No. 23-CF-175

DISTRICT OF COLUMBIA COURT OF APPEALS

WAYNE D. ROBERTSON,

Appellant,

v.

UNITED STATES,

Appellee.

Appeal from the District of Columbia Superior Court
Criminal Division, Felony Branch

BRIEF FOR APPELLANT WAYNE D. ROBERTSON

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LISTING OF PARTIES

Undersigned counsel hereby certifies that the only parties who appeared in the District of Columbia Superior Court were Mr. Wayne D. Robertson and the United States of America. Mr. Robertson was represented by attorney Joseph W. Fay in the Superior Court, and Assistant United States Attorney David Williams Lawrence represented the United States.

Mr. Robertson is represented in this Court by attorney Peter H. Meyers and the United States is represented in this Court by Assistant United States Attorney Chrisellen R. Kolb.

No interveners or amici curiae have appeared in this case.

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APPEAL FROM FINAL JUDGMENT

This appeal is from a final judgment sentencing Mr. Wayne D. Robertson on March 3, 2023, disposing of all parties' claims.

ISSUES PRESENTED

I. Whether the trial court erred in concluding as a matter of law that Mr. Robertson could be convicted of possessing a large capacity ammunition feeding device without evidence that the device was operable.

II. Whether the trial court erred denying Mr. Robertson's motion to suppress the evidence seized from him after a *Terry* stop and frisk conducted without reasonable suspicion that Mr. Robertson was involved in any illegal activity.

STATEMENT OF THE CASE

I. Nature of the Proceedings

Mr. Wayne D. Robertson was indicted for five offenses arising out of his arrest on July 22, 2022, in the 500 block of R Street, N.W., in the District of Columbia.[1]

[1] Mr. Robertson was charged with unlawful possession of a firearm (prior conviction), in violation of D.C. Code § 22-4503(a)(1), (b)(1) (2001 ed.); carrying a pistol without a license (outside a home or place of business), in violation of D.C. Code § 22-4504(a)(2) (2001 ed.); possession of an unregistered firearm, in violation

Counsel for Mr. Robertson filed a pre-trial motion to suppress all the evidence seized from him after his stop and search on July 22, 2022, including a pistol, ammunition, and a large capacity ammunition feeding device, arguing that the *Terry*[2] stop and frisk of Mr. Robertson was conducted illegally, without reasonable, articulable suspicion. R. 12, at 1. The government filed an opposition on October 28, 2022. R. 15. Defense counsel filed a reply on November 6, 2022. R. 17. An evidentiary hearing on the suppression motion was held before Associate Judge Sean C. Staples on November 7, 2022. At the conclusion of the hearing, Judge Staples denied the motion to suppress, finding that there was reasonable suspicion to stop and frisk Mr. Robertson. Tr. 11/7/22 at 178-80.

The next morning, counsel for Mr. Robertson and counsel for the United States filed with the court an agreement under which Mr. Robertson waived his right to a jury trial, R. 18, and submitted an agreed stipulation of facts. R. 19. Judge Staples accepted the jury trial waiver and the stipulated facts. Tr. 11/8/22 at 14-19. Counsel for Mr. Robertson then moved for a judgment of acquittal on all five counts, *id.* at 16, but the court found Mr. Robertson guilty, based upon the stipulated facts,

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of D.C. Code § 7-2502.01(a) (2001 ed.); unlawful possession of ammunition, in violation of D.C. Code § 7-2506.01(3) (2001 ed.); and possession of a large capacity ammunition feeding device, in violation of D.C. Code § 7-2506.01(b) (2001 ed.). *See* the Indictment, in the Record on Appeal (hereafter "R.") 10 at 1-2.

[2] *Terry v. Ohio*, 392 U.S. 1 (1968).

of four of the five counts – all counts except possession of a large capacity ammunition feeding device. *Id.* at 17. The court gave the parties the opportunity to submit legal memoranda on the issue of whether the stipulated facts were sufficient to find Mr. Robertson guilty of that offense. *Id.*

The government argued that Mr. Robertson was guilty of the offense of possessing a large capacity ammunition feeding device under either of two alternative bases – the magazine he possessed "has the capacity" to accept more than 10 rounds of ammunition or it "can be readily restored or converted to accept more than 10 rounds of ammunition." Government Memorandum, R. 20 at 2.

Defendant responded that the factual stipulation submitted in the case was insufficient to find Mr. Robertson guilty under either theory proposed by the government because the stipulation did not show that the ammunition feeding device was "operable" or could be "restored or converted to accept, more than 10 rounds of ammunition." Defendant Memorandum, R. 21 at 4.

Judge Staples held an oral argument on the sufficiency of the factual stipulation to find Mr. Robertson guilty of possessing a large capacity ammunition feeding device on December 15, 2022. Judge Staples ruled "as a matter of law, the capacity feeding device does not have to be proven to be operable." Tr. 12/15/22 at 7. No evidence was introduced that the device was operable, and Judge Staples never found that it was operable, only that it had the capacity to hold more than 10

rounds, and on that basis found Mr. Robertson guilty of the ammunition feeding device charge. *Id.* However, with respect to the government's alternative argument, Judge Staples held that the stipulated facts were insufficient for him to find that the magazine could be "readily restored or converted to accept, more than 10 rounds of ammunition." *Id.* at 11. Judge Staples reached this conclusion because "there is a crucial connecting fact that's missing from the stipulated facts" -- the stipulation did not specify that the separated spring and base plate comprised all of the component parts necessary for a magazine that could be "readily restored or converted to accept, more than 10 rounds of ammunition." *Id.* at 9, 11.

Mr. Robertson was subsequently sentenced by Judge Staples on March 3, 2023, to a prison term of 36 months, followed by three years of supervised probation, and payment of $400 to the victims of crime fund. Tr. 3/3/2023 at 15-16; R. 25 (Sentence of the Court).[3]

A timely notice of appeal was filed on March 3, 2023, R. 26, and this court appointed undersigned counsel (who was not trial counsel) to represent Mr. Robertson on appeal.

[3] Mr. Robertson was sentenced to concurrent terms of imprisonment of 36 months for felon in possession, 19 months for carrying a pistol without a license, 9 months for possession of a large capacity ammunition feeding device, 6 months for possession of an unregistered firearm, and 6 months for possession of unregistered ammunition. Tr. 3/3/2023 at 15-16. This was the minimum sentence authorized by D.C. law. *Id.* at 15.

II. Statement of the Facts

The facts surrounding Mr. Robertson's arrest were provided in the testimony of D.C. Metropolitan Police Officer Pablo Rosa at the suppression hearing held on November 7, 2022. Based on Officer Rosa's testimony, the trial court found that the police received a 911 call from a man who identified himself as Chris and stated that he saw a black male flashing a gun on the street. *Id*. at 178. Based on that 911 call, the police sent out a radio run describing the man as wearing a black top and blue jeans and indicated that he was with a woman with a blond haircut, wearing a teal shirt and white pants. *Id*. Officer Rosa testified that he could not remember whether the lookout contained any description of the man's build, his height, his weight, his hairstyle, or his facial hair. *Id.* at 144, 167.

Officer Rosa and his partner saw a man and woman who appeared to meet the lookout description in the 600 block of T Street, N.W. at about 2:30 a.m., and exited their police cruiser. *Id*. at 149-50, 179. Officer Rosa's partner asked the man if he could speak to him, but the man left on his bicycle. *Id*. Officer Rosa testified that he did not see any weapon or bulge in Mr. Robertson's pocket when he first approached him on T Street, N.W. *Id.* at 165. A short time later, he saw Mr. Robertson again, in the custody of other police officers. *Id.* at 150. Officer Rosa observed a bulge in Mr. Robertson's right front pocket, and when the item in his pocket was removed it turned out to be a gun. *Id.* at 151.

Based on these facts, the trial court found that the police had reasonable suspicion to stop Mr. Robinson, in light of his "unprovoked flight" from Officer Rosa and his partner, and had reasonable suspicion to later pat him down after observing the bulge in his pocket. *Id.* at 180.

Subsequent to the suppression hearing, the parties submitted a stipulation of facts with respect to the pistol, bullets, and large capacity ammunition feeding device found in Mr. Robertson's pocket. R. 19. Judge Staples accepted the factual stipulation and stated it would form the basis for his verdicts in the case. Tr. 11/8/22 at 14-19. The stipulation provided:

> The parties in this case, the United States and the defendant, Wayne Robertson, hereby stipulate and agree as follows:
>
> 1. The defense and the government agree that on July 22, 2022, at approximately 2:20 a.m. in the 500 block of R St. NW, Washington, DC, the defendant, Wayne Robertson possessed a firearm.
> 2. The defense and the government agree that the firearm recovered in this case-a black Taurus G2C 9mm pistol with the serial number "ACD753615"-is a firearm designed to expel a projectile by means of an explosive, is designed to be fired with a single hand, and has a barrel length of less than 12 inches.
> 3. The defense and the government agree that the magazine inserted into the recovered firearm had a capacity of 15 rounds. When the firearm was recovered from the defendant, the spring and base plate of the magazine were protruding from the bottom of the magazine as depicted in Attachment A. MPD officers removed the spring from the magazine after recovering the firearm. The spring and baseplate were separate from the magazine when documentary photos were

taken at the station as depicted in Attachment B.

4. The defense and the government agree that, as of July 22, 2022, the defendant, Wayne Robertson, did not have a license to carry a pistol in the District of Columbia, as required by the law of the District of Columbia.

5. The defense and the government agree that, as of July 22, 2022, the defendant; Wayne Robertson, did not have a valid registration certificate, as required by the law of the District of Columbia, to possess a firearm or ammunition. The firearm recovered in this case was not registered to the defendant.

6. The defense and the government agree that, on July 22, 2022, the defendant, Wayne Robertson, had previously been convicted of a crime of violence punishable by imprisonment for a term exceeding one year. The defense and the government further agree that, on July 22, 2022, the defendant, Wayne Robertson, knew that he had been convicted of a crime of violence punishable by imprisonment for a term exceeding one year.

7. The defendant's actions were voluntary and on purpose, and not the product of mistake of [sic] accident.

SUMMARY OF ARGUMENT

The statutory provision criminalizing possession of a large capacity ammunition feeding device, D.C. Code § 7-2506.01(b) (2001 ed.), requires that the device be operable. This is an issue of first impression that has not previously been addressed by this Court. The operability requirement flows from the language of the statutory provision, § 7-2506.01(b), read as a whole. This statute defines a large capacity ammunition feeding device as a device with "a capacity of, or that can be

readily restored or converted to accept, more than 10 rounds of ammunition" (emphasis added). The statute further states: "The term 'large capacity ammunition feeding device' shall not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition" (emphasis added). A plain reading of this statutory language necessarily leads to the conclusion that operability involving non-.22 caliber ammunition is an essential element of this offense.

This Court has required operability for many other weapons-related offenses, including carrying a pistol without a license, possession of a machine gun, possession of a shotgun or a sawed-off shotgun, and carrying a "dangerous weapon." The D.C. Council subsequently amended these weapons offenses to specify that operability was not required, but on the very same day that the D.C. Council passed that law it also passed the law criminalizing possession of a large capacity ammunition feeding device, without containing the weapons operability language, and in fact containing opposite language defining a large capacity ammunition feeding device as a device that "shall not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition" (emphasis added).

The legislative reports for these two laws were also released on the same day, and made clear that the purposes of the two statutes were different. The D.C.

Council adopted the provision eliminating the operability requirement for certain weapons offenses because even inoperable weapons can still appear dangerous to others who observe them, but adopted the large capacity ammunition feeding device prohibition "to prevent the ability of an individual to fire a large quantity of ammunition without having to pause to reload." Council of the District of Columbia Committee on Public Safety and the Judiciary, Report on Bill 17-843, November 25, 2008, at 2.

Finally, if this Court should find the statutory language unclear as to operability, the rule of lenity should be applied to interpret the statute most favorable to the defendant and require operability. For all these reasons, the trial court erred in concluding that operability was not an essential element of the offense, and erred in convicting Mr. Robertson for possession of a large capacity ammunition feeding device without evidence that the device was operable.

* * *

All of Mr. Robertson's convictions must be reversed because the evidence in this case was seized after police officers illegally stopped and searched Mr. Robertson without reasonable, articulable suspicion that he had committed any criminal offense. The police based their stop of Mr. Robertson on a 911 call describing a black male wearing dark clothes holding a gun in the area of T and 7th Streets, N.W., and when police officers arrived in that area they observed Mr.

Robertson, a black male wearing dark clothing get on a bicycle and drive away. He was later observed with a bulge in his pocket. These facts did not provide reasonable, articulatable grounds to believe that criminal activity was afoot, as required for a *Terry* stop and frisk. This case is similar to *Miles v. United States*, 181 A.3d 633 (D.C. 2018), where this Court held that police did not have reasonable suspicion to support the detention and frisk of the defendant based on a 911 call from a "concerned citizen" describing a man "shooting a gun in the air," and defendant's flight after police officers approached him near the location of the alleged shooting. 181 A.3d at 639-40.

ARGUMENT

I. The Trial Court Erred in Concluding that Mr. Robertson Could be Convicted of Possessing a Large Capacity Ammunition Feeding Device Without Evidence That the Device was Operable

A. Factual Background

The statutory offense of possession of a large capacity ammunition feeding device, D.C. Code § 7-2506.01(b) (2001 ed.), states:

> No person in the District shall possess, sell, or transfer 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, belt, drum, feed strip, or similar device that has a capacity of, or that can be

> readily restored or converted to accept, more than 10 rounds of ammunition. The term "large capacity ammunition feeding device" shall not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition.

The factual stipulation submitted by the parties relating to this offense stated as follows, R. 19 at 1, para. 2:

> The defense and the government agree that the magazine inserted into the recovered firearm had a capacity of 15 rounds. When the firearm was recovered from the defendant, the spring and base plate of the magazine were protruding from the bottom of the magazine as depicted in Attachment A. MPD officers removed the spring from the magazine after recovering the firearm. The spring and baseplate were separate from the magazine when documentary photos were taken at the station as depicted in Attachment B.

The government argued in the trial court that Mr. Robertson was guilty of possessing a large capacity ammunition feeding device under either of two alternative bases – the magazine he possessed "has the capacity" to accept more than 10 rounds of ammunition or it "can be readily restored or converted to accept more than 10 rounds of ammunition." R. 20 at 2.

Defense counsel argued that the factual stipulation submitted in the case was insufficient to find Mr. Robertson guilty under either theory proposed by the government because the stipulation did not show that the ammunition feeding device was "operable." R. 21 at 4.

Judge Staples issued an oral ruling that concluded "as a matter of law, the

capacity feeding device does not have to be proven to be operable." Tr. 12/15/22 at 7. In fact, no evidence was introduced that the device was operable, and Judge Staples never found it was was operable, only that it had the capacity to hold more than 10 rounds. *Id.* However, Judge Staples rejected the government's alternative argument that the magazine could be "readily restored or converted to accept, more than 10 rounds of ammunition." *Id.* at 11. Judge Staples reached this conclusion because "there is a crucial connecting fact that's missing from the stipulated facts" -- the stipulation did not specify that the separated spring and base plate comprised all of the component parts necessary for a magazine that could be "readily restored or converted to accept, more than 10 rounds of ammunition." *Id.* at 9, 11.

B. Applicable Legal Principles

This Court has not yet addressed the question of whether the government must prove that a large capacity ammunition feeding device is operable before a defendant can be convicted of its unlawful possession. This Court has addressed the operability requirement for a number of other weapons offenses, concluding that operability is required to convict a person of carrying a pistol without a license,[4]

[4] *Lee v. United States*, 402 A.2d 840, 841 (D.C. 1979).

possession of a shotgun or a sawed-off shotgun,[5] possession of a machine gun,[6] and carrying a "dangerous weapon,"[7] but was not required for possession of a BB gun.[8]

Questions of statutory interpretation are reviewed in this Court *de novo*. *Holloway v. United States*, 951 A.2d 59, 60 (D.C. 2008). Several general rules of statutory construction guide this Court's analysis of whether operability is required to convict a person of possessing a large capacity ammunition feeding device. The primary rule is that "the intent of the lawmaker is to be found in the language that he has used." *In re D.F., supra,* 70 A.3d at 243 (quoting *Peoples Drug Stores, Inc. v. District of Columbia,* 470 A.2d 751, 753 (D.C.1983) (*en banc*)); *see also Brownlee v. District of Columbia Dep't of Health,* 978 A.2d 1244, 1249 n. 8 (D.C. 2008).

Moreover, the words of a statute should be read in light of the statute taken as a whole:

> Statutory interpretation, we have recognized, is "a holistic endeavor, ... in which we must consider not only the bare meaning of [words] but also [their] placement and purpose in the statutory scheme. *District of Columbia Appleseed Ctr. for Law & Justice, Inc. v. District of Columbia Dep't of Ins., Sec. & Banking,* 54 A.3d 1188 (D.C. 2012) (internal quotation marks omitted). "The literal words of a statute ... are

[5] *Washington v. United States*, 498 A.2d 247, 249 (D.C. 1985).

[6] *Moore v. United States*, 927 A.2d 1040, 1060 (D.C. 2007).

[7] *Strong v. United States*, 581 A.2d 383, 386 (D.C. 1990) (inoperable pistol is not a "dangerous weapon').

[8] *In re D.F.*, 70 A.3d 240, 241 (D.C. 2013).

> not the sole index to legislative intent, but rather, are to be read in light of the statute taken as a whole," with the goal of interpreting the statute "as a harmonious whole." *Id.* (internal quotation marks and citations omitted).

In re D.F., *supra*, 70 A.3d at 243-44 (citations in original).

It is also appropriate to consider the legislative history of a statute and the "purpose of the statutory scheme" if they assist in explicating statutory terms:

> [A] court may refuse to adhere strictly to the plain language of a statute in order to effectuate the legislative purpose as determined by a reading of the legislative history or by an examination of the statute as a whole.

In re D.F., *supra*, 70 A.3d at 243 (quoting *District of Columbia v. Edison Place*, 892 A.2d 1108, 1111 (D.C.2006) (internal quotation marks and alterations omitted).

Finally, if after considering all of above sources, this Court finds statutory language ambiguous or in genuine doubt, the rule of lenity requires that a criminal statute be interpreted in favor of the defendant. *Holloway v. United States, supra*, 951 A.2d at 65.

> To be sure, the "rule of lenity" is "a secondary canon of construction, and is to be invoked only where the statutory language, structure, purpose and history leave the intent of the legislation in genuine doubt."…. However, after all of these primary guides to the meaning of a criminal or penal statute have been taken into account and ambiguity remains, that ambiguity should be resolved in favor of the defendant.

Washington v. D.C. Dep't of Pub. Works, 954 A.2d 945, 948-49 (D.C. 2008) (citations and footnote omitted).

C. Legal Argument

The government must prove that a large capacity ammunition feeding device is operable before a defendant can be convicted of its unlawful possession pursuant to D.C. Code § 7-2506.01(b) (2001 ed.). No evidence was introduced that the device in this case was operable, and the trial court did not find that it was operable. The trial court ruled "as a matter of law" that operability was not required to convict Mr. Robertson of the offense. The trial court erred for a number of reasons.

First, the plain language of the statutory definitions in § 7-2506.01(b), read as a whole, indicates that operability is required. The statute defines a large capacity ammunition feeding device as a device with "a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition." *Id.* (emphasis added). The statute further states: "The term 'large capacity ammunition feeding device' shall not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition." *Id.* (emphasis added). These statutory definitions necessarily lead to the conclusion that operability with respect to non-.22 ammunition is an essential element of this offense. *In re D.F.*, *supra*, 70 A.3d at 243-44 (statutory language should be determined by considering the language of the statutory provision as a whole).

Although this Court has not previously addressed the operability requirement for large capacity ammunition feeding devices, it has addressed the operability

requirement for a number of other weapons-related offenses, concluding that operability is required to convict a person of carrying a pistol without a license,[9] possession of a shotgun or sawed-off shotgun,[10] carrying a "dangerous weapon,"[11] and possession of a machine gun.[12]

The D.C. Council subsequently amended these weapons offenses in 2008 to specify that operability was not required.[13] But on the very same day that the D.C. Council passed that law it also passed the law criminalizing possession of a large capacity ammunition feeding device, without containing that language ("regardless of operability"), and in fact the new large capacity ammunition feeding device criminal prohibition contained opposite language defining such a device as one that "shall not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition" (emphasis added).

Finally, the legislative reports for these two laws, also issued the same day,

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[9] *Lee v. United States*, *supra*, 402 A.2d at 841.

[10] *Washington v. United States*, *supra*, 498 A.2d at 249.

11 *Strong v. United States*, supra, 581 A.2d at 386.

[12] *Moore v. United States*, *supra*, 927 A.2d at 1060.

[13] The Inoperable Pistol Amendment Act of 2008, § 2(a)(1), 2008 District of Columbia Laws 17-388 (Act 17-690) (re-defining "firearm" to include specified weapons "regardless of operability").

November 25, 2008, made clear that the purposes of the two statutes were different. The D.C. Council adopted the provision eliminating the operability requirement for certain weapon offenses because even inoperable weapons appear dangerous to other people who observe them:

> In general, persons should not be carrying real weapons on the street regardless of operability. What is the good in allowing someone to carry a Smith and Wesson revolver for instance -- especially if it is not working? To everyone else who might see it, the gun still appears completely dangerous.[14]

Inoperable real weapons are dangerous because they can be used to commit serious offenses such as assault with a dangerous weapon or armed robbery of people who are not aware that the weapon is inoperable. And the sight of inoperable guns on the street can cause fear or panic in individuals who do not know their inoperable. Inoperable real weapons are inherently dangerous and are appropriately prohibited for that reason.

In contrast, the D.C. Council adopted the large capacity ammunition feeding device prohibition for a different purpose, "to prevent the ability of an individual to fire a large quantity of ammunition without having to pause to reload":

> D.C. Act 17-502 also prohibits large capacity ammunition feeding devices (such as a magazine or ammunition feed strip) similar to a

[14] Council of the District of Columbia, Committee on Public Safety and the Judiciary, Report on Bill 17-593, November 25, 2008, at 3. A copy of this Committee report is contained in the Appendix to this brief as Appendix E.

> provision in the now-lapsed federal assault weapons ban, so as to prevent the ability of an individual to fire a large quantity of ammunition without having to pause to reload.[15]

The federal assault weapons ban, passed by the U.S. Congress in 1994, established a 10-year prohibition on the manufacture, transfer, or possession of "semiautomatic assault weapons," as well as "large capacity ammunition feeding devices." P.L. 103-322, Title XI (1994). The Act's definition of "large capacity ammunition feeding devise" is virtually identical to the definition in the D.C. law.[16]

The legislative history of the federal assault weapons ban, similar to the D.C. law, makes clear that the purpose of the federal prohibition of large capacity ammunition feeding devises was to prevent the ability of an individual to fire a large quantity of ammunition without having to pause to reload:

> Because of the greater enhanced lethality -- numbers of rounds that can be fired quickly without reloading -- H.R. 4296 also contains

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[15] Council of the District of Columbia, Committee on Public Safety and the Judiciary, Report on Bill 17-843, November 25, 2008, at 2. A copy of this Committee report is contained in the Appendix to this brief as Appendix F.

[16] DEFINITION OF LARGE CAPACITY AMMUNITION FEEDING DEVICE. — Section 921(a) of title 18, United States Code, as amended by section 110102(b), is amended by adding at the end the following new paragraph:
"(31) The term 'large capacity ammunition feeding device'—
"(A) means a magazine, belt, drum, feed strip, or similar device manufactured after the date of enactment of the Violent Crime Control and Law Enforcement Act of 1994 that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition; but
"(B) does not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition."

> a ban on ammunition magazines which hold more than 10 rounds, as well as any combination of parts from which such a magazine can be assembled.
>
> * * *
>
> High-capability magazine, for example, make it possible to fire a large number of rounds without re-loading, then to reload quickly when those rounds are spent…. [E]xpended magazines can be quickly replaced, so that a single person with a single assault weapon can easily fire literally hundreds of rounds within minutes.[17]

Other courts have recognized the potential public-safety impacts of large-capacity magazine bans. *See, e.g., Heller v. District of Columbia*, 70 F.3d 1244, 1264 (D.C. Cir. 12011) (stating that "evidence demonstrates that large-capacity magazines tend to pose a danger to innocent people and particularly to police officers" who may take advantage of shooter's pause to reload); *N.Y. State Rifle and Pistol Ass'n v. Cuomo*, 804 A.3d 242, 263-64 (2d Cir. 2015) ("[L]arge-capacity magazines result in more shots fired, persons wounded, and wounds per victim than do other gun attacks.") (quotation omitted)).

Finally, after considering all of above sources, if this Court finds the statutory language ambiguous or in genuine doubt, the rule of lenity requires that this criminal statute be interpreted in favor of the defendant to require operability. *Holloway v.*

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[17] U.S. House of Representatives, Committee on the Judiciary Report 103-489 on the Public Safety and Recreational Firearms Use Protection Act, May 2, 1994, at 19. A copy of this Committee report is contained in the Appendix to this brief as Appendix F.

United States, supra, 951 A.2d at 65.

For all these reasons, the trial court erred in concluding that operability was not an essential element of the offense, and convicting Mr. Robertson for possession of a large capacity ammunition feeding device with no evidence that it was operable and without finding that the device was operable. Mr. Robertson's conviction for possession of a large capacity ammunition feeding device pursuant to D.C. Code § 7-2506.01(b) must be reversed.

II. The Trial Court Erred in Denying the Motion to Suppress the Evidence Seized from Mr. Robertson After His Stop and Search

A. Applicable Legal Principles

In reviewing the denial of a motion to suppress in the Superior Court, this Court will give substantial deference to the trial court's factual findings, and will not disturb those factual findings if they are supported by substantial evidence, but the conclusions of law reached by the trial court are reviewed *de novo*. *Jones v. United States*, 972 A.2d 821, 824 (D.C. 2009); *Singleton v. United States*, 998 A.2d 295, 299 (D.C. 2010).

Generally, "[a] search conducted without a warrant is 'per se unreasonable' under the Fourth Amendment unless it falls within a few specific and well-established exceptions." *Basnueva v. United States*, 874 A.2d 363, 369 (D.C. 2005) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)). One such well-

established exception is a stop and frisk under *Terry v. Ohio*, 392 U.S. 1 (1968). A *Terry* stop must be justified by the police officer's reasonable, articulable suspicion that a crime has been or is being committed by the suspect. 392 U.S. at 30. "[T]he totality of the circumstances – the whole picture – must be taken into account." *United States v. Cortez*, 449 U.S. 411, 417 (1981). Flight alone is not sufficient to justify a *Terry* stop:

> [F]light cannot imply consciousness of guilt in all cases. Leaving a scene hastily may be inspired by innocent fear, or by a legitimate desire to avoid contact with the police. A citizen has as much prerogative to avoid the police as he does to avoid any other person, and his efforts to do so, without more, may not justify his detention . . .
>
> To provide grounds for suspicion . . . "the circumstances of the suspect's efforts to avoid the police must be such as 'permit[ ] a rational conclusion that flight indicated a consciousness of guilt.'"

Smith v. United States, 558 A.2d 312, 316 (D.C. 1989) (*en banc*) (citations omitted).

B. Legal Argument

All of Mr. Robertson's convictions must be reversed because the trial court erred in not suppressing the evidence seized from Mr. Robertson after his illegal stop and search without reasonable, articulable suspicion. The basis for the police stop and search of Mr. Robertson – the original citizen 911 call which contained only a

generic clothing description, Mr. Robertson's flight when the police approached, and the bulge later observed in his pocket – taken together did not constitute particularized, reasonable suspicion that he had committed any illegal activity.

This case is similar to *Miles v. United States*, *supra*, 181 A.3d 633, where this Court held that police did not have reasonable suspicion to support the detention of the defendant based on a 911 call from a "concerned citizen" describing a man "shooting a gun in the air," and defendant's flight after police officers approached him near the location of the alleged shooting. 181 A.3d at 639-40.

In Armstrong v. United States, 164 A.3d 102, 108 (D.C. 2017), this Court stated:

> [O]ur cases have made clear the difficulty we have supporting a finding of particularized reasonable suspicion when a lookout description is limited to a person's race and a generic clothing color description, especially when more than one suspect is indicated or there are other persons in the vicinity. *See, e.g.*, *In re S.B.*, 44 A.3d 948, 951 (D.C. 2012) (reversing conviction when lookout was for juvenile black male with white pants, messing about in a public park); *In re T.L.L.*, 729 A.2d at 340. (The court reversed T.L.L.'s conviction when his arrest was based on a lookout for black teenagers wearing dark clothing; one medium complexion, another dark brown complexion. "Without identifying information with respect to height, weight, facial hair or other distinguishing features, this description could have fit many if not most young black men.").

See also Mayo v. United States, 266 A.3d 244, 257 (D.C. 2022) (police did not have reasonable, articulable suspicion to stop and pat down a suspect who took flight after police officers exited their vehicle and asked if he had a gun in an area where

police had previously seized guns); *Cauthen v. United States*, 592 A.2d 1021 (D.C. 1991) (no reasonable suspicion where caller said three or four persons were at a certain corner selling drugs, and police drove through the relatively busy intersection 15 or 20 minutes later and saw three to five people disperse and begin walking briskly upon seeing them).

Similarly, in this case, the police did not have reasonable, articulable suspicion to stop and pat down Mr. Robinson, and the evidence subsequently seized from him – the gun, accompanying ammunition, and large capacity ammunition feeding device -- must be suppressed as the fruit of an illegal search and seizure, and Mr. Robertson's convictions must be revered.

CONCLUSION

WHEREFORE, for all the reasons set forth above, this Court should rule that Mr. Robertson's conviction for possession of a large capacity ammunition feeding device must be vacated because the government did not prove it was operable. In addition, all of Mr. Robertson's convictions must be reversed because the evidence used to secure his convictions was seized as a result of an unlawful stop and search of Mr. Robertson, without reasonable, articulable suspicion, and this evidence must therefore be suppressed. This case should be remanded for further proceedings consistent with the Court's mandate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copy of the foregoing Brief for Appellant was served electronically on counsel for Appellee, Chrisellen R. Kolb, Esquire, Appellate Division, U.S. Attorney's Office, this 27th day of June, 2023.

/S/Peter H. Meyers
Peter H. Meyers

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

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23-CF-175
Case Number(s)

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