ORAL ARGUMENT SCHEDULED FOR FEBRUARY 1, 2

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

REPY BRIEF FOR APPELLANT WAYNE D. ROBERTSON

Peter H. Meyers
Bar No. 26443
2000 G Street, N.W.
Washington, D.C. 20052
(202) 994-7463
PMeyers@law.gwu.edu
Counsel for Appellant
Appointed by the Court

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

CONCLUSION 11

CERTIFICATE OF SERVICE 12

REDACTION CERTIFICATE DISCLOSURE FORM 13

TABLE OF AUTHORITIES

CASES: **Page(s)**

**Bruce v. United States*, ___ A.3d ___, 2023 WL 8264178 (D.C. Nov. 30, 2023) 9-10

In re D.F., 70 A.3d 240 (D.C. 2013) 7

Lee v. United States, 402 A.2d 840 (D.C. 1979) 7

Moore v. United States, 927 A.2d 1040 (D.C. 2007) 7

Strong v. United States, 581 A.2d 383 (D.C. 1990) 7

---

*Cases and other authorities chiefly relied on are marked with an asterisk.

TABLE OF AUTHORITIES (Continued)

CASES (Continued): **Page(s)**

Washington v. United States, 498 A.2d 247 (D.C. 1985) ……. 7

Washington v. D.C. Dep't of Pub. Works, 954 A.2d 945 (D.C. 2008) ……. 7

OTHER AUTHORITIES:

*D.C. Code § 7-2506.01(b) (2001 ed.) …… *passim*

*The Inoperable Pistol Amendment Act of 2008, § 2(a)(1), 2008 District of Columbia Laws 17-388 (Act 17-690) ……..... 8

INTRODUCTION

This Reply Brief responds to the argument made in the government's brief that it is unnecessary for the government to prove that a "large capacity ammunition feeding device," as that term is defined in D.C. Code § 7-2506.01(b) (2001 ed.), is "operable" for its possession to be a crime under the statute. This "operability" issue with respect to the large capacity ammunition feeding device statute is an issue of first impression that has not previously been addressed by this Court.

SUMMARY OF ARGUMENT

The definition of a "large capacity ammunition feeding device" contained in D.C. Code § 7-2506.01(b) requires that the device be operable in the sense that it is in fact **capable** of holding, not merely designed to hold, more than 10 rounds of ammunition.

The trial court's oral ruling on the "operability" issue concluded that there was insufficient evidence that the magazine in this case could be "readily restored… to accept, more than 10 rounds of ammunition" because it was uncertain from the stipulation submitted by the parties that the protruding spring and baseplate could be placed back into the magazine, and if they could be placed back in, whether additional parts would be necessary to allow the device to be capable of accepting more than 10 rounds of ammunition. Tr. 12/15/22 at 11. It defies logic for the trial

court to further hold, and the government to argue in this appeal, that a device that the trial court held **cannot** be readily **restored** to have the capacity to accept more than 10 rounds of ammunition, is nevertheless a device that **does have** the capacity to accept more than 10 rounds of ammunition.

The statutory scheme and the legislative history support the additional requirement that the magazine be operable in the sense that it has the present capacity to feed bullets into the weapon.

ARGUMENT

There are two serious flaws in the argument made in the government's brief with respect to the "operability" issue.

1. The **first flaw** in the government's argument involves the stipulated facts and the statutory definition of a large capacity ammunition feeding device (hereafter sometimes referred to simply as the "device").

The factual stipulation submitted by the parties relating to the large capacity ammunition feeding device was the only evidence introduced with respect to this issue. The stipulation stated in pertinent part as follows, R. 19 at 1, para. 3:[1]

> The defense and government agree that… [w]hen the firearm was recovered from the defendant, the spring and base plate of

[1] "R." Refers to the Record on appeal. Transcripts are cited to the date of the proceeding and the page number, *e.g.*, Tr. 12/15/22 at 11.

> 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.

This stipulation makes clear that when the magazine was recovered from Mr. Robertson, the spring and the base plate of the magazine "were protruding from the bottom of the magazine." A picture of the magazine, with the spring and base plate sticking out the bottom, is contained as Appendix A to the stipulation. *See* R. 19 at App. A.

The statutory language of D.C. Code § 7-2506.01(b), states as follows:

> 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 (emphasis added).

The trial court's oral ruling on the "operability" issue concluded that there was insufficient evidence that the device could be "readily restored… to accept, more than 10 rounds of ammunition" because it was uncertain from the stipulation submitted by the parties that the protruding spring and baseplate could be placed back into the magazine, and if they could be placed back in, whether additional parts

would be necessary to allow the device to be capable of accepting more than 10 rounds of ammunition. Tr. 12/15/22 at 11. The trial court concluded that it could not determine from the stipulated facts whether additional components were necessary for the device to be put together to have the capacity to accept more than 10 rounds of ammunition, and on that basis the trial court rejected the government's alternative argument that the device Mr. Robertson possessed was a large capacity ammunition feeding device. *Id.* The trial court stated that "there is a crucial connecting fact that's missing from the stipulated facts" -- the stipulation did not specify that the protruding spring and base plate comprised all of the component parts necessary for the magazine to become "readily restored or converted to accept more than 10 rounds of ammunition." *Id.* at 9, 11.

The government's brief in this appeal does not challenge the trial court's conclusion that the magazine in this case did not qualify as a large capacity ammunition feeding device on the basis that it could be "readily restored" to accept more than 10 rounds of ammunition.

The trial court convicted Mr. Robertson of the offense based on the alternative statutory definition of a large capacity ammunition feeding device, that it had the "capacity" to accept more than 10 rounds of ammunition, and that it was unnecessary for the government to prove that the device was "operable." Tr. 12/15/22 at 7. The government's brief in this appeal reiterates this argument to

support the affirmance of Mr. Robertson's conviction. Gov. Br. at 26.

However, this decision by the trial court is fatally flawed because of a logical inconsistency: if, as the trial court found, there was insufficient evidence that the magazine in this case with a protruding spring and baseplate could be readily **restored** to have the capacity to accept more than 10 rounds of ammunition, it is illogical for the trial court to further find that the magazine in this case **had** the capacity to accept more than 10 rounds of ammunition. It necessarily follows from the trial court's conclusion that there was insufficient evidence to find that the magazine could be restored to accept more than 10 rounds of ammunition that the magazine in its present condition could not be shown to be currently capable of accepting more than 10 rounds of ammunition.

The trial court's ruling did not specify what definition it was giving to the term "operable," but it appears that the trial court confused two possible meanings for the term. One meaning is that the device was operable in the sense that it was **designed to have** the capacity and theoretically had the capacity to hold more than 10 bullets. That is the meaning that the trial court appeared to adopt here. But the definition of "capacity" and "operability" more consistent with the statutory definitions contained in § 7-2506.01(b) is that the device is in fact capable, it **does in fact have the capacity**, to hold more than 10 bullets. The language of § 7-2506.01(b), defines the large capacity ammunition device as follows:

> 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** (emphasis added).

This language supports the view that actual capacity, not theoretically designed capacity is the capacity and operability that the D.C. Council intended. This is further reinforced by the very next sentence of the statutory definition which indicates that certain devices are not included within the definition of a large capacity ammunition feeding device:

> 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).

The key words in this provision are "capable of operating only with .22 rimfire ammunition." These words further reinforce that the concept of "operability" applicable in this case is not some theoretical design capacity to hold more than 10 bullets, but the actual "operating" ability of the device to hold more than 10 bullets.

All of the considerations discussed above point to the conclusion that the device in this case did not have the capacity to actually hold more than 10 rounds of ammunition, and that it was not operable in this sense. If this Court were to find, however, that ambiguity remains as to which concept of "operability" is applicable to the statutory definitions contained in § 7-2506.01(b), "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).

The concept of "operability" applicable to the statutory offense in this case distinguishes this case from the prior weapons operability cases decided by this Court. In all those prior cases, the operability issue involved whether the weapon could fire or expel bullets. *See Lee v. United States*, 402 A.2d 840, 841 (D.C. 1979) (operability required to convict of carrying a pistol without a license); *Washington v. United States*, 498 A.2d 247, 249 (D.C. 1985) (operability required to convict of possession of a shotgun or sawed-off shotgun); *Strong v. United States*, 581 A.2d 383, 386 (D.C. 1990) (operability required to convict of carrying a "dangerous weapon"); *Moore v. United States*, 927 A.2d 1040, 1060 (D.C. 2007) (operability required to convict of possessing a machine gun); *In re D.F.*, 70 A.3d 240, 244-45 (D.C. 2013) (operability not required to convict of possessing a B-B gun).

All of these cases turned on whether the weapons were "operable" in terms of whether they could expel bullets. In this case, by contrast, the statutory provision on possession of a large capacity ammunition feeding device turns on whether the device is "operable" in the sense that it has the actual "capacity" to hold more than ten rounds of ammunition.

It is also significant that **on the very same day** that the District of Columbia Council adopted legislation amending the city's other weapons statutes to specify

that offenses involving carrying a pistol without a license, carrying a dangerous weapon, and possession of a shotgun, sawed-off shotgun, or a machine gun were crimes "regardless of operability",[2] the D.C. Council also adopted the prohibition on possession on a large capacity ammunition feeding device without containing the same language. 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).

For all these reasons, the District's large capacity ammunition feeding device statute requires the government to prove that the device is operable in the sense that it is capable of holding more than 10 rounds of ammunition. Because the government failed to do so in this case, Mr. Robertson's conviction for possession of the large capacity ammunition feeding device must be vacated.

* * *

2. The **second flaw** in the government's argument is that the government would limit the operability requirement to the capacity of the device to hold more than 10 rounds of ammunition. The operability requirement should also include the

[2] 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 these specified weapons "regardless of operability").

capacity of the device to feed the bullets into the weapon, as defense counsel argued in the trial court. R. 21 at 4. Such a conclusion is supported by the statutory scheme and the statute's legislative history. The statutory provision involved in this case prohibits possession of a large capacity ammunition **feeding** device, not possession of a large capacity ammunition **holding** device. *See* D.C. Code § 7-2506.01(b).

Moreover, the legislative history of the statute makes clear that the purpose of statute was not merely to prohibit devices that held more than 10 bullets, but devices that facilitated the rapid firing of those bullets. This legislative history was discussed in this Court's most recent decision involving the large capacity ammunition feeding device prohibition contained in D.C. Code § 7-2506.01(b), *Bruce v. United States*, ___ A.3d ___, 2023 WL 8264178 (D.C. Nov. 30, 2023):

> The legislative history explains that the purpose of the bill was "to prevent the ability of an individual to fire a large quantity of ammunition without having to pause to reload." Firearms Registration Amendment Act of 2008, D.C. Council, Report on Bill 17-843 at 2 (Nov. 25, 2008). The committee recognized that "magazines holding[ ] over 10 rounds are more about firepower than self-defense" and "agree[d] with the Chief of Police that the 2 or 3 second pause to reload can be of critical benefit to law enforcement." *Id.* at 9. It recommended the ban on extended clips to "limit[ ] fire power" and because of its "desir[e] to advantage the police, especially given homeland security issues in the District." *Id.*

Bruce, supra, at *10 (alterations in original).

The Court in *Bruce* added:

> The committee reports surely demonstrate that the Council appreciated the increased danger that firearms with extended magazines posed to the public and to law enforcement officers.

Id.

Bruce involved the issue of whether the government was required to prove that the defendant knew the magazine he possessed was capable of holding more than 10 rounds. *Id.* at *8. The parties agreed that the statute was silent on this question. *Id.* This Court ruled that that government was required to prove that the defendant knew that the magazine was capable of holding more than 10 rounds, and because the government had failed to do so, this Court reversed appellant's conviction. *Id*. at *10.

In Mr. Robertson's case, the government was required to prove that the magazine he possessed had the capacity to hold more than 10 rounds and feed them into the weapon. The government's brief in this Court concedes that there was no evidence that the magazine possessed by Mr. Robertson could feed more than 10 rounds into the firearm:

> Because the spring and base plate of the magazine in this case were protruding from the bottom of the magazine (11-8-22 Tr. 10), we concede there was no evidence that Robertson's magazine could feed more than 10 rounds into the firearm.

Gov. Br. at 20.

Because the government concedes that there was no evidence that the magazine in this case could feed the ammunition into the weapon, Mr. Robertson's

conviction should also be reversed on this ground as well.

CONCLUSION

WHEREFORE, for all the reasons set forth above, and in Mr. Robertson's initial brief, 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, for the reasons set forth in Mr. Robertson's initial brief, all of Mr. Robertson's convictions should 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,

/S/Peter H. Meyers
Peter H. Meyers
Bar. No. 26443
2000 G Street, N.W.
Washington, D.C. 20052
(202) 994-7463
PMeyers@law.gwu.edu
Attorney for Appellant Robertson
Appointed by this Court

CERTIFICATE OF SERVICE

I hereby certify that copy of the foregoing Reply Brief for Appellant Wayne D. Robertson was served electronically on counsel for Appellee, Chrisellen R. Kolb, Esquire, Appellate Division, U.S. Attorney's Office, this 3rd day of January 2024.

/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.

Initial here

G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

Signature

23-CF-175
Case Number(s)

PETER H. MEYERS
Name

1/3/24
Date

PMEYERS@LAW.GWU.EDU
Email Address