat." *Id.* at 813 (quoting *Carrell*, 165 A.3d at 324).

This Court then held in *Malloy* that the trial court's failure to instruct the jury on this scienter requirement was "'clearly at odds' with the law established in *Carrell*," and thus was plainly erroneous at "the time of appellate review." *Id.* at 815 ("plainness is assessed as of 'the time of appellate review' regardless of 'the state of

the law at the time of trial'" (quoting *Wills v. United States*, 147 A.3d 761, 772 (D.C. 2016))). The Court further held that the error was prejudicial and warranted reversal under the plain error standard because the evidence of Mr. Malloy's intent to threaten was "not 'overwhelming and uncontroverted,'" and the omission of an essential element of the offense from the jury instructions is the type of constitutional error that, if prejudicial to the outcome of the trial, necessarily undermines the fairness and integrity of the proceedings. *Id.* at 815–20.

So too here. Consistent with the standard Redbook instructions at the time of Mr. Miller's trial, the trial court instructed the jury that the offense of PLCFD had only two elements: (1) Mr. Miller "possessed a large capacity ammunition feeding device," and (2) "he did so voluntarily and on purpose and not by mistake or accident." 7/19/23 at 175. Although the trial court instructed the jury that "large capacity" means "a capacity of . . . more than ten rounds of ammunition," *id.*, it did not instruct the jury that the government was required to prove beyond a reasonable doubt that Mr. Miller *knew* the magazine in his possession had a capacity of more than 10 rounds. This Court subsequently held in *Bruce* that such knowledge is an essential element of PLCFD. *Bruce*, 305 A.3d at 399. Thus, just as in *Malloy*, the trial court's failure to instruct the jury on the scienter element of the offense is plainly erroneous under current law.

Also like in *Malloy*, the weakness of the government's evidence and the jury's apparent struggle to reach a guilty verdict demonstrate that the instructional error in this case was not harmless and therefore affected Mr. Miller's "substantial rights." *Malloy*, 186 A.3d at 815. An error "affects substantial rights" when, "viewed in the

context of the trial, there was a reasonable probability that but for the error the factfinder would have had a reasonable doubt respecting guilt"—"essentially the application of *Kotteakos* [harmless error review]." *Id.* at 815–16; *see also United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004).[22] In *Malloy*, this Court held that the erroneous omission of the scienter requirement from the jury instructions was not harmless under the plain error standard because, although Mr. Malloy's words were "certainly inappropriate and disturbing," and although the evidence was "sufficient to find that [he] had the requisite intent" to threaten, the evidence of such intent was "not 'overwhelming and uncontroverted.'" 186 A.3d at 816, 819. The Court explained that "[a jury] might have determined that Malloy had meant his words merely as taunts" or "hyperbole," given that the complainant himself "appeared unperturbed" by the words, which took the form of "questions" rather than "direct statement[s]." *Id.* at 816–17. The Court further noted that the jury acquitted on all counts but the erroneously instructed threats, and sent two notes expressing difficulty reaching a verdict after four and a half hours of deliberation. *Id.* at 820. Based on this record, the Court concluded that it was "reasonably probable that the jury—already struggling with whether to find Malloy guilty of felony threats without having to find an intent to threaten—would have harbored a reasonable doubt about Malloy's guilt if it had been properly instructed on the *mens rea* element." *Id.* (brackets omitted) (quoting *Perry*, 36 A.3d at 819).

[22] "To conclude that an error is harmless under *Kotteakos*, [this Court] must find it *highly probable* that that error did not contribute to the verdict." *Andrews v. United States*, 922 A.2d 449, 458 (D.C. 2007) (brackets omitted) (emphasis in original) (quoting *Wilson-Bey v. United States*, 903 A.2d 818, 844 (D.C. 2006) (en banc)).

The record in this case compels the same conclusion. Here, as in *Malloy*, the evidence regarding Mr. Miller's knowledge of the magazine's capacity was "far from 'overwhelming and uncontroverted.'" *Id.* at 819. As discussed above, the government presented no evidence that the magazine's capacity was obvious from its size or appearance, and the prosecutor's own closing argument conceded that there was no evidence Mr. Miller had ever owned, loaded, or even touched the magazine. *See supra* pp. 31–34. Although Mr. Miller did not object to the standard jury instruction on the elements of PLCFD, he did not concede any knowledge of the magazine's capacity and in fact vigorously denied any knowledge of the magazine at all. *See* 7/20/23 at 41–42, 47 (Mr. Miller's closing argument). Given the paucity of evidence regarding Mr. Miller's familiarity with the magazine, there is at least a reasonable probability that a properly instructed jury would have found reason to doubt that Mr. Miller knew its capacity.

Indeed, just like in *Malloy*, the record indicates that the jury in this case already "had difficulty reconciling the evidence with guilt," even without having to find that Mr. Miller knew the magazine's capacity. *Malloy*, 186 A.3d at 820. Like in *Malloy*, the jury acquitted Mr. Miller of most of the charges against him. *Supra* p. 18. Like in *Malloy*, jurors sent notes to the trial court expressing their inability to reach a decision on the counts charged. *Supra* pp. 17–18. And like in *Malloy*, the jury deliberated for a prolonged period—five hours—before stating that they had come to an impasse, then another four hours before reaching a verdict on the PLCFD count, all for a case where the evidence and argument totaled approximately eight hours. *Supra* pp. 17–18. Therefore, just like this Court concluded in *Malloy*, "it is

reasonably probable that the jury—already struggling with whether" to convict Mr. Miller, "would have harbored a reasonable doubt about [his] guilt if it had been properly instructed on the *mens rea* element." *Malloy*, 186 A.3d at 820.

Finally, like in *Malloy*, all of the above circumstances compel the conclusion that the erroneous omission of the scienter requirement from the jury instructions "seriously undermine[d] the fairness and integrity of judicial proceedings." *Id.* at 821–22. As this Court has repeatedly held, failure to instruct the jury on an essential element of the offense is an error of "constitutional dimension" that, if prejudicial to the outcome of the trial, "necessarily affects the integrity of [the] proceeding" and warrants correction to prevent the wrongful conviction of an innocent defendant. *Id.* at 821–22 (quoting *Wilson-Bey*, 903 A.2d at 843, and *Perry*, 36 A.3d at 822); *see also Perez v. United States*, 968 A.2d 39, 96 (D.C. 2009); *Vaughn v. United States*, 93 A.3d 1237, 1270 (D.C. 2014). In reversing the conviction in *Malloy*, this Court explained that, where the omitted element of the offense is "contested and has not been found by the jury," and where the evidence of the element is neither "overwhelming" nor "uncontroverted," there can be "no question that such an omission . . . seriously undermines the fairness and integrity of judicial proceedings." *Malloy*, 186 A.3d at 822 (citation omitted). Because the circumstances in this case are materially identical to those in *Malloy*, reversal is likewise required.

IV. REVERSAL IS REQUIRED UNDER THE SECOND AMENDMENT.

The Second Amendment provides that the "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. As the Supreme Court recently held in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022),

"the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id*. at 24 (citation omitted).

Prior to trial, Mr. Miller moved to dismiss the PLCFD charge as a violation of the Second Amendment. R. 22. The trial court denied the motion, ruling that large capacity magazines are not "arms" within the meaning of the Second Amendment, and that even if they are, their complete prohibition is "consistent with the Nation's historical tradition" of "gun safety regulations." R. 40 at 19 (citation omitted). Those rulings are erroneous and require reversal.

A. Magazines Are Presumptively Protected "Arms."

In analyzing the threshold question in the *Bruen* test—whether the regulated conduct falls within "the Second Amendment's plain text"—the trial court correctly recognized that the "arms" protected by the Second Amendment are not limited to firearms themselves, but also cover ammunition and other components that render firearms operable for the core lawful purpose of self-defense. R. 40 at 16; *see, e.g.*, *Herrington v. United States*, 6 A.3d 1237, 1243 (D.C. 2010) (holding that "the right to keep and bear arms extends to the possession of handgun ammunition"). The trial court erred, however, when it ruled that the PLCFD statute does not regulate "arms" because large capacity magazines "merely *enhance* the functionality of firearms but

are not *necessary* to the use of firearms for their core lawful purpose." R. 40 at 17 (emphases added).[23]

While it is true that not all firearms use large capacity magazines, and some firearms (such as revolvers) do not use magazines at all, *see id.* at 17–18, an instrument need not be "necessary" for armed self-defense to be covered by the Second Amendment's plain text. Such a narrow definition of "arms" would permit a ban on an entire class of firearms commonly possessed for self-defense (such as semiautomatic pistols), so long as other types of firearms (such as revolvers) remained legal—a prospect that the Supreme Court has already rejected. *See District of Columbia v. Heller*, 554 U.S. 570, 629 (2008) ("It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed. It is enough to note . . . that the American people have considered the handgun to be the quintessential self-defense weapon."); *Caetano v. Massachusetts*, 577 U.S. 411, 421 (2016) (Alito, J., concurring in the judgment) (concluding that stun guns are "arms" within the meaning of the Second Amendment, and emphasizing that "the right to bear *other* weapons is 'no answer' to a ban on the possession of protected arms"). Rather, the Supreme Court has made clear that the Second Amendment's protection of "arms" covers all "modern

[23] Contrary to the trial court's suggestion, *United States v. Cox*, 906 F.3d 1170 (10th Cir. 2018), does not stand for the proposition that an instrument must be "necessary to the use of firearms" in self-defense to qualify as an "arm" within the meaning of the Second Amendment. R. 40 at 17. Rather, *Cox* held that a silencer is not an "arm" because it is "a firearm accessory" and "not a weapon itself," 906 F.3d at 1186—a rationale that conflicts with this Court's binding precedent in *Herrington*.

instruments that *facilitate* armed self-defense"—not just those that are *necessary* to armed self-defense. *Bruen*, 597 U.S. at 28 (emphasis added); *cf. Ezell v. City of Chicago*, 651 F.3d 685, 704 (7th Cir. 2011) ("the right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that *make it effective*" (emphasis added)).

There can be no question that firearm magazines—including those capable of holding more than 10 rounds of ammunition—are "instruments that *facilitate* armed self-defense." *Bruen*, 597 U.S. at 28 (emphasis added); *see Facilitate*, Black's Law Dictionary (5th ed. 1979) ("To make easier or less difficult"). By enabling a person to fire more than one shot at her attacker without stopping to manually reload the firearm each time, a magazine makes a firearm far more effective for self-defense, especially if the person is not a practiced shooter or is attacked by more than one assailant.[24] For that reason, among the 145 million handguns owned in the United

[24] *See* Matthew Larosiere, *Losing Count: The Empty Case for "High-Capacity" Magazine Restrictions*, Cato Inst. (July 17, 2018), https://www.cato.org/legal-policy-bulletin/losing-count-empty-case-high-capacity-magazine-restrictions ("novice shooters have a 39 percent hit probability over typical engagement distances," which, "combined with the fact that an assailant is rarely stopped by a single bullet, makes magazine capacity all the more important for effective defensive use of firearms"); David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 851–52 (2015) (a "constant goal has been to design firearms able to fire more rounds without reloading," because "[w]hen the defender is reloading, the defender is especially vulnerable to attack); *Kolbe v. Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) (en banc) ("[Gun owners] regard large-capacity magazines as especially useful for self-defense, because it is difficult for a civilian to change a magazine while under the stress of defending herself and her family from an unexpected attack. Moreover, a civilian firing rounds in self-defense

States ("the most popular weapon chosen by Americans for self-defense," *Heller*, 554 U.S. at 629), 70 percent, or 102 million, are pistols.[25] And among those 102 million pistols, more than half—including the four most popular models of handguns in the United States[26]—are designed to be used with magazines that hold more than 10 rounds of ammunition.[27] Thus, while neither magazines in general nor large capacity magazines in particular are strictly "necessary" to the use of firearms in self-defense, they unquestionably "facilitate armed self-defense" and indeed are integral components of some of "the most popular weapon[s] chosen by Americans for self-defense." *Heller*, 554 U.S. at 629; *Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J.*, 910 F.3d 106, 116 (3d Cir. 2018) ("The law challenged here regulates magazines, and so the question is whether a magazine is an arm under the Second

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will frequently miss her assailant, rendering it 'of paramount importance that she have quick and ready access to ammunition in quantities sufficient to provide a meaningful opportunity to defend herself and/or her loved ones.'"), *abrogated in part by Bruen*, 597 U.S. 1.

[25] John Berrigan et al., *The Number and Type of Private Firearms in the United States*, 704 Annals Am. Acad. Pol. & Soc. Sci. 70, 75 (Nov. 2022) ("Among handguns, 70 percent were pistols (102 million) and 30 percent revolvers (43 million).").

[26] The four top-selling handguns in 2022 were the Sig Sauer P365 (12 rounds), the Sig Sauer P320 (17 rounds), the Smith & Wesson M&P9 (17 rounds), and the Glock G19 (15 rounds). *See* Gun Genius, *Top 10 Handguns of 2022*, https://www.gungenius.com/top-selling/guns/top-10-handguns-of-2022/.

[27] *See Duncan v. Bonta*, 19 F.4th 1087, 1097 (9th Cir. 2021) (en banc) ("Most pistols are manufactured with magazines holding ten to seventeen rounds."), *cert. granted, vacated on other grounds*, 142 S. Ct. 2895 (2022); Larosiere, *supra* note 24 ("Most pistols sold in the United States come equipped with magazines that hold between 10 and 17 rounds," and "those holding 10 rounds are generally compact or subcompact models.").

Amendment. The answer is yes. . . . Because magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are 'arms' within the meaning of the Second Amendment."), *abrogated in part by Bruen*, 597 U.S. 1; *Hanson v. District of Columbia*, 671 F. Supp. 3d 1, 9–10 (D.D.C. 2023) (holding that large capacity magazines are "arms" because, while "a firearm technically does not require *any* magazine to operate," as "one could simply fire the single bullet in the firearm's chamber," they "*facilitate* armed self-defense" by "feed[ing] ammunition into certain guns" (quoting *Bruen*, 597 U.S. at 28) (emphasis in *Hanson*)); *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1276 (N.D. Cal. 2014) (holding that large capacity magazines are "arms" because "they are integral components to vast categories of guns"); *Duncan v. Bonta*, --- F. Supp. 3d ---, 2023 WL 6180472, at *8 (S.D. Cal. 2023) (holding that magazines are "arms" because "[i]t is hard to imagine something more closely correlated to the right to use a firearm in self-defense than the ability to effectively load ammunition into the firearm"). Accordingly, they are "arms" covered by "the Second Amendment's plain text." *Bruen*, 597 U.S. at 17.

B. The Government Cannot Show that the PLCFD Statute Is Justified by the Nation's Historical Tradition of Firearms Regulation.

Because the PLCFD statute regulates "arms," the government bears the burden to "affirmatively prove" that the statute's complete prohibition of this entire class of arms is consistent with the Nation's historical tradition of firearm regulation. *Id.* at 19. To do so, the government must identify a "well-established and representative historical analogue" from the Founding era that is "relevantly similar"

to the PLCFD statute in both "how" and "why" it burdens the Second Amendment right. *Id.* at 28–30 (emphasis omitted). The government failed to meet that burden in the trial court, and the trial court erred in concluding otherwise.

The government argued in the trial court that, because large capacity magazines are "associated in the civilian context with mass shootings and public terror," R. 28 at 74, their prohibition is consistent with the Nation's historical tradition of prohibiting certain weapons and uses of weapons that "posed special dangers to human life," such as "'Bowie Knives' and other particularly dangerous and unusual knives," and "the practice of rigging firearms to be fired with a string or similar method . . . without an actual finger on the firearm trigger." *Id.* at 72–73 (quoting Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & Contemp. Probs. 55, 67 (2017)); *see also* R. 40 at 20.

While the Supreme Court has recognized a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,'" *Heller*, 554 U.S. at 627, it has also emphasized that "[a] weapon may not be banned unless it is *both* dangerous *and* unusual," *Caetano*, 577 U.S. at 417 (Alito, J., concurring in the judgment), and a weapon is not "dangerous and unusual" if it is "in common use today," *Bruen*, 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 627). And as already explained above, *see supra* pp. 42–44, magazines capable of holding more than 10 rounds of ammunition are not "highly unusual in society at large," and instead are commonly "possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625, 627; *supra* pp. 42–44 & nn.24–27. Indeed, courts have long recognized that large capacity

magazines are "in common use,"[28] and a recent national survey estimated that nearly half of American gun owners (roughly 39 million people) have owned large capacity magazines for lawful purposes such as self-defense.[29] Because large capacity magazines "belong[] to a class of arms commonly used for lawful purposes," their "relative dangerousness . . . is irrelevant." *Caetano*, 577 U.S. at 418 (Alito, J., concurring in the judgment).

Although the trial court recognized that large capacity magazines are "in wide circulation nationwide," it questioned whether they "are commonly *used* or are *useful specifically* for self-defense or hunting." R. 40 at 18 & n.2 (quoting *Heller II*, 670 F.3d at 1261) (emphasis added). Similarly, the government argued that, because "most homeowners only use two to three rounds of ammunition in self-defense," and "[t]he use of more than ten bullets in defense of the home is 'rare,'" there is no evidence that large capacity magazines are "commonly used" for self-defense. R. 28 at 66 (quoting *Duncan*, 19 F.4th at 1104, 1107). But in invalidating bans on handguns and stun guns in *Heller* and *Caetano*, respectively, the Supreme Court did not cite statistics about how frequently homeowners *actually use* handguns and stun guns for self-defense. Nor did the Court cite evidence that handguns and stun guns are empirically *more useful* for self-defense than other weapons. Rather, the Court

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[28] *See, e.g.*, *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1261 (D.C. Cir. 2011); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015); *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015).

[29] William English, Georgetown University, McDonough School of Business, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* (May 13, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109494.

simply cited the popularity and widespread ownership of such weapons as sufficient indication that they are "typically *possessed* by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625 (emphasis added), and "accepted as a legitimate means of self-defense across the country," *Caetano*, 577 U.S. at 420 (Alito, J., concurring in the judgment) (state ban on stun guns violated the Second Amendment because, "[w]hile less popular than handguns, stun guns are widely owned," with "[h]undreds of thousands of Tasers and stun guns hav[ing] been sold to private citizens" (second alteration in original) (citation omitted)).

In short, it simply does not matter whether a typical person defending himself from an armed attacker will ever *need* to fire—or will ever *actually* fire—more than 10 rounds of ammunition. *See Fyock*, 25 F. Supp. 3d at 1276 ("the standard is whether the prohibited magazines are 'typically *possessed* by law-abiding citizens for lawful purposes,' not whether the magazines are *used* for self-defense" (quoting *Heller*, 554 U.S. at 625) (emphasis in *Fyock*)); *Duncan*, 2023 WL 6180472, at *10 ("[T]o be protected, an arm needs only to be regarded as *typically* possessed or carried, or *commonly* kept, by citizens to be ready for use, if needed. The Supreme Court has not said that the actual firing of a gun is any part of the test." (emphasis in original)). "It is enough" that, "[w]hatever the reason," pistols equipped with large capacity magazines are "the most popular weapon chosen by Americans for self-defense in the home." *Heller*, 554 U.S. at 629. Because large capacity magazines are widely owned and possessed by tens of millions of presumptively law-abiding Americans for presumptively lawful purposes, their complete prohibition cannot be

justified by the Nation's historical tradition of banning "dangerous and unusual weapons." *Id.* at 627 (citation omitted).

Nor can the PLCFD statute be justified by the Nation's historical tradition of "gun safety regulations," such as early American laws restricting "the amount of gunpowder that an individual could keep in his home." R. 40 at 19–20 (citing Saul Cornell & Nathan DeNino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 510–11 (2004)); R. 28 at 73. Unlike the PLCFD statute, "[t]he point of these statutes was, as they themselves proclaimed, to protect communities from fire and explosion." Cornell & DeNino, *supra*, at 512. While these "safe storage" laws may have also incidentally "provided a check on the creation of a private arsenal," *id.*; *see* R. 40 at 20, they were "clearly crafted to meet the needs of public safety" in storing flammable materials, and not to limit the number of shots that an individual could fire with a gun. Cornell & DeNino, *supra*, at 512. Because these gunpowder storage regulations are not "relevantly similar" to the PLCFD statute in both "how and why" they burdened the Second Amendment right, *Bruen*, 597 U.S. at 29, they do not provide the necessary historical justification for banning the possession of all magazines capable of holding more than 10 rounds of ammunition. Mr. Miller's PLCFD conviction should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse Mr. Miller's convictions.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been served electronically via the Appellate E-Filing System upon Chrisellen R. Kolb, of the U.S. Attorney's Office for the District of Columbia, on this 10th day of June, 2024.

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