BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 19-CF-546

SEAN T. GREEN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Cr. No. 2015-CF1-014494

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ISSUES PRESENTED

I. Whether the trial court erred when it found Green's *Miranda* wavier to be knowing and voluntary, where: (1) Green waived his rights after they were read to him, he was given the opportunity to read them himself, and he was told repeatedly that he could stop answering questions at any time, (2) the detectives did not engage in any coercion or trickery, (3) it appeared to the detectives that Green understood the conversation, (4) Green had been arrested numerous times before and had waived his rights three times, (5) Green asked no questions about his rights, and (6) the evidence strongly supported the trial court's factual finding that Green's stated confusion related to the reason for his arrest, not his rights.

II. Whether Green's statement was voluntarily made, where the detectives did not threaten or harm Green, raise their voices, lie about adverse consequences to his family members, or otherwise engage in any coercive activity, and where the circumstances of the interview—including Green's repeated self-serving lies—show that Green's will was not overborne or his capacity for self-determination impaired.

III. Whether the trial court plainly erred when it did not require the jury to find that Green knew he had been convicted of an offense punishable by more than one year, where this Court has never held that the District's unlawful possession of a firearm statute contains that *mens rea* requirement, and where the text and history of the statute indicate that it does not.

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BRIEF FOR APPELLEE

INTRODUCTION

On July 30, 2015, appellant Sean T. Green murdered Derrick Black by shooting him in the head where he lay in the middle of Georgia Avenue. While doing so, Green dropped his cellphone and his gun's magazine with his DNA on it. Green's phone contained pictures of a firearm that could have been the murder weapon. When he was arrested more than two months later, Green falsely claimed to have been in a drug-treatment program when the murder occurred, lied about having lost his cellphone a month before the murder, and then eventually admitted to killing Black and apologized to his girlfriend for not telling her.

Green argues that his *Miranda* waiver was not knowing and intelligent and that his post-*Miranda* statement was not voluntary. These assertions are meritless. Green was fully informed of his *Miranda* rights and repeatedly told that he could decline to speak with the detectives. Although Green expressed confusion during the

waiver process, both the detective who interviewed Green and the trial court concluded that Green was confused about the reason for his arrest—confusion he had exhibited both when speaking to himself while waiting to be interviewed and immediately upon speaking with the detectives before he had been read his *Miranda* rights (which he had been given and waived on three prior occasions). And Green identifies no government misconduct or other legitimate reason supporting a finding that this is the rare case in which his self-incriminating statements were involuntary notwithstanding the detective's compliance with *Miranda*.

COUNTERSTATEMENT OF THE CASE

On July 19, 2016, a grand jury charged Green with first-degree murder while armed of Black, in violation of D.C. Code §§ 22-2101, -4502; assault with intent to kill while armed an unknown individual, in violation of D.C. Code §§ 22-401, -4502; two counts of possession of a firearm during a crime of violence, in violation of D.C. Code § 22-4502(b); and unlawful possession of a firearm (prior conviction), in violation of D.C. Code § 22-4503(a)(1) (Indictment (Record on Appeal (R.)) 15).

On July 30, 2018, a jury trial began before the Honorable Judith Bartnoff (R.A at 26). On August 9, the jury convicted Green of all counts (R.45; 8/9/18 Transcript (Tr.) 92-94). On June 7, 2019, Judge Bartnoff sentenced Green to a total of 38.5 years in prison, followed by five years of supervised release (6/7/19 Tr. 27-28). Green timely appealed (R.55).

The Trial

The Government's Evidence

The evening of July 30, 2015, Wesley Pulley was driving a Metro bus north on Georgia Avenue NW near the Eddie Leonard carryout (8/1/18 Tr. 35-38). After stopping to pick up some passengers, Pulley looked to his left before leaving the stop (*id.* at 38). Pulley saw two people—Black and an unknown individual—run into the street (*id.* at 39-40). Pulley then saw a man running behind them—Green—who "started shooting" (*id.* at 39). Green had a medium-build and short hair (*id.* at 42-43). Green fired three or four shots, causing Black to fall to the ground (*id.* at 39). Green then stood over Black, shot him two more times, and ran down Lamont Street (*id.* at 39-41). As Green ran, Pulley saw him "fumbling . . . like he was kind of trying to conceal [something]" (*id.* at 41).

A surveillance camera recorded the murder (8/1/18 Tr. 15; Government Exhibits (Exhs.) 301-02). The video showed Green cross Georgia Avenue east to west and then disappear behind some trees (Exh. 302 at 0:05–0:21). Approximately 20 second later, Black and the unknown man ran side-by-side onto Georgia Avenue from that same area (*id.* at 0:44). The unknown man fell in the curbside lane, and then Black fell in the middle of the road as Green—who appeared to be holding a gun—entered the street (*id.* at 0:44–0:45). Green briefly stood over Black before continuing to run east down Lamont Street; as he was doing so, the unknown man

got up and ran back in the direction from which he had come (*id.* at 0:45–0:51). Black's body remained lying on Georgia Avenue (*id.*). The cause of Black's death was gunshot wounds to the head and back (8/7/18 Tr. 38).

Metropolitan Police Department (MPD) reserve officer Erik Gaull was turning onto Georgia Avenue when he heard a series of gunshots followed a few seconds later by more (7/31/18 Tr. 174-75, 181). Officer Gaull drove to the corner of Georgia and Lamont and asked the people there, "Which way did he go?" (*Id.* at 183.) When the crowd pointed down Lamont Street to the east, Officer Gaull—who had not seen Black's body—began turning onto Lamont (*id.* at 183-84). Officer Gaull then heard the screech of brakes and a loud thud, which caused him to turn his head in time to see a sedan run over Black (*id.* at 184).

Officer Gaull called for an ambulance (7/31/18 Tr. 185). Eventually, he learned that Black had been shot and began looking for evidence (*id.* at 192-93). Officer Gaull found a firearm magazine on the northeast corner of Georgia Avenue and Lamont Street (*id.* at 193, 196). The magazine had a capacity of ten rounds and contained three cartridges (8/1/18 Tr. 73; 8/6/18 Tr. 155-56). Green's DNA matched the major contributor to the DNA found on the magazine (8/2/18 Tr. 71-72).

On the other (west) side of Georgia Avenue, Officer Gaull found a cellphone in a tree box—"a cut-out in the sidewalk, out of which a tree grows"—in front of the Eddie Leonard carryout (7/31/18 Tr. 197, 208). Believing that another officer had

dropped his or her phone, Officer Gaull picked it up and began asking if it belonged to anyone (*id.* at 198). When he realized the phone was probably evidence, Officer Gaull put it on the ground where he was standing at the time, which was in the crosswalk between Georgia Avenue and Lamont Street (*id.*).

Officers found eight 9-millimeter cartridge casings at the crime scene (8/1/18 Tr. 98-99, 131-32; 8/2/18 Tr. 140-43; 8/6/18 Tr. 148). A firearms expert opined that seven of the cartridges had been fired from the same gun (8/6/18 Tr. 149). Those seven cartridges had the same head stamp, "Federal," as the three found in the ten-round magazine with Green's DNA on it (*id.* at 156-57). The eighth cartridge found at the crime scene—which was "pretty chewed up" and "looked like it had either been stepped on or run over by a car"—had not been fired by the guns recovered in this case (*id.* at 150-51).

Information contained in the cellphone found by Officer Gaull indicated that it belonged to Green (8/1/18 Tr. 160-61). For example, the username and e-mail address associated with accounts stored on the phone was SeanG[Green's numerical date of birth]@gmail.com (*id.* at 164-67). The phone's number matched one Green gave to Howard University Hospital, and Green's email address included his date of birth (*id.* at 161; 8/2/18 Tr. 30-32, 35). On July 24 & 25, 2015, the phone exchanged text messages with a number saved under the name "Damon" (8/1/18 Tr. 168-70). Green has an older brother named Damon, and in a recorded phone call he told his

aunt Damon's number, which matched the one saved in the phone (8/2/18 Tr. 202-04; Exh. 303). A text message from the phone to Damon on July 24, 2015, stated, "N da hospital" (8/1/18 Tr. 169). Green was in Howard University Hospital that day (8/2/18 Tr. 33-35).

Green's cellphone account had terminated on July 18, 2015, after which his phone had "limited functionality" but could have been used on Wi-Fi (8/2/18 Tr. 113-15). Calls and internet browsing using Wi-Fi would not appear in Green's phone records (*id.* at 114, 117). The last call appearing in Green's phone records was one made to Damon on July 26, 2015, four days before the murder (*id.* at 112-13). Information extracted from Green's cellphone indicated that it had been used to access a website the day before the murder (*id.* at 168-69).

There were three photos of a handgun on Green's phone that had been saved there between July 11 and 21, 2015 (8/2/18 Tr. 164-65). The firearm was a Taurus Millennium Pistol that came in a 0.9-millimeter version (8/6/18 Tr. 158-59).

The night he was killed, Black was in front of a liquor store near the carryout trying to sell a pair of shoes (8/6/18 Tr. 71-72, 85-88). Black had a handgun in his pants and was pulling up his shirt to flash the gun while saying, "these [n**s] don't want no problems" (*id.* at 89-92, 98-99). Green killed Black less than an hour later (*id.* at 93-94). Police officers found Black's gun next to his pants, which paramedics

had cut off; it had not been fired (8/1/18 Tr. 70-71, 77, 80, 93-94; 8/6/18 Tr. 144-45, 150).

In the eastern portion of Lamont Street where Green fled after the murder, there is an alley that runs "right to the front of the building" located at 602 Morton Street (8/1/18 Tr. 100-01). Green was in an apartment at that address on October 12, 2015 (8/2/18 Tr. 128-33). On October 19, officers executed a search warrant there (8/6/18 Tr. 102). They found Green's wallet and a backpack containing a .45-caliber handgun (*id.* at 108-15). The gun was not the one used to murder Black (*id.* at 108). Green stipulated that, as of July 30, 2015, he had been convicted of a crime punishable by imprisonment for a term exceeding one year (8/8/18 Tr. 56).

As discussed in greater detail below (at 12-20), during a post-arrest interview, Green admitted having committed the murder and otherwise exhibited consciousness of guilt (Exh. 300; Corrected Limited Appendix for Appellant (A) 1-160). For example, a detective told Green that he had left "evidence from a firearm" at the murder scene with his DNA on it (A20-21, A44-45, A49). When Green's girlfriend later spoke with him, Green specifically identified the evidence as "the clip" (A134). Green said that he had entered a drug-treatment program in July (A30-31), when in fact he had not started the program until August 10—eleven days after the murder (8/6/18 Tr. 31-35). And Green claimed that someone stole his cellphone three or four weeks before he went into the drug-treatment program, and that he did

not have it during the month of July (A40-42). In fact, Green had texted his brother Damon on July 24, and called him two days later (*supra* at 5-6).

Green began describing the murder after a detective suggested that Green "may have felt like this was self-defense" and asked him, "Did you do this for somebody?" (A62, A72.) Green answered, "Yeah" (A72). Green continued, "This n[***] was telling me . . . that he could help me out and he'd do things for me[.] . . . And that dude [Black] that day, he had a weapon on him and pointed it at me. I got scared." (A75.) Green said that he had walked past Black "and dude pointed a joint at me. So I got scared and I ran[.]" (A76-77.) The gun "looked like . . . an Uzi" (A119). (Green also claimed that Black had two guns, "a Mac and a .45" (A81)). According to Green, he went into the alley off Lamont Street where a man named "Mike-Mike" threatened to kill Green if he did not kill Black (A77-81). "Mike-Mike"—who Green later called "Man-Man"—gave Green a gun (A80-81, A151-52). Green approached Black: "He saw me, he tried to whip out" (A90). Green said that Black "tried to shoot" and that Green "was protecting [him]self" (A91). "I shot first" (*id.*).[1]

[1] After Green asked to call his girlfriend (A107), the detectives allowed him to speak with her in the interview room. During that conversation, Green appeared to admit murdering Black. Green's girlfriend said that she had gotten a call "about the dude that got slumped on the alley, that you had something to do with it" (A127). She was angry because she had asked, "was you on the run? Was you wanted? Did you need

(continued . . .)

SUMMARY OF ARGUMENT

The trial court did not err when it found Green's *Miranda* wavier to be knowing and voluntary. Green waived his rights only after they were read to him, he was given the opportunity to read them himself, and he was told repeatedly that he could stop answering questions at any time. The detectives did not engage in any coercion or trickery. It appeared to the detectives both that Green understood the conversation about his rights and that he gave responsive answers during the subsequent questioning. Green had also been arrested numerous times before and had waived his rights on three occasions. Although Green stated that he was confused during the waiver process, the trial court found that confusion to relate to the reason for his arrest, not the substance of his rights. Green does not challenge this finding as clearly erroneous, and it was not: Green had repeatedly expressed confusion about the reason for his arrest while waiting to speak to the detectives and immediately upon speaking to them, Green did not ask questions about his rights,

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anything? You told me no." (*Id.*) Green apologized and said, "I was planning on telling you but I just didn't. I didn't want to upset you." (*Id.*)

Later, Green claimed to have "no recollection" of the murder and said he "just went by the stories they told me" (A131). Green then told his girlfriend, "I know who did it" (A134). She repeatedly urged Green to tell the police, saying, "[Y]ou need to let them know, man. I mean, even if you had the gun and you had to hold it for the man." (A136.) After Green's girlfriend left, Green told the detective that he "was holding [Man-Man's] gun," and "I believe that he did it" (A155).

and the detective who interviewed Green understood his confusion to be about the reason for his arrest. This case thus in no way resembles those in which courts have found a waiver to be unknowing or unintelligent.

Green's statement was voluntarily made. The detectives did not engage in any coercive activity: they did not threaten Green, injure him, deprive him of food or sleep, threaten adverse consequences to his family members, question him for an unusually long time, or otherwise coerce Green's statement. And even if something about the detectives' conduct was coercive, the circumstances of the interview itself—including Green's self-serving lies attempting to exonerate himself or minimize his criminal conduct—demonstrate that his will was not overborne in such a way as to render his confession the product of coercion.

The trial court did not plainly err by failing to instruct the jury that, to be convicted under D.C. Code § 22-4503(a)(1), Green had to know that he had been previously convicted of a crime punishable by imprisonment over a year. Unlike the federal statutes at issue in the Supreme Court's decision in *Rehaif*, § 22-4503(a)(1) does not contain any express *mens rea* requirement, much less a requirement that the defendant knowingly violate the law. There are strong textual and historical reasons to conclude that Congress did not mean to incorporate a knowledge-of-status requirement into § 22-4503(a)(1). And even if it did, this Court has never interpreted the statute in that fashion, and thus any error was not plain. In any event, given that

Green pleaded guilty to a crime with a ten-year maximum sentence, and was sentenced to that statutory maximum, he cannot establish prejudice.

ARGUMENT

I. The Trial Court Did Not Err When it Denied Green's Motion to Suppress His Statement.

The law is clear: a defendant can knowingly and intelligently waive his *Miranda* rights and make a voluntary statement notwithstanding that he suffers from mental illness, possesses a significantly diminished mental capacity, or is intoxicated. *See, e.g.*, *(Steven) Robinson v. United States*, 928 A.2d 717, 725 (D.C. 2007); *see also United States v. Walker*, 607 F. App'x 247, 257 (4th Cir. 2015) (listing cases); *Garner v. Mitchell*, 557 F.3d 257, 264 (6th Cir. 2009) (en banc) (same); *United States v. Rojas-Tapia*, 446 F.3d 1, 8-9 (1st Cir. 2006) (same).

The cases in which this Court has found a defendant's *Miranda* waiver to be unknowing and unintelligent or the defendant's statement to be involuntary, in contrast, have involved extraordinary circumstances. For example, the defendant in *Di Giovanni v. United States* was "shaking from being wet and cold," had "limited intellectual capacity," and "was clearly having trouble understanding what his rights were, and was therefore completely reliant on [the officer's] explanations and embellishments." 810 A.2d 887, 890, 892, 894 (D.C. 2002). The police in *Little v. United States* questioning a teenager "instilled in him a fear of being raped in jail, . . . played up the risk that he would be prosecuted for myriad robberies they did not

suspect him of committing, and . . . [told him] that he had to confess before he could arrange a meeting with his lawyer[.]" 125 A.3d 1119, 1133 (D.C. 2015). And the detective in *In re S.W.* "suggest[ed] that if [the juvenile] remained silent, he would face fabricated charges for things that he did not do." 124 A.3d 89, 103 (D.C. 2015).

The present case involves nothing remotely similar. As the trial court correctly concluded, there was no "question that [Green] understood what was happening": he "underst[ood] what[was] happening in the conversation" and was not "coerced in any way. To the contrary . . . he was given the opportunity to participate if he wanted to and not [to participate] if he didn't want to." (7/30/18 Tr. 39-40.) Green's challenges to the court's suppression ruling should thus be rejected.

A. Additional Background

1. The Interview

Officers arrested Green around 7:30 a.m. on October 19, 2015—roughly two-and-a-half months after the murder (7/30/18 Tr. 16). Green had spent much of that intervening period—August 10 to September 24—in an inpatient drug-treatment program (8/6/18 Tr. 34-35). Green was 24 years old and on probation (A53; 7/30/18 Tr. 58-60). Green had been arrested seven times before and had waived his *Miranda* rights three times (R.37 at 2 & n.2 (11/17/09 & 7/30/12); R.48, Exh. 4 p.5 (2/13/13)).

Green was transported to the homicide branch, where he was left alone in an interview room (8/6/18 Tr. 173-73; Exh. 300, 18:18–20:41). On and off for the next

hour and a half, Green spoke to himself quietly (Exh. 300, 20:41–1:56:38). Although much of what Green said was indiscernible, he knew that he was being recorded (*id.* at 22:45–22:50 ("Of course, a fucking camera"); A24.1 ("[Det. Patterson:] Mister Green, everything that we're saying in here is being recorded. Are you aware of that? [Green:] Yeah.")).[2]

While he waited, Green repeatedly expressed bewilderment at why he had been arrested, saying things such as: "How the fuck did I have a warrant?" (A6); "what th[e] fuck I got a warrant for?" (A10); "It seems some serious shit I'm here for. What the fuck happened now?" (A16); and "I don't understand what the fuck this is all about" (A17). Green also expressed his desire to return to his girlfriend as quickly as possible: "I just want to see if I can possibly get back to my woman as fast as possible. That's all I want." (A2); "I'm in here fucking with these clowns instead of being out there with her, where my hearts at" (A3); "I just pray, man, whatever they want to know I could just get back tomorrow" (A7); "I'm really trying to get back to my woman, Slim." (A8); "I'm trying to marry this woman" (A11).

[2] Green's description of the video relies on the transcript and, as a result, inaccurately portrays the video's timing. For example, Green asserts that "[h]e said that he wanted to see his girlfriend as soon as possible, but *mid-thought* he resumed complaining about his chair and its temperature" (Br. at 7 (emphasis added)). In fact, over a minute elapsed between the statements (Exh. 300 at 46:35–47:15 (girlfriend); 48:30-48:35 (chair)). In the interim, Green adjusted his shoes, yawned, and stretched, and spit into a napkin (*id.* at 47:15 –48:30).

Two officers came into the interview room while Green waited. One gave Green a drink (A6-8). Another officer asked for Green's address and a family member's phone number (A13-16). In response, Green provided his girlfriend's address and his aunt's phone number from memory (Exh. 300, 1:35:35–1:38:10).

Just before the interview started, Green said to himself, "What the fuck am I supposed to know? . . . Can't even fucking think of nothing . . . Trying to figure that shit out. What the fuck am I supposed to know?" (A19; Exh. 300, 1:54:40–1:55:20.) Shortly thereafter, two detectives entered the room and Detective Anthony Patterson asked Green, "How are you doing?" (A20; Exh. 300, 1:56:30–1:56:50). Green responded, "tired, confused" (*id.*).

Detective Patterson explained that Green had been charged with murder (A20-21). The murder occurred on Georgia Avenue and Green had left behind "some physical evidence" with his DNA on it, which allowed the police to get a warrant for his arrest (A21). Detective Patterson told Green, "I want to talk to you about it. If you want to talk to us, fine. If you don't want to talk to us, that's ok." (A21.)

Detective Patterson then read the *Miranda* rights section from a paper form PD-47 (A21-22; Exh. 299). When explaining that Green had "the right to talk to a lawyer for advice before we question you and to have him with you during questioning," Detective Patterson explained, "That does not happen here. You know, there is not a lawyer out there. We're not going to bring a lawyer in here to talk to

you. That happens when you get down to court[.]" (*Id.*) When Detective Patterson told Green that a lawyer would be provided to him if he could not afford one, he explained that "also happens when you get to court" (A22). Detective Patterson finished by informing Green, "If you want to answer questions now, without a lawyer present, you still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer[.]" (*Id.*)

Detective Patterson then began going through the waiver. Detective Patterson asked Green, "[H]ave you read, or had read to you, the warning as to your rights?" (A22). In response, Green asked, "Was it this paper?" (*Id.*) Detective Patterson said, "I read it to you," to which Green responded, "I mean, you just gave me a whole lot all in one" (*id.*). Detective Patterson put the PD-47 in front of Green, handed him a pen, and again asked, "have you read, or had read to you, the warning as to your rights?" (A22; Exh. 300, 1:59:30–1:59:40.) Green checked the "Yes" box and put his initials next to it (Exh. 300, 1:59:40–1:59:55; Exh. 299). Detective Patterson then asked, "do you understand these rights?" (A23.) While appearing to read the PD-47, Green responded, "Yes" (*Id.*; Exh. 300, 2:00:00–2:00:10; 7/30/18 Tr. 19).

Detective Patterson asked Green the third question from the PD-47, "Do you wish to answer any questions?" (A23.) Green responded, "I mean, I got some questions I would like to ask. I mean, I'm so fucking confused right now." (*Id.*) Detective Patterson responded, "[W]ell, what's confusing you? I just . . . explained

to you what you're charged with." (*Id.*) After Green responded, "yeah," Detective Patterson continued:

> I told you, kind of like, the evidence that we have against you at this point and, you know what, man? I don't know, sometimes things just happen. I don't know if you intended to kill this person. I don't know if it was—I just don't know the circumstances. But, right now, we want to talk to you about it. If you can explain it, you can justify doing what you did, I mean, tell us. We want to know. But, we need your permission to talk to you and that's all this is. This is saying, well, look, I want to talk to you. (*Id.*)

Detective Patterson then asked, "Do you understand?" before reading from the PD-47, "Do you wish to answer any questions?" (A24); Exh. 300, 2:01:22–2:01:30.) After taking time to think while looking at the PD-47, Green responded, "Might as well. I mean, shit, I don't know. I'm just confused about—I mean, I'm sorry. I heard what you said but it's just, that's a lot to take in. You know what I'm saying?" (A24; Exh. 300, 2:01:30–2:01:50.) Detective Stephanie Garner then interjected, "You can read it over. Because you can answer questions and you still have—it says right there—that you still have to stop [sic] answering any questions until you talk to a lawyer. So, if you want to talk to us and then, eventually, you just say, 'Okay, I don't want to talk anymore,' that's what that's saying." (A24; Exh. 300, 2:01:50–2:02:05.) Detective Patterson added, "[A]t any point during our conversation about this, if you decide, 'Hey, Detective Patterson, Detective Garner, I don't want to talk about it anymore,' you have that right." (A24; Exh. 300, 2:02:05–2:02:20.) Green said, "uh huh," and then checked "yes" (Exh. 300, 2:02:20–2:02:25; Exh. 299).

Detective Patterson then asked Green, "[A]re you willing to answer questions without having an attorney present?" (A24.) He explained, "[W]e don't bring attorneys in here. So . . . you aren't going to have an attorney present anyway." (*Id.*) Green checked the last "yes" box on the PD-47, initialed it, and signed the form (Exh. 300, 2:02:40–2:02:55; Exh. 299).

The detectives then began interviewing Green. They told him that he was being charged with the murder of Derrick Black on Georgia Avenue on July 30 (A25). Green responded, "I don't have any idea who that is" (*id.*). Detective Patterson asked, "[Y]ou're saying that you didn't kill Mr. Black?" (*Id.*) Green responded, "Basically" (*id.*). Green then gave a lengthy explanation during which he claimed to have been in a drug-treatment program from July to September (A25-31). That led to a discussion of Green's living situation, causing Detective Patterson to say, "Well, it sounds like you were doing okay until you killed this guy on Georgia Avenue" (A31-40). Green responded, "I'm trying to figure out how you all even figured that—you all saying that I did it" (A40).

Detective Patterson asked Green, "You have a cell phone?" (A40). Green claimed that it had been stolen at least three or four weeks before he entered the drug-treatment program (A40-41). Green also said he had never handled a firearm other than when he went to the shooting range with his mother when she was alive (A43). Detective Patterson responded, "Your dilemma . . . is that we have physical

evidence . . . at the scene of this murder" (A43). "We found your cell phone . . . [and] there was another piece of evidence that we found, that you dropped as you ran across the street. It had your DNA on it." (A43-44.) And "the shooting was captured on video" (A45). He continued: "You can sit here all day long and tell me that somebody stole your cell phone . . . but you drop it when you shoot this guy. We see you on the video." (A46.) "[D]on't sit here and tell me that you didn't do it because I know you did do it. . . . We see you on the video." (A47.) Detective Patterson asked Green, "Can you explain what your phone is doing on the scene? Can you explain how it is that you never handled a gun but we have evidence from a firearm that has your DNA on it?" (A48.)

Eventually, Green asked, "[W]hat can I really tell you?" (A51.) Detective Patterson responded, "Tell us what happened, for starters, and why it happened" (*id.*). Green said, "I don't even know the guy," and asked, "I'm really going to get a rack of time for this, huh?" (*Id.*) He then asked for a cigarette, which Detective Garner got for him (A52-55). While she was doing so, Green expressed his concern that he would not "get a chance to come out [of jail] again" and that all of his life plans were "crushed" (A53). Green then asked Detective Patterson if he could "get a pardon" (A56). Detective Patterson responded by asking Green what he meant and said, "What the hell happened? I mean . . . how did you get to that point where you did what you did? . . . What happened?" (A56-57.)

Green replied, "I might've handled a gun but I didn't do anything" (A57). Detective Patterson told Green that he did not believe him (A57-58). He said, "I would imagine that you had what we call like, an oh shit moment, because you realized that one, your phone was gone, and two, something from that gun was missing." (A59.) Detective Patterson told Green, "[Y]ou're just in a bad spot. You're charged with murder." (A60.) Green again asked he could get pardoned (A61), and also said, "[I]f I tell you what I'm going to tell you, I just want to know if I'm going to be safe" (A69). Detective Patterson responded, "You haven't told me anything. . . . We've been sitting in here, now, for like an hour. . . . Whatever your concerns are as it relates to your safety . . . we'll talk about it[.] But, you need to tell me." (A69.)

Detective Patterson asked, "[D]id somebody put you up to this?" (A72). Green responded, "Yeah" (*id.*). He then said that someone "[f]orced" him to commit the murder (A73). Green continued, "[I]f I tell you, that's why I want to know, can I like, be pardoned or be put into some type of protective custody?" (A74.) Detective Patterson said there would be "[n]o pardon," but that the government could "make sure you're safe" (*id.*). Green asked, "There ain't no way I'm going out? . . . I mean, what if I offer to be some type of informant or something? Would that work?" (A74-75.) Detective Patterson responded, "No, that's not how that works. You can't, no.

Now, somebody put you up to doing this? Who?" (A75.) Green then began giving the explanation described above (at 7-8).

After Green admitted shooting Black, Detective Patterson asked, "How many times did you shoot him?" (A92.) Green answered, "I'm not sure" (*id.*). Detective Patterson asked, "Where was he when you shot?" (*Id.*) Green said, "On the sidewalk?" (*Id.*) Detective Patterson responded, "You don't recall how many times you shot him or you shot at him? You don't recall shooting him in the middle of street? You saying you didn't do it or you saying you don't recall?" (A93.) Green responded, "Honestly. I don't recall. . . . Think I might've been doing dope at that time but I could've been high or drunk." (*Id.*)

Later, after Green had spoken with his girlfriend, Detective Patterson asked, "Are you high today?" (154). Green responded, "No, no" (*id.*). Detective Patterson asked, "You have any mental health issues?" (*Id.*) Green responded, "I have short-term memory. I've recently [been] diagnosed with dysthymic disorder and intermittent explosion disorder. I take medication for it." (*Id.*) Green said that the medication was still at the drug-treatment center (*id.*). When Detective Patterson asked Green how he was feeling, Green responded "Shitty. . . . Because, honestly, like he . . . Man-man, he . . . He did it. . . . I believe that he did it." (A155.)

2. The Suppression Hearing

Green moved to suppress his statement (R.32). In a bare-bones, two-page motion, Green pointed to his statements of confusion at the beginning of the interview (*id.* at 1), and asserted that "[a] waiver of Miranda rights is only effective if it was knowing, intelligent and voluntary. . . . Herein, the statement may not have been voluntary." (*Id.* at 2.) In its opposition, the government noted, among other things, that Green had waived his *Miranda* rights on two previous occasions—in November 2009 and July 2012—and provided the court with videos of the two waivers (R.37 at 2 & n.2).[3]

At the July 30, 2018, suppression hearing, the court stated that the basis for the defendant's motion was unclear, and that it would be "helpful to get a clearer notion of exactly what it is that the defense is claiming is the basis for suppressing the statements" (7/30/18 Tr. 4). Defense counsel responded, "[R]ight at the beginning Mr. Green says—before he's given his *Miranda* warnings, he says on two occasions, 'I'm confused.'" (*Id.* at 4-5.) The court responded, "I did not take the statement about being confused as any confusion about his rights. I understood it to be confusion about: What am I doing here?" (*Id.* at 5.)

[3] Green had also waived his *Miranda* rights a third time, in February 2013 (R.48, Exh. 4 p.5).

Detective Patterson then testified. When Green said, "I'm tired and confused," Detective Patterson understood Green to be confused about "[h]is arrest" and "[t]he reason why he was transported to homicide" (7/30/18 Tr. 17-18). Similarly, when Green said, "I'm so fucking confused right now" after being asked if he wished to answer any questions (A23), Detective Patterson "took it to mean that he was confused about what I had just explained to him about what he was charged with" (7/30/18 Tr. 19-20). At no time during the *Miranda* waiver did Detective Patterson have the impression that Green was under the influence or incapable of understanding the conversation (*id.* at 21-22). And at no time during the interview did it appear to Detective Patterson that Green did not understand his questions or was not providing responsive answers (*id.* at 31).

The defense made no argument after Detective Patterson's testimony (7/30/18 Tr. 36). The court denied the motion, explaining that it understood Green's statements "to mean, as the detective did, that he was confused about the charges and not that he was confused about his rights" (*id.* at 38). The court reached that conclusion "both because of the nature of the questions and the way the conversation went," and because "it did not appear" that Green had questions "about the process . . . and the rights" (*id.*). Although Green's statement, "That's a lot to take in," could be interpreted "as all of these rights could be a lot to take in," neither the court nor Detective Patterson understood it that way (*id.*). And, in any event, "the detective

then went over the form and pointed to each of the questions as [he] went over the questions, and Mr. Green didn't ask any questions about that" (*id.* at 38-39). Another "important point" was that, when Green "was told this is all being recorded, he said, 'Yes, I know,' which indicated an understanding of the process, which is not a surprise since Mr. Green had been through it before" (*id.* at 40).

The court found no "question that [Green] understood what was happening . . . [during] the process" (7/30/18 Tr. 39). He also "underst[ood] what[was] happening in the [subsequent] conversation" (*id.* at 40). And there was no "basis for a finding that anything was coerced in any way" (*id.*). Green "was given the opportunity to participate if he wanted to and not [to participate] if he didn't want to" (*id.*). The court did not "believe that any statements that Mr. Green made about being confused related to any confusion about his rights" (*id.*). Rather, it "was a confusion about his arrest and what the charges were" (*id.*). That was "not entirely surprising" because, when he was arrested, Green did know "know why" and did not "know what the charges are. And then all at once he's told about these very serious charges. That would be a reason for anybody to be confused." (*Id.* at 40-41.)

3. Closing Arguments

During trial, the defense requested that—with some redactions—the entire recording of Green's interview be played for the jury, including the lengthy portion in which he was sitting in the interview room alone (8/6/18 Tr. 9-13).

In its closing argument, the government began by pointing the jury to the evidence of Green's guilt apart from his statement (8/9/18 Tr. 38-51). The prosecutor then stated, "The Government could take its seat right now, because we've proven to you beyond a reasonable doubt by overwhelming evidence—DNA, forensic evidence, evidence that doesn't pick sides—that it was the defendant that committed this crime" (*id.* at 51-52). However, there was "more[:] . . . the defendant's statement" (*id.* at 52). That statement was "four, five hours" (*id.*). "A lot of it is rambling. It's convoluted. It's confusing. But when you push through the distractions, the efforts to mislead, the blame shifting, you get some semblance, some small semblance of truth that comes from it." (*Id.*) The government then summarized the incriminating parts of Green's statement and addressed which parts the jury should believe and which parts it should discredit (*id.* at 52-57).

In its closing, the defense argued that Green's statement was neither voluntary nor reliable (8/9/18 Tr. 67-68). Counsel pointed out that Green said he shot Black on the sidewalk, when in fact Black had been shot in the crosswalk (*id.* at 68). And Green said to his girlfriend, "I just told them what they wanted to hear" (*id.*). Green was "confused" and "disoriented" and his "intellect was overwhelmed" (*id.*). The government responded by arguing that Green "knew exactly what he was doing" (*id.* at 74). He gave a "false alibi," knew that he had dropped the firearm magazine, and "knew enough to lie to the police on that particular day" (*id.* at 74-77). Green was

"very smart, because he was playing with [the detectives]; giving false alibis, shifting the blame" (*id.* at 77).

B. Applicable Legal Principles and Standard of Review

The Supreme Court's decision in *Miranda* "requires that police 'adequately and effectively' warn a suspect of his or her right to remain silent and to have an attorney present during custodial interrogation if the suspect's statements are to be admissible at trial." *In re S.W.*, 124 A.3d at 95 (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)). "After receiving this warning, a suspect may opt to waive his or her rights." *Id.* The government bears the "burden of proving, by a preponderance of evidence, that the accused knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel." *In re D.W.*, 989 A.2d 196, 203 (D.C. 2010) (quotation marks omitted).

A "knowing and intelligent waiver does not necessitate an understanding of the tactical advantages of having an attorney present or otherwise invoking *Miranda* rights[.]" *Di Giovanni*, 810 A.2d at 892. Rather, "[a] suspect's waiver is knowing and intelligent when, considering the totality of the circumstances, the suspect demonstrates 'awareness of the right to remain silent and [makes] a decision to forego that right.'" *In re. S.W.*, 124 A.3d at 99 (quoting *(Steven) Robinson*, 928 A.2d at 725). The court may "consider a range of factors in determining if a suspect made a knowing and intelligent waiver of his *Miranda* rights[,] including: prior experience

with the legal system, evidence of coercion or trickery, cognitive ability of the suspect or delay between arrest and statement." *Robinson*, 928 A.2d at 725.

Separate from *Miranda*, a defendant's statements are only admissible if they were made voluntarily. *United States v. (Darryl) Turner*, 761 A.2d 845, 853 (D.C. 2000). "The test for determining the voluntariness of specific statements is whether, under the totality of the circumstances, the will of the [suspect] was overborne in such a way as to render his confession the product of coercion." *Id.* at 854 (quotation marks omitted). The relevant factors "include the circumstances surrounding the questioning, the accused's age, education, and prior experience with the law, his physical and mental condition at the time the statement was made, other factors showing coercion or trickery, and the delay between the suspect's arrest and confession." *Id.* (quotation marks omitted). Regardless of the other circumstances, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary[.]'" *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

This Court "must defer to the trial court's findings of historical fact as long as they are not clearly erroneous, and we must view the facts and the reasonable inferences that may be drawn from them in the light most favorable to sustaining the court's ruling." *Dorsey v. United Sates*, 60 A.3d 1171, 1190 (D.C. 2013) (en banc). The Court reviews *de novo* whether Green "validly waived his Fifth Amendment rights and voluntarily confessed." *Id.*

C. Argument

1. Green's waiver was valid.

The trial court did not err when it found that Green's *Miranda* waiver was knowing and intelligent. Green waived his rights after Detective Patterson both read those rights to him and placed the PD-47 in front of Green so that Green could read the rights himself (A21-22; Exh. 299; Exh. 300, 1:59:30–1:59:40). Before reading Green's rights, Detective Patterson told him, "If you don't want to talk to us, that's ok" (A21). Detective Patterson later reiterated, "[W]e need your permission to talk to you" (A23). And both Detective Garner and Detective Patterson emphasized to Green that, even if he agreed to waive his rights, he could stop answering questions at any time (A24; Exh. 300, 2:01:50–2:02:20). *See In re S.W.*, 124 A.3d at 100 (finding waiver knowing and intelligent where the detective "accurately and comprehensively apprised [the defendant] of his rights").

At no time during the *Miranda* waiver did it appear to Detective Patterson that Green was incapable of understanding the conversation, and at no time during the subsequent interview did it appear that Green did not understand the questions or was not providing responsive answers (7/30/18 Tr. 21-22, 31). *See (Steven) Robinson*, 928 A.2d at 726 (finding waiver knowing and intelligent where detectives "did not perceive the [defendant] to be of below-average intelligence or capacity").

The detectives did not engage in any coercion or trickery. *See (David) Robinson v. United States*, 142 A.3d 565, 570 n.8 (D.C. 2016) (highlighting absence thereof).

Green answered "yes" to each question on the PD-47, checked each "yes" box and placed his initials next to it, and signed the form (Exh. 299). "[T]his fact alone carries significant weight in determining whether his waiver was knowing and intelligent." *United States v. Rooney*, 63 F.4th 1160, 1168 (8th Cir. 2023) (cleaned up); *see (David) Robinson*, 142 A.3d at 570 ("These actions persuasively demonstrate [the defendant's] awareness of the right to remain silent and a decision to forego that right.") (cleaned up). And Green, who was 24 years old, had been arrested six times and waived his *Miranda* rights three times before (A53; R.37 at 2 n.2 (11/17/09 & 7/30/12); R.48, Exh. 4 p.5 (2/13/13)). *See, e.g.*, *(Steven) Robinson*, 928 A.2d at 726 (highlighting defendant's testimony "that he had been arrested four times as a juvenile and on each occasion he had been read his *Miranda* rights"); *Rooney*, 63 F.4th at 1168 ("A history of interaction with the criminal justice system supports an inference that an interviewee is familiar with his constitutional rights").

Although Green stated during the wavier process that he was confused, the trial court rightfully found Green's confusion to be related to the reason for his arrest, not the substance of his rights. Green responded to the question "Do you wish to answer any questions," by saying, "I mean, I got some questions I would like to ask. I mean, I'm so fucking confused right now." (A23.) Detective Patterson responded

by noting that he had informed Green of the evidence against him, stating that the detectives wanted to talk to Green about the murder, and explaining that they "need[ed] [Green's] permission to talk to [him]" (A23). Detective Patterson then again asked, "do you wish to answer any questions?" (A23-24). Green responded, "Might as well. I mean, shit, I don't know. I'm just confused about—I mean, I'm sorry. I heard what you said but it's just, that's a lot to take in." (A24.) After the detectives reiterated that Green could end the interview at any time, Green checked "yes" and initialed the PD-47 (Exh. 300, 2:02:20–2:02:25; Exh. 299).

The trial court did not clearly err when it found Green's confusion to relate to the reason for his arrest, not the substance of his rights. Green's statement that he was "confused" echoed Green's repeat statements, while waiting to be interviewed, expressing a lack of understanding as to why he had been arrested (*supra* at 13). He later said that he "thought nothing was wrong" because the police had come to his apartment the week before his arrest but had not done anything (A32-33). Green's asserted confusion also echoed his first statement to the detectives, well before he had been read his *Miranda* rights, that he was "tired [and] confused" (A20). Detective Patterson testified that he understood Green's later statements of confusion to be about the reason for Green's arrest (7/30/18 Tr. 19-20), and also evidenced that understanding in real time, responding to Green by asking, "what's confusing you? I just—I kind of explained to you what you're charged with." (A23.)

And, despite asserting that he was confused, Green did not ask any questions about his rights (7/30/18 Tr. 38-39). Under the totality of the circumstances, the trial court committed no error when it found that Green's *Miranda* wavier was knowing and intelligent because Green was aware of his rights made the decision to forgo them.

In arguing that the trial court erred, Green asserts that he "was told that he could not consult a lawyer during questioning," "expressed confusion while his *Miranda* rights were being explained to him," and "showed multiple signs of mental illness" (Br. at 33-41). Green's arguments ignore both the law and the facts.

First, both the Supreme Court and this Court have directly rejected Green's assertion that it is improper to tell a suspect that he will not be provided with a lawyer in the police station (Br. at 39-41). In *Duckworth v. Egan*, the Supreme Court held that it was appropriate for the police to tell a suspect "that they could not provide [him] with a lawyer, but that one would be appointed 'if and when you go to court.'" 492 U.S. 195, 203 (1989). This Court held in *(David) Robinson* that effectively the same statement ("we don't provide you a lawyer here") made by the same Detective (Patterson) "was not 'an impermissible embellishment of the *Miranda* rights.'" 142 A.3d at 570. The Court rejected the argument that this statement left the suspect "uncomprehending of and inattentive to the *Miranda* right to counsel." *Id.* at 569. Instead, by providing that information, an officer "simply anticipates" a "relatively commonplace" question that suspects have. *Egan*, 492 U.S. at 204.

Second, Green's argument regarding his "confusion" during the *Miranda* ignores the deference due the trial court's factual finding. Green nowhere asserts that the trial court's finding regarding the source of Green's confusion was clearly erroneous or discusses the clear-error standard (Br. at 36-38). Nor does he address the requirement that this Court "must view the facts and the reasonable inferences that may be drawn from them in the light most favorable to sustaining the court's ruling." *Dorsey*, 60 A.3d at 1190.[4]

Applying the correct legal standard, Green fails to show that the trial court clearly erred when it concluded that he was not confused about his rights (Br. at 39). As discussed above, the trial court had ample basis to conclude that Green was confused about the reason for his arrest: (1) Green had committed the murder more than two-and-a-half months before; (2) police officers had come to Green's house the week before his arrest, but had not arrested him; (3) Green repeatedly expressed confusion about the reason for his arrest while waiting for the detectives; (4) Green's very first statement to the detectives, before being given his *Miranda* rights, was that he was "confused"; (5) Detective Patterson understood Green's confusion to be

[4] Elsewhere, Green appears to suggest that, because the interrogation video is in evidence, this Court may engage in its own interpretation of the facts (Br. at 32). Not so: "the video 'footage allows [the Court] to visualize the events . . . in a way that would not be possible based on witness testimony alone,' but that does not make [it] 'finders of fact, nor . . . change [its] standard of review.'" *(David) Robinson*, 142 A.3d at 570 n.8 (quoting *Collins v. United States*, 73 A.3d 974, 981 n.4 (D.C. 2013)).

about the reason for his arrest; (6) Green did not ask any questions about his rights during the interview; (7) Green had been arrested multiple times and had waived his *Miranda* rights three times; and (8) Green did not testify at the suppression hearing or provide any evidence other than the interview to support a finding that he did not understand his rights. Although Green repeatedly faults Detective Patterson's "failure to directly ask Green why he was confused" (Br. at 38), that "failure" does not somehow constitute affirmative evidence that Green was confused about his rights. To the contrary, after Green said that he was confused, Detective Patterson repeated that he "need[ed] [Green's] permission to talk to [him,]" and the detectives told Green that he could stop answering questions at any time (A23-24). Viewing the facts and the reasonable inferences draw therefrom in the light most favorable to sustaining the trial court's ruling, *Dorsey*, 60 A.3d at 1190, the court did not clearly err when it found Green's confusion to relate to the reason for his arrest rather than the substance of his *Miranda* rights.

Third, and finally, there is no merit to Green's assertion that his waiver was not knowing and voluntary due to his "mental illness" (Br. at 33-36). Here, too, Green did not present any evidence other than the interview video, despite having consulted with a "false confession expert" (Sealed Record 8-9). There is thus no evidence in the record about what it means to have "dysthymia and explosive personality disorder" (Br. at 35) or how those conditions would affect a person's

ability to understand his rights, if at all. *Cf. (Steven) Robinson*, 928 A.2d at 721-22 (describing expert testimony introduced by defense). Nor was there any evidence about the effects of Green's "car crash where I have short-term memory" (A28).

The evidence actually in the record provides no basis to conclude that Green's waiver was not knowing and intelligent. At no time during the waiver did it appear to Detective Patterson that Green was incapable of understanding the conversation, and at no time during the subsequent interview did it appear that Green did not understand the questions or was not providing responsive answers (7/30/18 Tr. 21-22, 31). Green provided officers with detailed information from memory, such as his girlfriend's address, his aunt's phone number, his deceased mother's phone numbers, and the phone number for a man his girlfriend was staying with (A13-15, A72, A151). He knew that he had dropped his gun's clip despite not having been told so (*supra* at 7). And Green's attempts to exculpate himself by falsely claiming to have been in drug treatment when the murder occurred and by lying about losing his cellphone show that he understood the import of the evidence against him.

Green's focus (at 33-34) on his pre-interview comments to himself is misplaced. Those comments show that Green was unhappy about being arrested, did not understand why that had happened, and wanted to get back to his girlfriend as soon as possible (*supra* at 13). These were all rational responses to having been arrested (*cf.* 7/30/18 Tr. 39 ("He's in a police station. He's been there for at least

four hours, and he's being questioned about a homicide. It's not exactly surprising that he wouldn't be feeling great.").) And, rather than "confirm[ing] that he did not genuinely understand his circumstances" (Br. at 34), Green's request for a pardon showed that he appreciated his predicament: the police had powerful evidence that he had committed murder. Indeed, Green was clearly casting about for some way to avoid being put in jail (A53 ("I won't ever get a chance to come out again. I'm like, two weeks away from doing something really important. . . . Now, all that shit is crushed.").) And his statement was "rambling" and "convoluted" because he was attempting to "mislead" the detectives and shift blame (8/9/18 Tr. 52). However "odd" (Br. at 35) Green's pre-interview mumbling and questions during the interview may have been, they do not establish either that he was unaware of his rights or did not make a decision to forgo them.

Indeed, this and other courts have found *Miranda* waivers to be knowing and intelligent even where the evidence raised far more serious concerns about a defendant's comprehension. "A district court may find a knowing and intelligent waiver where the defendant has a low-level education and an inability to speak English, and where the defendant with a low IQ . . . interacted normally and intelligently with the arresting agents and was familiar with the criminal justice system." *United States v. Calles*, 271 F. App'x 931, 939 (11th Cir. 2008) (cleaned up). "Similarly, although mental illness is a factor to be considered by the trial court,

mental retardation does not by itself prevent a defendant from voluntarily and intelligently waiving his *Miranda* rights." *Id.* (cleaned up). Likewise, "diminished mental capacity alone does not prevent a defendant from validly waiving his or her *Miranda* rights." *Mitchell*, 557 F.3d at 264 (citing cases).

Thus, for example, in *(Steven) Robinson*, this Court found a waiver to be knowing and intelligent notwithstanding testimony from two defense experts that the defendant "read at less than a second-grade level" and "bordered 'mild mental retardation[.]'" 928 A.2d at 721. In *Smith v. Mullin*, the Tenth Circuit found that a defendant had validly waived his rights despite having "limited" intellectual functioning and "cognitive abilities [that] may have mirrored those of a twelve-year-old[.]" 379 F.3d 919, 933 (10th Cir. 2004). And in *United States v. (Eddie) Turner*, the Eighth Circuit found a knowing and intelligent waiver notwithstanding the defendant's "low I.Q., PCP intoxication, and mental illness." 157 F.3d 552, 555 (8th Cir. 1988). *See also, e.g.*, *Rojas-Tapia*, 446 F.3d at 8-9 (citing cases). On this record, the trial court did not err when it found that the government had established Green's knowing and intelligent wavier by a preponderance of the evidence.

2. Green's statement was voluntary.

There is no merit to Green's argument that his statement was involuntary. Green did not preserve this argument: although Green's motion to suppress asserted that "the statement may not have been voluntary" (R.32 at 2), when the trial court

asked him to clarify the basis for his motion, defense counsel identified only Green's statements of confusion during the *Miranda* waiver (7/30/18 Tr. 4-5). The court thus was not fairly apprised that Green was making a separate voluntariness challenge. *See Hunter v. United States*, 606 A.2d 139, 144 (D.C. 1992) ("Objections must be made with reasonable specificity; the judge must be fairly apprised as to the question on which he is being asked to rule."). But regardless of whether the standard of review is plain error or *de novo*, there was no error.

Here, there was no coercive police activity, which is "is a necessary predicate to the finding that a confession is not 'voluntary[.]'" *Connelly*, 479 U.S. at 167. As the trial court noted, there was no "basis for a finding that anything was coerced in any way" (7/30/18 Tr. 40). Green "does not claim that police threatened or injured him during the interrogation or that he was in any way fearful." *Berghuis v. Thompkins*, 560 U.S. 370, 386 (2010). The questioning lasted only three hours, and "there is no authority for the proposition that an interrogation of this length is inherently coercive." *Id.* at 387. Green was given a drink and provided with cigarettes at his request. And there were no other "facts indicating coercion, such as an incapacitated and sedated suspect, sleep and food deprivation, [or] threats." *Id.*

It is unclear what, exactly, Green believes to have been the coercive police activity in this case. Green asserts "that he would say anything to get home" (Br. at 41). But "the Fifth Amendment privilege is not concerned with moral and

psychological pressures to confess emanating from sources other than official coercion." *Connelly*, 479 U.S. at 170 (quotation marks omitted). And, in any event, Detective Patterson made clear to Green that nothing he said would allow him to return home that day (A74-75). Green complains about Detective "Patterson's repeated insistence that he would accept nothing less than a confession" (Br. at 42). In fact, Detective Patterson said that he would not believe Green if Green said "that I didn't do it" (A58). Green agreed that, if the roles were reversed, he also would not believe that claim (*id.*). This statement in no way suggested that Green "would not be leaving the interrogation room until he confessed[.]" *In re J.F.*, 987 A.2d 1168, 1177 (D.C. 2010). And even if Detective Patterson had accused Green of lying—which he did not—"as an interrogator can legitimately express his disbelief at a defendant's story in order to elicit further comments or explanations." *United States v. Wolf*, 813 F.2d 970, 975 (9th Cir. 1987); *see also, e.g.*, *Jenner v. Smith*, 982 F.2d 329, 334 (8th Cir. 1993) (same).

It is not the case that Green's statement consisted "mostly [of] details that he 'had adopted from the officers' suggestions'" (Br. at 42 (quoting *In re J.F.*, 987 A.2d at 1177)). Green's story—that Black had pointed a gun at him; that Green went into the alley, where Mike-Mike/Man-Man threatened to kill Green if he did not kill Black; that Green took a gun from Mike-Mike/Man-Man and went back to where Black was standing; and that Black reached for his gun, causing Green to shoot him

first—was provided entirely by Green (A75-91). *See generally Toudle v. United States*, 187 A.3d 1269, 1288 (D.C. 2018) ("[W]e will not infer that appellant's confession, which went far beyond the lines of 'one of the stories [the investigators] had proposed,' was the product of his will having been overborne."). Although Green claimed not to remember details about how many times he shot Black or where he did so (A92), he never agreed with Detective Patterson that he had shot Black in the street, but instead insisted that he did not remember because he might have been "high or drunk" (A93). The interview itself thus refutes Green's statement to his girlfriend that he "just went by the stories [the officers] told me" (A131).

Nor was coercive for the officers to allow Green to speak with his girlfriend during the interview (Br. at 43-44), which they did after Green asked if he could call her (A107). By that point, Green had already confessed to killing Black. And there was no indication that Green's girlfriend was acting as an agent of the police. The Constitution forbids law enforcement from "coerc[ing] a suspect into making self-incriminating statements; it provides no similar protection against third-party cajoling, pleading, or threatening." *Van Hook v. Anderson*, 488 F.3d 411, 420-21 (6th Cir. 2007) (en banc); *see also, e.g.*, *United States v. Erving L.*, 147 F.3d 1240, 1247 (10th Cir. 1998). And Green was not "suffering from nicotine withdrawal" (Br. at 44)—the officers provided him with cigarettes at his request (A55). Although when Green denied having his phone at the time of the murder, Detective Patterson

told him, "I'm not going to let you sit here and smoke all them cigarettes and going to sit here and lie to me," he handed Green a cigarette even as Green continued to deny having his phone (A85-87; Exh. 300, 3:14:50–3:16:05).

In any event, even if the detectives' conduct were somehow coercive, Green's "will" was not "overborne in such a way as to render his confession the product of coercion." *(Darryl) Turner*, 761 A.2d at 853; *see United States v. Hallford*, 816 F.3d 850, 857 (D.C. Cir. 2016) ("The ultimate question is whether Hallford's will was overborne and his capacity for self-determination critically impaired as a result of the agents' conduct.") (quotation marks omitted). Detective Patterson's statement about the cigarette came after Green had already confessed, and Green never admitted having his cellphone when the murder occurred. *See Graham v. United States*, 950 A.2d 717, 737 (D.C. 2008) (statement that "demonstrably had little effect on appellant" did not "render[] an otherwise voluntary confession involuntary"). Green had likewise already confessed when he spoke with his girlfriend. At the time of the interview, Green was 24, had finished school through eleventh grade, had extensive prior experience with the law, and was not in a distressed physical or mental state. *See id.* at 736 ("In general, the personal factors to be considered include the suspect's age, education, prior experience with the law, and physical and mental condition.") And during the interview, Green was advised of his rights, the questioning was neither long nor intense, and there was no physical punishment,

threats, or trickery. *See id.* ("The relevant details of the interrogation include its duration and intensity, the use of physical punishment, threats or trickery, and whether the suspect was advised of his rights."). Under these circumstances, "this is not that rare case" in which "'a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda*[.]'" *Toudle*, 187 A.3d at 1286 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 423 n.20 (1984)).[5]

II. The Trial Court Did Not Plainly Err When Instructing the Jury On the Elements of D.C. Code § 22-4503(a)(1).

The District's unlawful possession of a firearm statute states: "No person shall own or keep a firearm, or have a firearm in his or her possession or under his or her control, within the District of Columbia, if the person: (1) Has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year[.]" D.C. Code § 22-4503(a)(1). Although § 22-4503(a)(1) contains no express *mens rea* element, and despite the absence of any holding by this Court that the statute requires the government to prove the defendant knew his status as a prohibited person, Green argues that the trial court plainly erred by failing to instruct the jury that Green had

[5] Although there was powerful evidence of Green's guilt apart from his confession, including his cellphone and his gun's magazine with his DNA on it at the crime scene, the government recognizes that, if Green's confession was improperly admitted, it cannot establish that error was harmless beyond a reasonable doubt.

to know he had been previously convicted of a crime punishable by imprisonment for a term exceeding one year (Br. at 46-50). *See Bellamy v. United States*, 810 A.2d 401, 406 (D.C. 2002) (plain-error standard). This argument is meritless.

A. The Trial Court Did Not Err.

The question whether to apply a knowledge requirement to § 22-4503(a)(1)'s status element, "though not expressed in the statute, is a question of legislative intent to be answered by construction of the statute." *McIntosh v. Washington*, 395 A.2d 744, 756 (D.C. 1978). Relying on *Rehaif v. United States*, 139 S. Ct. 2191 (2019), Green argues that the Court should import a knowledge-of-status element into § 22-4503(a) "because the federal provision addressed in *Rehaif* is materially identical to the local provision at issue in this case" (Br. at 47). Not so. Not only are there meaningful textual differences between the federal statutes at issue in *Rehaif* and § 22-4503(a), but there are additional reasons to conclude that Congress did not intend to apply a knowledge requirement to § 22-4503(a)'s status element. Indeed, post-*Rehaif*, numerous courts have concluded that analogous state statutes do not require a defendant to have knowledge of his status as a prohibited person. *See Howling v. State*, 274 A.3d 1124, 1143 (Md. 2022); *State v. Holmes*, 478 P.3d 1256, 1261 (Ariz. Ct. App. 2020); *Campbell v. State*, 161 N.E.3d 371, 379 (Ind. Ct. App. 2020); *State v. Fikes*, 597 S.W.3d 330, 334 (Mo. Ct. App. 2019); *State v. Leija*, 2022 WL 333606, at *9 (Kan. Ct. App. 2022); *Woods v. State*, 2020 WL 6504629, at *5

(Nev. 2020); *Bo v. State*, 2020 WL 6266353, at *2 (Minn. Ct. App. 2020). The same is true of § 22-4503(a).

Unlike § 22-4503(a), the federal statutes at issue in *Rehaif* contained an express *mens rea* requirement. Under 18 U.S.C. § 924(a)(2), it is a crime to "knowingly violate[]" a separate statute, 18 U.S.C. § 922(g), which prohibits certain categories of persons from possessing firearms. In *Rehaif*, 139 S. Ct. at 2194, the Supreme Court addressed "the scope of the word 'knowingly'" as it is used in § 924(a)(2). The Court held that, read together, the statutes require the government to "show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Id.* In reaching that conclusion, the Court explained that "[t]he proper interpretation of the statute . . . turns on what it means for a defendant to know that he has 'violate[d]' § 922(g)." *Id*. at 2195. The Court noted that, "[a]s 'a matter of ordinary English grammar,' [it] normally read[s] the statutory term '"knowingly" as applying to all the subsequently listed elements of the crime.'" *Id.* at 2196 (quoting *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009)). "[E]veryone agree[d] that the word "knowingly" applies to § 922(g)'s possession element, which is situated after the status element." *Id.* The Court saw "no basis to interpret 'knowingly' as applying to the second § 922(g) element but not the first." *Id.* Rather, "by specifying that a defendant may be convicted only if he 'knowingly violates' § 922(g), Congress intended to require the Government to

establish that the defendant knew he violated the material elements of § 922(g)." *Id.* The Court found support for this text-based conclusion because a defendant's knowledge of his status "helps to separate wrongful from innocent acts." *Id.* at 2197.

Section 22-4503(a)(1), in contrast, provides no textual basis to conclude that Congress meant to require that a defendant know his status as a prohibited person. That statute has no express *mens rea* requirement, much less a requirement that the defendant must "knowingly violate" the law. Because § 22-4503(a)(1) makes it a crime for a prohibited person to "have a firearm in his or her possession," Congress presumably meant to require knowledge of that possession. *See, e.g.*, *(Leon) Robinson v. United States*, 100 A.3d 95, 105 n.16 (D.C. 2014) (explaining that both actual and constructive possession require knowledge); *Howling*, 274 A.3d at 1139 ("The plain text of [Maryland's FIP statute] omits *mens rea* language of knowledge. The statute uses the word 'possess,' which this Court has interpreted to require knowledge of possession."). But by "criminalizing the possession of a firearm . . . by a disqualified person" without more, "the clear intent of [Congress] was to require only knowledge of that possession." *Howling*, 274 A.3d at 1139.

Beyond § 22-4503(a)'s plain language, there are additional reasons to conclude that Congress did not intend to require knowledge of status. Congress enacted both the federal firearms offenses at issue in *Rehaif* and the original version of § 22-4503(a). *See* Pub. L. No. 83-85, § 204, 67 Stat. 90, 93 (1953). In so doing, it

explicitly included a "knowingly violate[]" requirement in 18 U.S.C. § 924(a)(2) but did not do so in D.C. Code § 22-4503(a). Moreover, in enacting the original version of § 22-4503(a), Congress required that those who "keep a pistol for, or intentionally make a pistol available to" a previously convicted felon "know[ ] that [t]he [felon] has been so convicted," but did not enact such a knowledge-of-status requirement for the felons themselves. Pub. L. No. 83-85, § 204, 67 Stat. 90, 93-94 (1953). These contrasting statutory provisions enacted at the same time are powerful evidence that Congress did *not* intend to require the government to prove that a defendant knows his status as a previously convicted felon under § 22-4503(a). *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quotation marks omitted).

Declining to read a knowledge-of-status requirement into § 22-4503(a)(1) is also consistent with federal decisions interpreting the pre-1986 versions of the relevant federal statutes, which were likewise "without any explicit scienter provision." *Rehaif*, 139 S. Ct. at 2199. Those decisions rejected a knowledge-of-status requirement, explaining that "Congress will not be presumed to have required scienter as an element of a crime where the purpose of the statute, as is the case here, is regulation of dangerous or harmful objects," *United States v. Turcotte*, 558 F.2d

893, 896 (8th Cir. 977), and that such a requirement "would be inconsistent with Congress' desire 'to maximize the possibility of keeping firearms out of the hands of (felons),'" *United States v. Pruner*, 606 F.2d 871, 874 (9th Cir. 1979) (quoting 114 Cong. Rec. 21784 (1968)). Congress had a similar intent when enacting § 22-4503(a)(1). *See* H.R. Rep. No. 82-538, at 7 (1951) ("[P]ersons forbidden to possess pistols enumerated in section 204(b) represent individuals who for varied reasons should not be permitted to possess a pistol and who, if permitted to possess a pistol, would be a menace to life and safety.").

Declining to read a knowledge-of-status requirement into § 22-4503(a)(1) is likewise consistent with this Court's decisions addressing the regulation of firearms in the District. Those decisions repeatedly have found that a defendant's knowledge that he possessed a firearm, rather than his knowledge of the relevant regulation or licensing requirement, is sufficient for conviction. For example, when addressing the statute imposing criminal sanctions "on those who fail to register firearms, regardless of their knowledge of the duty to register," the Court explained that "knowledge is not required" because "where dangerous or deleterious devices or products are involved, the probability of regulation is so great that anyone who is aware that he is either in possession of or dealing with them must be presumed to be aware of the regulation." *McIntosh v. Washington*, 395 A.2d 744, 756 (D.C. 1978). Likewise, this Court has rejected the argument that the Government must prove that

a defendant intended to carry a gun "without a license," because "[t]he District of Columbia has a great interest in protecting its citizenry from the dangers inherent in widespread ownership of weapons, . . . and licensure is a legitimate means of attaining that goal. Appellant cannot effectively rely upon a contention that he was unaware of the law." *McMillen v. United States*, 407 A.2d 603, 605 (D.C. 1979) (citations omitted); *see also Mitchell v. United States*, 302 A.2d 216, 217 (D.C. 1973) ("[A]lthough criminal intent, or an evil state of mind, is an essential ingredient in crimes derived from the common law, carrying a pistol without a license was not an offense at common law and all that is needed to prove a violation of such code provision is an intent to do the proscribed act.") (citations omitted). Thus, "under the statutory scheme that Congress enacted for the District of Columbia, anyone who knowingly and intentionally possesses a weapon in this jurisdiction does so at his or her own risk[.]" *Moore v. United States*, 927 A.2d 1040, 1055 (D.C. 2007).

Because "a legislative body may enact a valid criminal statute with a strict-liability element, the dispositive question is whether it has done so or, in other words, whether the presumption [in favor of scienter] . . . is rebutted. This rebuttal can be done by the statutory text or other persuasive factors." *Rehaif*, 139 S. Ct. at 2111-12 (Alito, J., dissenting). Here, § 22-4503(a)'s text and history, and the history of firearms regulation in the District, all establish that Congress did not intend when enacting § 22-4503(a) to require that a defendant have knowledge of his status as a

prohibited person. For that reason, the trial court did not err when it omitted that requirement from the jury instructions in this case.

B. Any Error was Not Plain.

As the foregoing discussion demonstrates, even if the trial court's instruction on the elements of § 22-4503(a)(1) was erroneous, that error was not plain. This Court has never held that § 22-4503(a) requires a defendant to know his status as a prohibited person. *See Atkins v. United States*, 290 A.3d 474, 481 (D.C. 2023) (noting that *Rehaif* "interpreted the concededly differently-worded federal felon in possession statutes," and "assuming without deciding" that § 22-4503(a) contains such a requirement). And the significant textual and historical differences between § 22-4503(a) and the statutes at issue in *Rehaif* make any such conclusion far from clear. Any error here thus was not plain. *See Williams v. United States*, 130 A.3d 343, 347 (D.C. 2016) (error must be "clear under current law"); *Euceda v. United States*, 66 A.3d 994, 1012 (D.C. 2013) (no plain error where "neither this court nor the Supreme Court has decided [the issue.]").

C. Green Was Not Prejudiced.

Finally, even if the trial court's instructions were plainly erroneous, Green cannot establish prejudice because he has not made "'a sufficient argument or representation on appeal that he would have presented evidence at trial that he did

not in fact know he was a felon.'" *Atkins*, 290 A.3d at 482 (quoting *Greer v. United States*, 141 S. Ct. 2090, 2100 (2021)).

Here, as in *Atkins*, Green stipulated that he previously had been convicted of a crime punishable by imprisonment for a term exceeding one year (8/8/18 Tr. 56). Green nonetheless argues that he would have presented evidence at trial that he did not know that he had been convicted of such a crime because "he was sentenced to serve only six months" (Br. at 48). Not so. Green was sentenced to a statutory maximum 10 years in prison, with the execution of that sentence suspended as to all but 6 months (Sealed Record 13 (Presentence Report) at 10, 13). *See* Md. Code Ann., Crim. Law § 3-203(c)(3) (ten-year maximum). The sentencing occurred on April 24, 2014, less than 15 months before the crimes at issue in this case (Presentence Report at 13). At that hearing, the court was required to orally pronounce the ten-year sentence with Green present. *See generally Tweedy v. State*, 845 A.2d 1215, 1225 (Md. 2004) (right to be present at sentencing); *Dutton v. State*, 862 A.2d 1075, 1081-82 (Md. Ct. Spec. App. 2004) (transcript of sentencing hearing controlling); Maryland Rule 4-342(e) (right to personally allocute during sentencing). The "pronouncement of the sentence in open court and its entry on the court docket are the objective and tangible manifestations of the judgment, which constitute notice, not only to the accused, but to all interested parties." *Jackson v. State*, 515 A.2d 768, 773 (Md. Ct. App. 1986).

Moreover, Green's ten-year sentence was the result of a guilty plea (R.48 at 4 n.6) during which the court was "required to inform [him] of the [ten-year] maximum sentence he may receive[.]" *Bryant v. State*, 424 A.2d 1115, 1118 (Md. Ct. App. 1981). And Green was still on probation when he committed the instant offenses, with the possibility that the entire unexecuted portion of the sentence could be imposed if he violated the terms of his probation. *See Hersch v. State*, 562 A.2d 1254, 1258 (Md. 1989) ("[I]t is entirely fair to hold him to an understanding that upon violation of his probation he may be required to serve the unexecuted portion of the sentence that was earlier suspended.").[6]

For these reasons, Green's reliance on *United States v. Baronette*, 46 F.4th 177 (4th Cir. 2022), is misplaced. There is no suggestion that the defendant in that case had pleaded guilty to his earlier crimes or that he was on probation at the time he unlawfully possessed a firearm. Whatever "colloquial[]" term is used for the crime, *Rehaif* does not require the government to prove that a defendant "knew he was a felon." *Id.* at 200. Rather, if this Court reads a knowledge-of-status requirement into § 22-4503(a)(1), the government need only prove that a defendant

[6] Green also knew he was not allowed to possess a firearm: when his girlfriend asked about the gun found in her apartment, Green asked her to find someone to "take [his] beef" (A126). And Green's self-serving claim aside, there is no indication that he had an "impaired short-term memory" (Br. at 50); to the contrary, he provided his girlfriend's address, his aunt's phone number, his brother's phone number, and his deceased mother's phone number from memory (A13-15, A71, A150; Exh. 303).

knew he had been convicted of a crime punishable by imprisonment for more than a year. Here, Green pleaded guilty to a crime with a ten-year maximum sentence, was sentenced to the full ten years, and was on probation for that crime and still facing the possible imposition of nearly the entire ten years. Green thus cannot establish prejudice.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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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.

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

(1) An individual's social-security number
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(6) Financial account numbers

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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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19-CF-546
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6/30/2023
Date

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Gregory M. Lipper, Esq., glipper@legrandpllc.com, on this 30th day of June, 2023.

_____/s/_____
DANIEL J. LENERZ
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