IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 23 CF 387

BRIAN CARRUTH Appellant, vs. UNITED STATES, Appellee	2021 CF2 006934

APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA – CRIMINAL DIVISION FELONY BRANCH

BRIEF FOR APPELLANT

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STATEMENT OF THE CASE

On December 5, 2021, a member of the United States Secret Service Uniform Division was on routine patrol in the area of 18th Street and C Street, N.W. in the District of Columbia when they observed a red Silverado truck drive through a yellow light. As a result of this traffic stop, a Remington .783 single shot rifle was located inside the cab of the vehicle in a padlocked rifle case by the investigating officers. A box of ammunition was also located in the vehicle. As a result, Brian Carruth was arrested and charged with one count of Carrying a Rifle or Shotgun (Outside Home or Business) in violation of D.C. Code 22 § 4504 (a)(1) (2001) in case 2021 CF2 6934. On June 5, 2022, a Grand Jury sitting in the Superior Court of the District of Columbia Criminal Division returned a three-count indictment against Mr. Carruth charging him as follows: Count One Carrying a Rifle or Shotgun (Outside Home or Business) in violation of D.C. Code 22 § 4504(a)(1) (2001); Count Two Possession of Unregistered Firearm in violation of D.C. Code 7 § 2502.01(a) (2001); and Count Three Unlawful Possession of Ammunition D.C. Code 7 § 2506.01(a)(3) (2001).

A jury trial was held between February 22nd and February 28th, 2023, in front of the Honorable Michael O'Keefe, Associate Judge. At the conclusion of the trial a jury convicted Mr. Carruth on all three counts.

On April 27, 2023, Mr. Carruth was sentenced to 18 months of incarceration, execution of sentence suspended, 3 years supervised release suspended, and 18 months of supervised probation on Count One, 9 months of incarceration, execution of sentence suspended, 18 months of supervised probation on Count Two, and 9 months of incarceration, execution of sentence suspended, and 18 months of supervised probation on Count Three. All counts were ordered to run concurrent with each other. Mr. Carruth was also ordered to pay a total of $200 under the Victims of Crime Compensation Act.

On May 4, 2023, Mr. Carruth filed a timely notice of appeal.

STATEMENT OF FACTS

The Government's Evidence

On December 5, 2021, at about 3:00 p.m., Tyler Young of the Uniform Division of the United States Secret Service was on routine patrol in the area of 18th and C Street, N.W., in the District of Columbia, when he observed a red Chevrolet Silverado truck parked at the intersection of 18th and C Streets. From the vantage point of his cruiser, he could see that on top of the truck bed was a black case which he knew from past experience could store a rifle. During his testimony

in court, Officer Young stated that he was familiar with this type of case as he owned one himself. (02/23/23 Tr. 43-45).[1]

Upon viewing both the truck and the black case on top of the bed of the vehicle, Officer Young drove past the Silverado and then around the block so that he could reposition himself at the back of the truck. However, as soon as Officer Young pulled in back of the vehicle, the truck pulled out and started to move with the officer's car following. At one point the Silverado passed through a steady yellow light. Officer Young also recalled that at the time the truck went through the yellow light, he observed, what he thought, were expired license plates.[2] In response to both elements, the officer activated his emergency lights and proceeded to execute a traffic stop of the truck. (02/23/23 Tr. 45-47). As soon as Officer Young activated his emergency lights, he made a radio call to his central dispatch for backup as the truck came to a halt. When his backup subsequently arrived Officer Young exited his cruiser and proceeded to the driver side of the Silverado. The officer recalled that he initially asked the driver[3] of the truck whether there were any weapons in the truck or in the back, to which the driver responded that there were no weapons in the Silverado. The driver, later identified

[1] "Tr." proceeded by a date and followed by one or more-page numbers refers to the transcript of the trial court proceedings on the date and at the page(s) indicated.
[2] Officer Young testified later during the trial that he was ultimately mistaken that the license plates on the Silverado were expired. (02/23/23 Tr. 48).
[3] Officer Young identified in court Brian Carruth as the individual who was the driver of the Silverado. (02/23/23 Tr. 52).

as Brian Carruth, told the officer that the back of the vehicle only contained camping equipment. (02/23/23 Tr. 51).

After his initial inquiry of Mr. Carruth concerning whether there were any weapons inside the vehicle, Officer Young proceeded to request Mr. Carruth's driver's license and the vehicle's registration. Officer Young then returned to his police car and proceeded to call in the information to his central dispatch.[4] The officer testified that while he was calling in the information on the radio, Officer Pina, one of the responding backup officers who was standing on the passenger's side of the truck, was advised by Mr. Carruth that he had a rifle inside his truck. Officer Pina then removed Mr. Carruth from the truck and placed him in handcuffs. Shortly thereafter several police technicians arrived and began to process the items inside the Silverado. During the inventory of the truck's contents, a locked rifle case with a rifle inside was located inside the vehicle. (02/23/23 Tr. 52-53, 55). No weapons were ever located inside the box that sat atop the back of the truck which was the subject of Officer Young's initial concern. (02/23/23 Tr. 59). During his testimony, Officer Young recalled that Mr. Mr. Carruth was calm and cooperative. During their conversation the officer claimed that Mr. Carruth told him that he (Mr. Carruth) was in the Washington, D.C. area on a matter of

[4] The recording of Officer Young's radio call to the dispatch was introduced as Gov't's Exhibit #2.

national security with the Department of the Interior and that he was going to visit the White House. (02/23/23 Tr. 71-74).

One of the other officers who arrived as backup for Officer Young on December 5th was Officer Jacob Pina of the Uniformed division of the United States Secret Service. Officer Pina was patrolling the nearby area when he received a call for a traffic stop in progress. When he arrived at 18th and C Streets to assist Officer Young, Officer Pian walked up to the driver side window of the red Silverado. As Officer Young returned to his police vehicle so that he could call the driver's information in to their dispatch, Officer Pina initiated a conversation with the driver. He specifically asked the driver whether there were any weapons inside the vehicle. In response, the driver, who Officer Pina identified in court as Mr. Carruth, stated that there was a rifle inside the truck. It was at this point that Officer Pina removed Mr. Carruth from the vehicle and placed him in handcuffs. (02/23/23 Tr. 99-102).[5]

All the items located inside Mr. Carruth's truck were processed by Officer Jeffrey Adubato of the United States Secret Service Crime Scene Search Unit. Besides taking photos of the truck and the items located inside Mr. Carruth's

[5] The third officer who arrived at the scene as served as additional backup was Officer Derrick Fenwick of the Uniform Division of the United States Secret Service. His testimony was similar to that of Officer Pina. It was Officer Fenwick who stood by the passenger side window of Mr. Carruth's truck when Officer Young went back to his car to radio the dispatch. He could not hear what both Mr. Carruth and Officer Pina were discussing as Officer Pina took Officer Young's place at the driver's side window. He observed Officer Pina remove Mr. Carruth from the vehicle and it was he, Officer Fenwick, who read Mr. Carruth his *Miranda* rights. (02/23/23 Tr. 109-112).

Silverado, Officer Adubato noted that one of the physical items he discovered was a Remington long .780 rifle locked inside a padlocked rifle case that was located inside the cab of the truck and behind the passenger side of the truck along with two spent cartridges and a box of ammunition. Officer Adubato additionally testified that several pieces of paper that contained different writings were also located inside the cab of the truck. (02/23/23 Tr. 134-136).[6]

Finally, Doris Brown of the District of Columbia Metropolitan Police Department's Firearm Registration Unit testified that Mr. Carruth was not registered to possess a firearm in the District of Columbia, nor was he licensed to carry a firearm in the District of Columbia.[7]

Defense First Motion for Judgment of Acquittal

At the conclusion of the government's case-in-chief the defense made their first motion for judgment of acquittal. The basis for the defense's motion was that Mr. Carruth had a constitutional right to own, transport, and carry his legally registered in Ohio firearm based on the United States Supreme Court decision in *N.Y.S. Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022) irrespective of any licensing requirements in any state. (02/27/23 Tr. 7-9).

[6] Photos of the rifle case and the rifle inside the case were introduced as Gov't's Exhibits #3-7. A photo of the rifle's receipt showing purchase in the state of Ohio was introduced as Gov't's Exhibit #13-14, and a photo of the box of ammunition was introduced as Gov't's Exhibit #18. The physical rifle was introduced as Gov't's Exhibit #32, and the ammunition as Exhibit #34.

[7] The Certificate of No Firearms Registration was introduced as Gov't's Exhibit #35, and the Certificate of No License to Carry was introduced as Gov't's Exhibit #35A.

The defense further pointed out that in terms of satisfying all the elements of D.C. Code 22 § 4504 (a)(1), the police recovered the firearm in question locked securely within a padlocked rifle case behind the passenger side of Mr. Carruth's Silverado and was by no means readily accessible to him as he was passing through the District of Columbia. (02/27/23 Tr. 30).

The trial court denied the motion. It held that, in viewing the evidence in the light most favorable to the government, there was sufficient evidence that the rifle in Mr. Carruth's truck was not licensed in the District of Columbia, and it was possessed not by either mistake or accident. The ruling also held that he carried it outside of his home or place of business and there was evidence that the firearm was not registered in the District of Columbia, as required under the law. Finally, it held that there was sufficient evidence that Mr. Carruth was in possession of ammunition, and that he did not have a registration certificate for a firearm of the same caliber. The trial court then went on to rule that although the record was clear that the rifle was in a locked container, it was still directly behind the driver's seat within arm's reach. The court recalled that Officer Young stated that it was clear that the locked rifle case was not necessarily inaccessible, even though one had to push away all the items that were on top of it. Lastly, the court held that the 38 rounds of ammunition were in close proximity to the rifle. For these reasons the trial court denied the defense's motion. (02/27/23 Tr. 41-43).

The Defense's Evidence

Mr. Carruth choose to testify on his own behalf. Prior to his testimony the trial court proceeded with its vior dire as required under *Boyd v. United States*, 586 A.2d 670 (D.C. 1991).

Mr. Carruth testified that on December 5, 2021, he was arrested in the District of Columbia for hunting and camping equipment that was located in the interior of his truck. Mr. Carruth recalled that prior to his arrest he was in the process of selling his home in Ohio. He was travelling through the District of Columbia because of a career opportunity with the Department of Interior that was posted on the internet. The reason he was in the area at the time was due to the fact that he wanted to check out the sites in the District of Columbia and to see for himself the area and whether he wanted to live here. More importantly, at the time he had no intent in staying in the District of Columbia. He testified that he was only in the District of Columbia for about 20 minutes when he was stopped by the Secret Service. (02/27/23 Tr. 47-49). Because his house in Ohio was under contract at the time most of his personal belongings with him at the time. This included camping equipment which was locked up in a box that sat atop the bed of his truck. (02/27/23 Tr. 51-53). The rifle that he had recently purchased was in a padlocked

secured case that was located behind the passenger side of his vehicle. Mr. Carruth explained that both the bolt and firing mechanism of the rifle were separated from the rifle thus making the firearm non-operable at the time. The ammunition was kept in a separate container on the other side of the vehicle's cab. (02/27/23 Tr. 57-58).

At the time that Mr. Carruth purchased his rifle in Ohio he filled out all the required paperwork to register the firearm in the state. The date of the purchase was April 29th, 2021. (02/27/23 Tr. 69-71). He recalled that when he was initially stopped by the police, he was extremely cooperative and voluntarily complied with all the officer's requests such as turning over his driver's license and car registration. (02/23/23 Tr. 72-74). He explained that although he was in the District of Columbia at the time, he was ultimately on his way to Texas and that he had recently leased an apartment there. (02/23/23 Tr. 75). He was also enrolled at the time at the University of Ashland in Ohio for MBA courses. Many of the papers that the police discovered in the Silverado's inner cab were related to the courses on organization that he was taking and were part of his writing assignments. (02/23/23 Tr. 76-78). During cross-examination by the United States, while Mr. Carruth agreed that the rifle was not registered in the District of Columbia, he was still under the belief that his registration in Ohio had reciprocity. (02/27/243 Tr. 90). As to the writings that were found inside the cab of his truck,

he stated that they had no connection to his trip to the District of Columbia. His plan was as soon as he was finished with his visit, he planned to return to Ohio in order to check on the sale of his house. (02/27/23 Tr. 134-136).

Rule on Witnesses Issue

During the government's cross-examination of Mr. Carruth, the trial court ordered an afternoon break with the intent for the government to return to its cross-examination. Upon the court's declaration of the recess, the government requested that "the Court to instruct the witness [Mr. Carruth] not to discuss his testimony, as he's still testifying, with his counsel." In response the trial court ordered "Mr. Carruth, you should not be speaking to your lawyer about the substance of your testimony." The defense strongly objected and made a clear desire to confer with Mr. Carruth in order to preserve its deprivation of assistance of counsel claim. The following colloquy took place:

> The defense: "Well, because my client has a constitutional right to discuss testimony at any time, whether he's on the stand or not, with his attorney. And I will brief the issue if Your Honor wishes. But he has an absolute right to discuss what he has said on the stand, what it means. I mustn't coach him, I also mustn't rehearse him, but he is able to discuss what has happened, why it's happened, what the theory of the case is, and so on and so forth. That is right to counsel, Your Honor, the Sixth Amendment."
>
> The trial court: "Well, he's in the middle of testifying, so he can't stop and say I need to talk to my lawyer about the substance of my testimony in the middle of his testimony; right?"

> The defense: "Well, that's not what we have here. We have a period of time when my client at the lunch hour has every right to discuss the case and what went on. What he doesn't have a right to, perhaps -- let me leave it there. I think he has an absolute right, Your Honor.
>
> The trial court: All right. Don't discuss your testimony with anyone, please. Thank you. We'll see you soon.

At the conclusion of the colloquy, the trial court maintained its ruling and ordered Mr. Carruth not to speak with his counsel. (02/27/23 Tr. 105-106)

The Defense's Renewal of its Motion for Judgment of Acquittal

Upon completion of Mr. Carruth's testimony, the defense renewed its motion for judgement of acquittal. In summarizing its argument, the defense, noting the different standard that now applied to its motion, renewed all its objections to Mr. Carruth's prosecution as violative of the Second Amendment of the Constitution. It was the defense's position that the United States could not prosecute Mr. Carruth due to his Second Amendment rights. Specifically addressing the charges under D.C. Code 22 § 4504 (a)(1), the defense asserted that Mr. Carruth's intent at the time of his arrest was to pass through the District of Columbia and his possession of the rifle was within an exception to the statute. Nor was the firearm, according to the defense, truly accessible as it was positioned securely in a padlocked case. In the defense's view there is no evidence that a juror

could reasonably find beyond a reasonable doubt to support the government's case. (02/27/23 Tr. 145-146).

The trial court, as it had done previously, denied the defense's motion. It held that there was sufficient evidence from which a reasonable jury could find Mr. Carruth guilty of each of the separate charges he was alleged to have committed. Even, if taking Mr. Carruth's version of events at his word, a reasonable juror could still find him guilty of the offense of possessing an unlicensed rifle in the District of Columbia and possessing an unregistered firearm in the District of Columbia. It would be up to the jury to decide if they can unanimously find that the defense of lawful transportation of a firearm had been met. For these reasons, the trial court denied the motion. (02/27/23 Tr. 146-150).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING MR. CARRUTH'S MOTION FOR JUDGMENT OF ACQUITTAL

Standard of Review

This court will review a claim of insufficiency of evidence, as Mr. Carruth is claiming here, *de novo*. It will apply the same standard that the trial court applied in its ruling on Mr. Carruth's motion for judgment of acquittal. *Coffin v. United States*, 917 A.2d 1089, 1091 (D.C. 2007), *citing*, *Robinson v. United States*, 797

A.2d 698, 705 (D.C. 2002) and *United States v. Bamiduro*, 718 A.2d 547, 550 (D.C. 1998). In considering the sufficiency of the evidence, this court will view the evidence presented at trial in the light most favorable to the government's position. While the government must introduce sufficient evidence to sustain a conviction and that it must be sufficient to persuade a jury to reach a verdict of guilty beyond a reasonable doubt, it does not need to compel such a verdict at the time a motion for judgment of acquittal is made. Nor for that matter is the government required to negate every possible inference of innocence before Mr. Carruth can be found guilty of an offense beyond a reasonable doubt. *Chaconas v. United States*, 326 A.2d 792, 797-98 (D.C. 1974). *citations omitted.* To prevail on his sufficiency of the evidence claim, Mr.Carruth has the burden of establishing "that the government presented no evidence upon which a reasonable mind could find guilt beyond a reasonable doubt. *Coffin*, 917 A.2d at 1091, *citing*, *Mihas v. United States*, 618 A.2d 197, 200 (D.C. 1992). The same standard is applied in ruling on a motion for acquittal at the end of the entire case. *Chaconas*, at 798 (D.C. 1974).

Analysis

D.C. Code § 22-4504 states as follows:

> (a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued

> pursuant to District of Columbia law, or any deadly or dangerous weapon. Whoever violates this section shall be punished as provided in § 22-4515, except that:
> (1) A person who violates this section by carrying a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon, in a place other than the person's dwelling place, place of business, or on other land possessed by the person, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both

In addition, D.C. Code § 22-4504.02 provides:

> a) A person may not transport a firearm unless the person:
> (1) Is not otherwise prohibited by law from transporting, shipping, or receiving the firearm;
> (2) Is transporting the firearm for a lawful purpose from a place where the person may lawfully possess and carry the firearm to another place where the person may lawfully possess and carry the firearm; and
> (3) Transports the firearm in accordance with this section.
> (b)
> (1) If the transportation of the firearm is by a vehicle, *the firearm shall be unloaded, and neither the firearm nor any ammunition being transported shall be readily accessible or directly accessible from the passenger compartment of the transporting vehicle*.
> (2) If the transporting vehicle does not have a compartment separate from the driver's compartment, *the firearm or ammunition shall be contained in a locked container other than the glove compartment or console, and the firearm shall be unloaded*.
> (c) If the transportation of the firearm is in a manner other than in a vehicle, the firearm shall be:
> (1) Unloaded;
> (2) Inside a locked container; and
> (3) Separate from any ammunition.

For this court to uphold the trial court’s denial of Mr. Carruth’s motion to dismiss, and to not uphold his lack of sufficiency of evidence claim under D.C.

Code § 22-4504, it would have to find that he was not eligible for the exception under D.C. Code § 22-4504.02(b)(1)-(2).

During Mr. Carruth's trial, both the defense and the government were in agreement that Mr. Carruth had purchased and registered his rifle legally in the state of Ohio. Nor for that matter does Mr. Carruth believe that the United States presented sufficient evidence, or specifically address, that he was not "transporting" the firearm according to D.C. Code § 22-4504.02. As the government stated in their closing, "I would submit that you [the jury] don't need to get to that question because the evidence has shown that he wasn't transporting the firearm in accordance with the requirements of the section." (02/27/23 Tr. 179-180). What the government did concentrate on, and what this court needs to consider, is whether, under D.C. Code § 22-4504.02 (b)(1)-(2), even though Mr. Carruth transported the rifle in his Silverado "unloaded" and securely locked, was the rifle still "readily accessible or directly accessible from the passenger compartment of the transporting vehicle." It was the government's position that it was. In their closing the prosecution asserted to the jury, that "the Government submits that the evidence has shown and your common sense can tell you that in a car, you've reached for things [the rifle] behind you, that it was within his reach." (02/23/27 Tr. 181). Mr. Carruth would strongly disagree with this position. As a matter of law, the rifle, in Mr. Carruth's circumstances, was not "accessible"

according to the dictates of the statute in question. Thus, the motion should have been granted.

In applying the "convenient of access and within reach" standard, this court must keep in mind the policy underlying D.C. Code § 22-4504. As this court has previously held, this statute was intended "to prevent a person's having a pistol or dangerous weapon so near him or her that he or she could *promptly* [emphasis added] use it, if prompted to do so by any violent motive." Therefore, this court's focus must be on whether the location of the firearm presented an obstacle such as to deny Mr. Carruth convenient access to the weapon or place it beyond his reach. *White v. United States*, 714 A.2d 115, 119-20 (D.C. 1998), *citing*, *(Pomeroy) Brown v. United States*, 30 F.2d 474 (D.C. Cir. 1929).

While the concepts of "possession" and "carrying on or about one's person" are indeed similar, they are not identical. *Henderson v. United States*, 687 A.2d 918, 921 (D.C. 1996). And, although Mr. Carruth would agree that had the rifle been placed in a locked glove compartment or console it would not have qualified for an exemption, it is his position that the evidence was clear that the rifle was inaccessible and qualifying for an exception. During Mr. Carruth's trial, Officer Adubato testified that the rifle he was assigned to recover was locked inside a padlocked rifle case that was located inside the cab and behind the passenger side of the truck. (02/23/23 Tr. 134-136). This was not the fact pattern that this court

faced in *White v. United States*, 714 A.2d at 120 where this court held that a firearm located in an ice cream truck, which was specifically designed to allow the driver to walk easily to the rear section, just a few steps away from the driver's seat, was sufficient for a jury to reasonably find that the location of the gun did not present any obstacle denying the defendant convenient access to the weapon or placing it beyond his reach and not qualifying for the exception. D.C. Code § 22-4504.02 (b)(1)-(2). As Mr. Carruth testified at trial, and which was not disproven by the government, not only was his rifled padlocked inside a secure rifle case, both the firing pin and the bolt action were physically separated from the rifle. The firearm was not physically active. (02/27/23 Tr. 57-58). Plus, as Mr. Carruth highlighted under cross-examination, the key to the padlock on the rifle case was on the same keychain as the key to his truck. (02/27/23 Tr. 91). Rather than the circumstances in *White*, these additional facts place Mr. Carruth's circumstances in the realm of the facts that this court faced in *Henderson v. United States*.

In *Henderson*, the focus of the case was a handgun securely locked in the trunk of the defendant's car. The facts showed that the only way to gain access to the weapon, was for the defendant to alight from the car, walk to the trunk, open the trunk, and ultimately pick up the pistol. When faced with this specific type of fact pattern, this court held that, viewing the evidence in the light most favorable to the prosecution, and drawing all reasonable inferences in the government's favor, the

location of the pistol in a locked trunk presented an obstacle to the defendant's ready access. Under this fact pattern this court held that the weapon was not convenient of access and within one's reach. Therefore, the prosecution thus failed to prove that the pistol was "on or about" the defendant's person. *Henderson*, 687 A.2d at 922. Consequently, Mr. Carruth respectfully submits to this court that at the time the United States Secret Service originally observed his vehicle, with the padlock key securely fastened to the keys in his ignition, it would have been physically impossible to yank the padlock key from the ignition in order to open his padlocked rifle case. Nor could he open the padlocked case and reassemble to rifle in a way to "promptly use it, if prompted to do so by any violent motive." When a defendant relies on a statutory exception as an affirmative defense to a criminal charge, the burden is on the defendant to bring himself or herself within the exception. *Abed v. United States*, 278 A.3d 114, 127 (D.C. 2022) (citations omitted). Mr. Carruth has done that here. For these reasons this court must reverse the trial court's denial of his motion for acquittal and remand the case back to the trial court and vacate his conviction.

II. THE TRIAL COURT'S RULE ON WITNESS' ORDER FOR MR. CARRUTH NOT TO DISCUSS HIS TESTIMONY WITH HIS COUNSEL VIOLATED HIS RIGHTS UNDER THE SIXTH AMENDMENT

Standard of Review

While a decision on the rule of witnesses may be deemed discretionary for a trial court, a violation of the Sixth Amendment is one of a statutory interpretation and this court will review such decisions *de novo*. *See*, *Myerson v. United States*, 98 A.3d 192, 197 (D.C. 2014).[8]

Analysis

During his trial, and especially during his direct and cross-examined testimony, Mr. Carruth possessed a clear, and unambiguous, right to counsel under the Sixth Amendment. *Riley v. United States*, 923 A.2d 868, 880 (D.C. 2007), *citing*, *Kirby v. Illinois*, 406 U.S. 682, 688-689 (1972), *United States v. Gouveia*, 467 U.S. 180, 187 (1984), *United States v. Moore*, 122 F.3d 1154, 1156 (8th Cir.1997) and *United States v. Duvall*, 537 F.2d 15, 18-19 (2d Cir.1976). ("It has been settled law for thirty-five years that a person's Sixth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against that person by way of formal charge, preliminary hearing, indictment, information or arraignment."). As other courts have stated, the Sixth Amendment provides that an accused such as Mr. Carruth shall enjoy a full, and unincumbered, right to have the assistance of their counsel for their defense. This right, fundamental to our system of justice, is meant to assure fairness in the

[8] Undersigned counsel would like to alert this court that this similar issue is pending a decision in *Jeffrey Petty v. United States* No. 22-CM-642 and may be determinative on this issue.

adversary criminal process. The Supreme Court has been especially responsive to claims where the court or government conduct has rendered a counsel's assistance to an accused ineffective. *See*, *State v. Mebane*, 204 Conn. 585, 589-90 (Conn. 1987), *citing, Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), *Glasser v. United States*, 315 U.S. 60, 69-70, 75-76 (1942), *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938), and *United States v. Morrison*, 449 U.S. 361, 364, *reh. denied*, 450 U.S. 960 (1981), *Moore v. Illinois*, 434 U.S. 220 (1977), *Geders v. United States*, 425 U.S. 80 (1976), *Herring v. New York*, 422 U.S. 853 (1975), *Gilbert v. California*, 388 U.S. 263 (1967), United States v. Wade, 388 U.S. 218 (1967), *Massiah v. United States*, 377 U.S. 201 (1964).

This court has previously ruled that a trial court's order prohibiting a defendant from conferring with his counsel during an overnight (or other significant) interruption of his testimony is a denial of the defendant's Sixth Amendment right to counsel that requires reversal without any showing of prejudice." *Martin v. United States*, 991 A.2d 791, 793 (D.C. 2010). In addition, even in situations where such orders are more limited where they prohibit a defendant from discussing his testimony with his counsel during a substantial recess, this court has ruled that such holdings would not survive a constitutional challenge. That is because a defendant has the right to discuss the entire case,

including his own testimony, with his trial attorney. *Jackson v. United States*, 420 A.2d 1202, 1205 (D.C. 1979).

When faced with a similar fact pattern such as what occurred with Mr. Carruth at trial, the United States has argued that although a trial court's order prohibiting a defendant from discussing his testimony with defense counsel during the overnight recess violates his Sixth Amendment right to counsel, the effect of the order on a defendant's ability to meaningfully communicate with counsel can be so trivial that it does not amount to a constitutional violation.[9] In response to this argument Mr. Carruth asserts that such a position is contrary to the purpose of the Sixth Amendment and the position of many state and federal courts. "Trivial" is both relative and subjective term and one that cannot provide a clear bright-line test for this court, let alone any future litigant.[10] Such an argument, as is expected the government will press here, was similar to the government's argument in *Mudd v. United States*, 798 F.2d 1509 (D.C. Cir. 1986). The *Mudd* court, in discussing "blanket" orders by the trial court not to discuss the case with counsel, held that such orders are clearly violative of the Sixth Amendment. Citing *Geders v. United States*, 425 U.S. at 89, the district court stated that such orders can deprive a defendant of the "guiding hand of counsel" at a critical point in the proceeding. As

[9] See the United States' position in *Jeffrey Petty v. United States* No. 22-CM-642 (Gov't's Brief p.11).
[10] Mr. Carruth would submit that an order that states, "Don't discuss your testimony with anyone" (02/27/23 Tr. 106) is not in fact limited, but unconstitutionally broad. Not only does it prevent defense counsel from discussing legal strategy, but everything including, but not limited to, advice such as "talk more slowly," or "please relax."

the *Mudd* court noted, subsequent cases and courts have liberally construed the holding of *Genders*. Courts have extended the holding to strike down orders restricting all discussions between attorney and client during a one-hour lunch recess, and during brief routine recesses in the trial day. The clear message being that a trial court may not place a blanket prohibition on all attorney/client contact, no matter how brief the trial recess. *Mudd*, 798 F.2d 1509, 1511 (D.C. Cir. 1986). In striking down the government's position that trial court bars on only discussing a defendant's testimony with his counsel was different than a blanket denial, the *Mudd* court pointed out that such limited orders cannot cure Sixth Amendment constitutional defects. According to *Mudd*, the Supreme Court did not suggest that an order restricting discussion to all matters, except testimony, would be permissible, and therefore the only logical implication is that the Supreme Court also meant to forbid prohibitions on attorney/defendant discussions of the defendant's testimony during a substantial recess, not just blanket prohibitions during such a recess. *Id*., at1512 (citations omitted). It is Mr. Carruth's position that the focus on such prohibitions by this court should not be based on duration of the recess, or whether the order involved a specified limit on the discussions between defendants and their counsel, but whether it was a critical point where a defendant would be reasonably expected to discuss matters of import with their counsel. And that is exactly what happened in Mr. Carruth's trial. The crime of

which Mr. Carruth was charged under D.C. Code § 22-4504 relies on whether his possession of the firearm was under a valid exception. Mr. Carruth was cross-examined extensively by the United States on this exception; a point the United States would most certainly concede here. Such prohibitions on discussing matters with counsel, no matter what their length or specified limits, cannot be deemed trivial by this court. The bottom line is that a defendant has a right "to unrestricted access to his lawyer for advice on a variety of trial-related matters" during the course of a trial. *Harris v. United States*, 594 A.2d 546, 548 (D.C. 1991). All that Mr. Carruth need demonstrate is that the prohibition actually prevented the opportunity to confer with his counsel. *Crutchfield v. Wainwrigh*t, 803 F.2d 1103, 1110 (11th Cir. 1986). That is exactly what Mr. Carruth made clear during his trial. And that is exactly why this error was both structural and a *per se* violation of Mr. Carruth's Sixth Amendment right to counsel that requires reversal without any showing of prejudice. *See, Martin*, 991 A.2d at 793-794. (Deprivation of counsel's assistance is presumptively prejudicial and, this right being transcendent, inherently constitutes plain error.).[11]

III. D.C. CODE 22 § 4504 (a)(1) (2001) IS UNCONSTITUTIONAL AS APPLIED TO MR. CARRUTH'S CONVICTION

[11] *See, United States v. Triumph Capital Group, Inc.*, 487 F.3d 124 (2nd Cir. 2007), *citing*, *Jones v. Vacco*, 126 F.3d 408, 416 (2d Cir.1997). A violation of a defendant's Sixth Amendment right to counsel constitutes a structural defect which defies harmless error analysis and requires automatic reversal.

Standard of Review

This court reviews a matter of statutory interpretation *de novo*. *In re Estate of Greene*, 829 A.2d 506, 508 (D.C. 2003).

Analysis

As this court is aware, the Supreme Court relatively recently decided that the Second Amendment "guaranteed to 'all Americans' the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions." *See, N.Y.S. Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. at 2156. The Supreme Court in *Bruen* held as invalid a New York statute requiring a firearm registrant to prove "proper cause" in order to obtain a license to carry a concealed firearm outside his home or place of business for self-defense. The Court defined the requirement of "proper cause" in the New York law to be a standard interpreted as requiring a showing of "special need." *Id.*, 142 S.Ct. at 2122, 2132. Because New York prohibited the open carry of firearms, the only way to carry a firearm would be to attain a concealed-carry license. *Id*. at 2169. This the Supreme Court found unacceptable. The *Bruen* Court held that under these circumstances the state of New York had not met its "burden to identify an American tradition justifying the State's proper-cause requirement," and held the law unconstitutional "in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." *Id*. at 2156. That being said, the *Bruen* Court did

not disturb the prior understanding that laws prohibiting only concealed carry of firearms were constitutional. *Id.* at 2150. As *Bruen* stated, there is "no historical basis for concluding that the pre-existing right enshrined in the Second Amendment permitted broad prohibitions on all forms of public carry" *Id*. at 2145. But it is logical to assume that there is historical evidence that the Second Amendment most certainly enshrined the right to carry a firearm in terms of transportation, and transporting such firearm from one legal place to another. This would be true even if the stay in the District of Columbia is brief as was Mr. Carruth's circumstances. While the historical evidence of legislation in the United States does demonstrate that the manner of public carry is subject to reasonable regulation, states could still lawfully eliminate one kind of public carry-concealed carry-so long as they left open the option to carry openly. *Id.* at 2147-2148. The fact that Mr. Carruth had lawfully registered his firearm in the state of Ohio, and therefore had a right to carry that firearm in the state of Ohio, it is both an unfair and undue burden to have him register his weapon in the District of Columbia if his ultimate goal was to travel to another jurisdiction where such similar carry was legal. Therefore, the statute D.C. Code § 22-4504, as applied to Mr. Carruth under the present fact pattern, is unconstitutional and violative of his Second Amendment rights. This per se violation requires reversal of his conviction by this court.

CONCLUSION

For all these reasons, and any others that may appear to this Court, Mr. Carruth would respectfully request this Court reverse his verdict of guilty and remand the case back for further proceedings as directed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief for Appellant was served by electronic means, through the Court's EFS system, upon counsel for Appellee, this 5th day of January 2024 to:
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Court of Appeals

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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.

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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
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(6) Financial account numbers

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

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(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-387

Case Number(s)

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