BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-387

BRIAN CARRUTH, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

Cr. No. 2021-CF2-6934

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II. Whether the trial court violated the Sixth Amendment when, during a lunch break in the midst of Carruth's cross-examination, it instructed Carruth not to discuss his testimony with anyone.

III. Whether the District's prohibition on carrying a rifle as applied to Carruth violates the Second Amendment where, contrary to Carruth's only argument, he could lawfully transport a firearm while traveling through D.C. without registering it.

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COUNTERSTATEMENT OF THE CASE

On June 2, 2022, a grand jury charged appellant Brian Carruth with carrying a rifle, D.C. Code § 22-4504(a-1); possession of an unregistered firearm, D.C. Code § 7-2502.01(a); and unlawful possession of ammunition, D.C. Code § 7-2506.01(a)(3) (Record on Appeal (R.) 8).

The Honorable Michael O'Keefe presided over a jury trial that began February 22, 2023 (R.A at 19). On February 28, the jury found Carruth guilty on each count (R.40). On April 27, Judge O'Keefe imposed

a total suspended sentence of 18 months in prison and required Carruth to serve 18 months on probation (4/27/23 Transcript (Tr.) 18; *see* R.43). Carruth timely appealed (R.44).

The Trial

The Government's Evidence

On December 5, 2021, United States Secret Service Officer Tyler Young was on patrol in a marked police cruiser when he saw a red pickup truck parked at the intersection of 18th and C Streets, NW, with what appeared to be "a rifle case mounted to [the] truck bed" (2/23/23 Tr. 44-45). Officer Young drove around the block and got behind the truck, which began moving north on 18th Street (*id.* at 45). After the truck "pass[ed] through a steady yellow light" at the F Street intersection, Officer Young pulled the truck over (*id.* at 46).

Officer Young approached the truck's driver—Carruth—and asked him "if there were any weapons in the vehicle and . . . if there was a rifle in the box on the back of the truck" (2/23/23 Tr. 51). Carruth said that there were no weapons in the truck and that the box held camping equipment (*id.*). Officer Young then asked Carruth for his driver's license, vehicle registration, and proof of insurance (*id.* at 52-53). In

response, Carruth "stated that he was here on a matter of national security with the Department of Interior" and "that he was here to visit the White House" (*id.* at 53). Officer Young asked Carruth if he had an appointment with the White House; Carruth said no (*id.*). The address on Carruth's driver's license was in Burbank, Ohio (2/27/23 Tr. 28).

Secret Service Officer Jacob Pina arrived as Officer Young was questioning Carruth (2/23/23 Tr. 101). When Officer Young returned to his patrol car, Officer Pina went to the driver's window (*id.*). Officer Pina asked Carruth a question he "normally ask[s] everybody[:] is there any weapons in the vehicle that I should know about, be aware of[?]" (*id.*). Carruth answered that he had a rifle in the truck (*id.*). Officer Pina asked Carruth to step out and then detained him (*id.*).

When Secret Service officers searched Carruth's truck, they found a rifle in a case on the floor behind the driver's seat (2/23/23 Tr. 135-36, 186). The rifle was unloaded and the case was locked with a padlock (*id.* at 136, 140). There were items on top of the rifle case that would have to be "removed or pushed" for the weapon to be accessible to the driver (*id.* at 183-84). Behind the front passenger seat, officers found a separate, unlocked case containing 38 live rounds of rifle ammunition (*id.* at 136-

37, 184; Government Exhibit (Exh.) 8). They also found two spent cartridge casings in the truck (2/23/23 Tr. 137).

The truck contained a receipt indicating that the rifle, rifle case, and ammunition had been purchased on April 29, 2021, at a sporting goods store in Wooster, Ohio (2/23/23 Tr. 145; Exh. 13). The officers also found a document from the sporting goods store entitled "safety notice to customers purchasing firearms" that Carruth had signed on April 29 (2/23/23 Tr. 146-47; Exh. 16). Other documents found in the truck discussed "New Liberty Washington" (2/23/23 Tr. 150; Exh. 22), and said things such as:

> Fundamentals of Survival of potential confirmed threat against the USA (redundance system)
>
> 1. Secure the perimeter
> 2. Head in the game
> 3. Water
> 4. First Aid
>
> A,B,C,D are priority levels of department activation

(Exh. 23; *see generally* 2/23/23 Tr. 154-59; Exhs. 22-28).

Carruth did not have a firearm registration in the District of Columbia for the rifle found in his car and did not have a license to carry a firearm in the District (2/23/23 Tr. 205, 209-10).

The Defense Evidence

Carruth testified that he came to D.C. in December 2021 because he had found "a career opportunity . . . on the Internet with the Department of [the] Interior," and decided to visit D.C. to "look at the historical sites and check out the various areas to see if it would be a potential for a career opportunity" (2/27/23 Tr. 48-49). Carruth had only been in the District "about 20 minutes, and then [he] was pulled over" (*id.* at 49). Carruth did not "intend to stay in D.C. at that time"; he "was just visiting to see what the area was like" (*id.* at 49-50). His "plan was to go back to Ohio to see if there were any more showings on [his] house," which was for sale and under contract, "and then go to the next place" (*id.* at 50, 74-75).

When Carruth was arrested, his rifle was in a padlocked case behind the driver's seat (2/27/23 Tr. 54-58). There were personal items on top of it, including tennis shoes (*id.* at 57). Carruth had removed the firing pin and bolt from the rifle and stored them separately (*id.* at 58). Ammunition for the rifle was in a separate container on the truck's passenger side (*id.*). Carruth bought the rifle "[f]or target shooting and

possibly going hunting" (*id.* at 67). He had not hunted since his "younger years" (*id.*).

Carruth claimed that the officers who stopped him did not ask him questions about having anything in his truck (2/27/23 Tr. 74). Instead, when he told the officer that he "had tools, camping and outdoor gear and a hunting rifle," "[t]hat was all voluntary information that [he] gave the officer" (*id.*). Carruth "didn't say anything about a weapon": because the rifle "was locked and secured [while] being transported," he "would not describe th[e] hunting rifle as a weapon" (*id.*). And, according to Carruth, the papers in his truck about "New Liberty Washington" were "part of a self[-]project of [his] studies at the University of Ashland in Ohio" (*id.* at 78).

On cross-examination, Carruth admitted that he had never registered his rifle in the District of Columbia (2/27/23 Tr. 90). He identified the key to the rifle case's padlock, which was on the same keychain as his truck key (*id.*). When asked whether he could have reached the rifle case handle if he had moved "the backpack and the shoes that were on top of the rifle case," Carruth answered: "Possibly. I don't think that the case would be easily moved from where it's at in these

pictures to the front seat because of the length of the case and the height of the cab to the floor, especially with the seat backs up." (*Id.* at 98.) He admitted that, if he had pulled the rifle case into the front seat, he could have unlocked the padlock using the key on his keychain (*id.* at 99).

The parties stipulated that Carruth's rifle "was legally purchased by the defendant on 4/29/21 in Ohio" (2/27/23 Tr. 156).

SUMMARY OF ARGUMENT

The evidence was sufficient to support Carruth's conviction for carrying a rifle under D.C. Code § 22-4504(a-1). That statute's prohibition on "carrying" is broader than the requirement, set forth in the District's carrying a pistol without a license statute, that the pistol be carried "on or about the[ ] person." D.C. Code § 22-4505(a). As the Supreme Court recognized in *Muscarello v. United States*, 524 U.S. 125, 126-27 (1998), the ordinary meaning of "carrying" "applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies." The evidence that Carruth knowingly conveyed a rifle in a locked case in the passenger compartment of his pickup truck was thus sufficient to establish a violation of D.C. Code § 22-4504(a-1).

The evidence was also sufficient to establish that Carruth had not complied with the affirmative defense set forth by the District's firearm-transportation statute, D.C. Code § 22-4504.02. This is so for numerous reasons. A reasonable jury could have concluded that Carruth's destination was the District of Columbia, and thus that he was not merely transporting his rifle through the District as the statute requires. The jury also could have found that Carruth was making a roundtrip journey from Ohio to the District and back to Ohio, which would not fall within the statute's coverage. And the jury could have determined that Carruth's pickup truck had a compartment that was separate from the passenger compartment, and therefore that he failed to comply with D.C. Code § 22-4504.02 by transporting his rifle in a location that was directly accessible from the passenger compartment.

The trial court did not violate the Sixth Amendment when, during a lunch break in the midst of Carruth's cross-examination, it instructed Carruth not to discuss his testimony with anyone. The Supreme Court has recognized that a criminal defendant has no constitutional right to consult with his attorney while he is testifying. It has thus held that a trial judge my preclude a defendant from consulting with his attorney

during brief recesses where any conversation would relate to ongoing testimony. Here, the trial court's order did not preclude all consultation between Carruth and his attorney. Instead, it only prevented Carruth from discussing his ongoing testimony with his attorney during the lunch recess. As numerous courts have found, such an order did not violate the Sixth Amendment.

The District's prohibition on carrying a rifle as applied to Carruth does not violate the Second Amendment. That prohibition applies "except as otherwise provided by law," and thus incorporates myriad exceptions that, taken together, restrict only the manner in which a person may carry a rifle. Carruth's only argument on this point erroneously claims that he was required to register his rifle before he could transport it through the District. And the District's laws regulating the manner in which rifles are carried apply to residents and nonresidents alike. There is thus no merit to Carruth's argument that he faced an undue burden as compared with a D.C. resident.

ARGUMENT

I. There was Sufficient Evidence Both that Carruth Carried a Rifle and That He Did So in a Way that Did Not Comply with the District's Firearm-Transportation Statute.

Carruth challenges the sufficiency of the evidence in two respects. He argues that there was insufficient evidence (1) that he was "carrying" the rifle as required by D.C. Code § 22-4504(a-1), and (2) that he transported the rifle in a manner inconsistent with the affirmative defense set forth in D.C. Code § 22-4504.02 (Brief for Appellant (Br.) at 12-18). These arguments are meritless.

A. Standard of Review

In challenging the sufficiency of the evidence, Carruth bears a "heavy burden." *Olafisoye v. United States*, 857 A.2d 1078, 1086 (D.C. 2004). The evidence need not "compel a finding of guilt beyond a reasonable doubt, nor . . . [must] the government negate every possible inference of innocence." *Timberlake v. United States*, 758 A.2d 978, 980 (D.C. 2000). To prevail, Carruth must show that there was "no evidence upon which a reasonable mind could find guilt beyond a reasonable doubt." *Watson v. United States*, 979 A.2d 1254, 1256 (D.C. 2009)

(quotation marks and citations omitted). This Court views the evidence "in the light most favorable to the government, giving full play to the right of the [fact-finder] to determine credibility, weigh the evidence, and draw justifiable inferences of fact, and mak[es] no distinction between direct and circumstantial evidence." *McCraney v. United States*, 983 A.2d 1041, 1056 (D.C. 2009) (quotation marks omitted).

B. Discussion

1. Carrying a rifle

Carruth argues that the evidence was insufficient to support his conviction for carrying a rifle because the rifle was not "convenient of access and within reach" (Br. at 16 (quotation marks omitted)). This argument applies the wrong legal standard and is otherwise meritless.

a. Section 22-4504(a-1) does not require the rifle to be "convenient of access and within reach."

A conviction for carrying a rifle under D.C. Code § 22-4504(a-1) does not require that the defendant keep the rifle in such proximity as to be "convenient of access and within reach." Rather, the "convenient of access and within reach" standard is this Court's interpretation of language in

the District's carrying a pistol without a license statute that requires the pistol to be carried "on or about the[ ] person." Under D.C. Code § 22-4505(a), "[n]o person shall carry within the District of Columbia either openly or concealed *on or about their person*, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon." (emphasis added). Interpreting the italicized language, this Court has held that, "[b]ecause 'possession' is a broader concept than to 'carry on or about the person,' the government's evidence must go beyond mere proof of constructive possession and must show that the pistol was in such proximity to the person as to be convenient of access and within reach." *White v. United States*, 714 A.2d 115, 119 (D.C. 1998) (cleaned up); *see generally Henderson v. United States*, 687 A.2d 918, 920 (D.C. 1996) ("The meaning of the statutory language italicized above has been the subject of judicial consideration in this jurisdiction for many years.").

The District's prohibition on carrying a rifle or shotgun, in contrast, contains no requirement that the firearm be carried "on or about the[ ] person." Instead, that statute states only: "Except as otherwise permitted by law, no person shall carry within the District of Columbia a rifle or shotgun." D.C. Code § 22-4504(a-1).

This Court does not appear to have interpreted the term "carry" for purposes of the District's prohibition on carrying rifles and shotguns, which the Council enacted in 2009. *See* 56 D.C. Reg. 1162, 1164 (Feb. 6, 2009). As the Supreme Court has explained, however, "[w]hen one uses the word [carry] in the first, or primary, meaning, one can, as a matter of ordinary English, 'carry firearms' in a wagon, car, truck, or other vehicle that one accompanies." *Muscarello v. United States*, 524 U.S. 125, 128 (1998) (discussing dictionary definitions of "carry"); *see generally Lucas v. United States*, 305 A.3d 774, 777 (D.C. 2023) ("When the statute does not define the term in question, it is appropriate for us to look to dictionary definitions to determine its ordinary meaning.") (cleaned up). Applying this primary meaning, the Supreme Court held that the federal prohibition on "carr[ying] a firearm" during and in relation to a drug-trafficking crime, 18 U.S.C. § 924(c)(1), "applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies." *Muscarello*, 524 U.S. at 126-27.

This Court should apply the same interpretation to § 22-4504(a-1). Nothing in the text, legislative history, or structure of that provision

suggests that, to violate the statute, one must carry a rifle or shotgun "in such proximity to the person as to be convenient of access and within reach." *White*, 714 A.2d at 119 (cleaned up). As a textual matter, when it enacted § 22-4504(a-1), the Council chose not to include the requirement, found in § 22-4505(a), that the rifle or shotgun be carried "on or about the[ ] person." The Council thus indicated that it intended different standards to apply to the two crimes. *See Beatley v. District of Columbia*, 307 A.3d 470, 476 n.8 (D.C. 2024) (noting the "usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended") (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004)) (some quotation marks omitted). Indeed, before the Council enacted § 22-4504(a-1), defendants who carried rifles in the District were prosecuted under § 22-4504(a) for carrying a dangerous weapon. *See, e.g.*, *Bean v. United States*, 576 A.2d 187, 188 (D.C. 1990). It would make no sense to import the "on or about the[ ] person" requirement from § 22-4504(a) into § 22-4504(a-1), when the text of the latter statute contains no such language and where the Council explicitly enacted it as a separate provision with different requirements.

Likewise, nothing in § 22-4504(a-1)'s legislative history indicates that the Council intended it be limited to situations where the rifle or shotgun was carried "in such proximity to the person as to be convenient of access and within reach." To the contrary, when enacting § 22-4504(a-1), the Council stated only that the law "clarif[ied] that no person shall carry a long arm in the District except as otherwise permitted by law (e.g. lawful transportation related to commerce or recreation)[.]" Committee on Public Safety and the Judiciary, Council of the District of Columbia, Committee Report on Bill 17-593, "Inoperable Pistol Amendment Act of 2008," at 3-4 (Nov. 25, 2008). If anything, the Council's focus on the "transportation" of rifles and shotguns indicates that it was contemplating a much broader swath of conduct than either physically carrying a rifle or shotgun or having one "convenient of access and within reach." *See generally Muscarello*, 524 U.S. at 134 (explaining that "'transport' is broader than the word 'carry'").

Adopting *Muscarello*'s understanding of what it means to "carry" a firearm also makes sense given the structure of the District's firearms crimes. In various different provisions, the District has criminalized being "armed with or having readily available" a firearm, D.C. Code § 22-

4502(a), carrying a firearm "on or about the[ ] person," § 22-4504(a), carrying a firearm, § 22-4504(a-1), "transport[ing]" a firearm, § 22-4504.02(a), and having a firearm in one's "possession or . . . control," § 22-4503(a). "Carrying" is a narrower concept than "possession" or "transporting," but broader than being "armed with" or having something "readily available" or "on or about the person." *See Muscarello*, 524 U.S. at 134 (explaining that "'transport' is broader than the word 'carry,'" and that the Court's "definition does not equate 'carry' and 'transport'"); *Snell v. United States*, 68 A.3d 689, 694 (D.C. 2013) ("carried" is "a narrower concept than possession"); *White*, 714 A.2d at 119 ("'possession' is a broader concept than to 'carry on or about the person'") (quotation marks omitted); *Thomas v. United States*, 602 A.2d 647, 654 (D.C. 1992) ("possession is a broader concept than armed with/readily available"). Adopting *Muscarello*'s definition of what it means to "carry" a firearm—which is not "limited to the carrying of firearms on the person," 524 U.S. at 126, but which "requires personal agency and some degree of possession, whereas 'transport' does not," *id.* at 134—would properly place § 22-4504(a-1) in the hierarchy of the District's firearms laws.

b. There was sufficient evidence that Carruth carried the rifle.

Although the jury was instructed that it had to find Carruth carried the rifle "on or about his person" (2/27/23 Tr. 168), "[b]ecause the [sufficiency] question is what 'any rational trier of fact' could have found, [the court's] determination 'does not rest on how the jury was instructed.'" *United States v. Abukhatallah*, 41 F.4th 608, 624 (D.C. Cir. 2021) (quoting *Musacchio v. United States*, 577 U.S. 237, 243 (2016)). Applying the correct legal standard, there was sufficient evidence that Carruth carried the rifle for purposes of D.C. Code § 22-4504(a-1). The evidence was undisputed that Carruth's rifle was in a padlocked case behind the driver's seat of his pickup truck, that Carruth was driving the truck, and that he knew the rifle was there. This was sufficient to establish that Carruth carried the rifle. *See Muscarello*, 524 U.S. at 126-27 (the prohibition on carrying a firearm "applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies"). And even were the Court to adopt a more stringent definition of "carrying," the evidence would be sufficient to meet it. The rifle was immediately behind Carruth's seat, where he could reach it, and

he had the key to the padlock on his truck keychain. Thus, "a jury could reasonably find that the location of the gun did not present any obstacle denying [Carruth] convenient access to the weapon or placing it beyond his reach." *White*, 714 A.2d at 120. *See also Porter v. United States*, 282 A.2d 559, 560-61 (D.C. 1971) ("[I]t can hardly be said that the location of the revolver under the passenger side of the front seat presented an obstacle such as to deny appellant convenient access to the weapon or place it beyond his reach.").

2. Lawful transportation

At the time of Carruth's offense, the District's lawful-transportation statute stated, in relevant part, that "any person . . . shall be permitted to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry the firearm to any other place where he may lawfully possess and carry the firearm if the firearm is transported in accordance with this section." § 22-4504.02(a) (2021).[1] The statute set forth the following requirements:

[1] All subsequent citations are to the 2021 version of the statute, which was amended in 2023 to make unlawful transportation a crime. *See* 70 D.C. Reg. 928, 933 (Jan. 27, 2023).

> (b)(1) If the transportation of the firearm is by a vehicle, the firearm shall be unloaded, and neither the firearm nor any ammunition being transported shall be readily accessible or directly accessible from the passenger compartment of the transporting vehicle.
>
> (2) If the transporting vehicle does not have a compartment separate from the driver's compartment, the firearm or ammunition shall be contained in a locked container other than the glove compartment or console, and the firearm shall be unloaded.

§ 22-4504.02(b)(1)-(2). The evidence was sufficient for the jury to reject this affirmative defense for several separate reasons. *See generally Abed v. United States*, 278 A.3d 114, 127 (D.C. 2022) ("'When a defendant relies on a statutory exception [such as the LEOSA exception] as an affirmative defense to a criminal charge, the burden is on the defendant to bring himself or herself within the exception.'") (quoting *Bsharah v. United States*, 646 A.2d 993, 998 (D.C. 1994)).

First, a reasonable jury could have concluded that Carruth's destination was D.C., and thus that he was *not* "transport[ing] a firearm . . . from any place where he may lawfully possess and carry the firearm to any other place where he may lawfully possess and carry the firearm[.]" § 22-4504.02(a). Carruth told Officer Young that he had come to D.C. "on a matter of national security with the Department of Interior"

and "that he was here to visit the White House" (2/23/23 Tr. 53). Carruth, however, could not lawfully possess and carry his rifle in the District of Columbia: Carruth had no firearm registration in D.C. for the rifle found in his car and no license to carry a firearm here (2/23/23 Tr. 205, 209-10). *See* D.C. Code § 7-2502.01(a) (making it a crime to "possess or control any firearm, unless the person . . . holds a valid registration certificate for the firearm").

Second, although the jury did not have to credit Carruth's testimony that he intended to return to Ohio after visiting D.C., that testimony also brought Carruth outside the statute's scope: § 22-4504.02(a) requires the person to be "transport[ing] a firearm . . . from any place where he may lawfully possess and carry the firearm to any *other* place where he may lawfully possess and carry the firearm[.]" (emphasis added). By its plain language, the statute does not encompass a roundtrip journey that begins and ends in the one state a defendant may lawfully possess a firearm. *See Bieder v. United States*, 662 A.2d 185, 187 (D.C. 1995) (explaining that identical language in 18 U.S.C. § 926A means that "a person may lawfully transport a weapon between *two states* in which it is lawful to carry the weapon") (emphasis added); *People*

v. Guisti, 926 N.Y.S.2d 345 (N.Y. Crim. Ct. 2011) ("The Court is not persuaded that [18 U.S.C. § 926A] applies to interstate travel which is in actuality a round-trip foray with a gun into states that the defendant is not entitled to possess the gun."). Indeed, were that the case, the tens of millions of tourists who visit D.C. each year could bring their firearms with them.[2] The Council cannot have intended such an absurd result. *See generally In re Clark*, 311 A.3d 882, 889 (D.C. 2024) ("'[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.'") (quoting *Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982)).

Third, Carruth also excluded himself from the statute's coverage when he testified that he was in the District to "look at the historical sites and check out the various areas to see if it would be a potential for a career opportunity" (2/27/23 Tr. 48-49). By Carruth's own admission, he was doing more than merely traveling through the District, which takes

[2] *See generally* Meagan Flynn, *D.C. Aims for More International Tourists After Signs of Pandemic Recovery*, WASH. POST, Aug. 23, 2023 ("[a]bout 21.9 million people visited D.C. in 2022").

him outside of the statute's coverage regardless of his ultimate long-term destination. *See Revell v. Port Auth.*, 598 F.3d 128, 136 (3d Cir. 2010) ("it is also clear that what happened here does not fall within § 926A's scope because his firearm and ammunition were readily accessible to him during his overnight stay in New Jersey"); *Matter of Khoshneviss v Property Clerk of N.Y. City Police Dept.*, 1 N.Y.S.3d 122, 123 (N.Y. App. Div. 2014) ("The firearm owner must be actually engaging in travel or acts incidental to travel"); *People v. Selyukov*, 854 N.Y.S.2d 298, 299 (N.Y. Just. Ct. 2008) ("Because the defendant was not solely engaged in acts incidental to travel through New York, but was stopping for another purpose, he is not entitled to the defense provided by 18 U.S.C. § 926A").

Fourth, and finally, a reasonable jury could have found that Carruth's pickup truck had a "compartment separate from the driver's compartment," and that Carruth's rifle and ammunition were nonetheless "directly accessible from the passenger compartment[.]" § 22-4504.02(b)(1)-(2). Under the firearm-transportation statute, "[i]f the transporting vehicle does not have a compartment separate from the driver's compartment, the firearm or ammunition shall be contained in a locked container other than the glove compartment or console, and the

firearm shall be unloaded." § 22-4504.02(b)(2). However, for vehicles that do have a separate compartment, "the firearm shall be unloaded, and neither the firearm nor any ammunition being transported shall be readily accessible or directly accessible from the passenger compartment of the transporting vehicle." § 22-4504.02(b)(2). Here, Carruth's pickup truck had two compartments separate from the driver's compartment: it had a covered bed in the back and a large case mounted to the bed (2/23/23 Tr. 44-45, 49-50; Exh. 1). Indeed, Carruth was storing possessions in the truck's covered bed (2/27/23 Tr. 94). The jury thus could have found that the defense did not apply because Carruth's rifle and ammunition were "readily accessible or directly accessible from the passenger compartment of the transporting vehicle." § 22-4504.02(b)(2).

Carruth appears to argue that, because the government did not "concentrate on" the requirements of § 22-4504.02(a) in its closing argument, the Court should not address the question whether he was "'transporting' the firearm according to D.C. Code § 22-4504.02" (Br. at 15). But the parties' closing arguments are irrelevant to the sufficiency inquiry, which does not depend on the parties' arguments but instead focuses solely on the evidence introduced at trial. *See, e.g.*, *McCraney*, 983

A.2d at 1056 ("The evidence is sufficient to sustain a conviction so long as a rational trier of fact *could* have found the essential elements of the charged offense beyond a reasonable doubt."). And even if the parties' arguments did matter, the government argued in its rebuttal closing that Carruth was "not just passing through [D.C.,] as somebody who [ ] might be lawfully transporting a firearm would do," but rather D.C. "was where he was going" (2/27/23 Tr. 201-02).

Carruth further argues that, "[a]s a matter of law, the rifle . . . was not 'accessible'" for purposes of § 22-4504.02(b)(2). That is not so. To be accessible, something needs only to be "capable of being reached." *Accessible*, MERRIAM-WEBSTER DICTIONARY (2024). And § 22-4504.02(b)(2) states that "neither the firearm nor any ammunition being transported shall be readily accessible or directly accessible from the passenger compartment of the transporting vehicle." In other words, the statute looks only at whether the firearm or ammunition is capable of being reached "from the passenger compartment[.]" Here, both Carruth's rifle and its ammunition were located in the pickup's passenger compartment, and the case holding the ammunition was unlocked. Both were thus "readily accessible or directly accessible from the passenger

compartment of the transporting vehicle," in contravention of the statute's requirements. There was thus sufficient evidence for the jury to reject Carruth's affirmative defense that he was lawfully transporting his rifle and ammunition in compliance with D.C. Code § 22-4504.02.

II. The Trial Court Did Not Violate the Sixth Amendment When It Ordered Carruth Not to Discuss His Testimony With Anyone During a Lunch Recess.

While Carruth was being cross-examined by the government, the trial court recessed for lunch (2/27/23 Tr. 104). At the government's request, the court instructed Carruth that he "should not be speaking to [his] lawyer about the substance of [his] testimony" during the break (*id.* at 105). Carruth objected, arguing that he "has a constitutional right to discuss testimony at any time, whether he's on the stand or not, with his attorney" (*id.*). Noting that Carruth could not "stop and say[, ']I need to talk to my lawyer about the substance of my testimony[,']" while he was "in the middle of" it, the trial court instructed Carruth: "Don't discuss your testimony with anyone, please" (*id.* at 106). On appeal, Carruth renews his argument that this restriction violated the Sixth Amendment (Br. at 18-23). There is no merit to Carruth's argument, which the Court

reviews de novo. *See United States v. Triumph Cap. Grp., Inc.*, 487 F.3d 124, 131 (2d Cir. 2007).

A claim "that a defendant's constitutional rights were violated by a court order restricting communication between the defendant and his attorney [is] governed by two Supreme Court precedents, *Geders v. United States*, 425 U.S. 80 (1976), and *Perry v. Leeke*, 488 U.S. 272 (1989)." *Triumph Cap. Grp.,* 487 F.3d at 129. In *Geders*, the trial court ordered the defendant, who was in the midst of testifying, "not to consult his attorney during a regular overnight recess." 425 U.S. at 81. The Supreme Court held that this order violated the Sixth Amendment. *Id.* at 91. The Court explained that "[a] sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness who presumably has no stake in the outcome of the trial." *Id.* at 88. Unlike a typical witness, the defendant "must often consult with his attorney during the trial." *Id.* And overnight recesses "are often times of intensive work, with tactical decisions to be made and strategies to be reviewed." *Id.* The attorney "may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier." *Id.* "At the very

least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events." *Id.*

The Court in *Geders* made clear that it was not addressing "limitations imposed in other circumstances." 425 U.S. at 91. Rather, it held only "that an order preventing [a defendant] from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment." *Id.*

Subsequently, in *Perry*, the Court held that a defendant does not have a "constitutional right to confer with his attorney during [a] 15-minute break in his testimony[.]" 488 U.S. at 280. This is because, "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Id.* at 281. Once a defendant begins to testify, "neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice." *Id.* Thus, it is "appropriate for a trial judge to decide, after listening to the direct examination of any witness, whether the defendant or a nondefendant, that cross-examination is more likely to elicit truthful

responses if it goes forward without allowing the witness an opportunity to consult with third parties, including his or her lawyer." *Id.* at 282.

The Court distinguished *Geders* as involving a recess "of a different character[.]" *Perry*, 488 U.S. at 284. Because a defendant has no "constitutional right to discuss [his] testimony while it is in process," the trial judge has "the power to maintain the status quo during a brief recess in which there is a virtual certainty that any conversation between the witness and the lawyer would relate to the ongoing testimony." *Id.* at 283-84. However, "the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's own testimony—matters that the defendant does have a constitutional right to discuss with his lawyer[.]" *Id.* at 284. Although discussions during an overnight recess "will inevitably include some consideration of the defendant's ongoing testimony," it is "the defendant's right to unrestricted access to his lawyer for advice on a variety of trial related matters that is controlling in the context of a long recess." *Id.* "But in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed,

the testifying defendant does not have a constitutional right to advice." *Id.*

The trial court's order in this case did not violate the Sixth Amendment because it was limited in two ways. First, the court did not preclude Carruth from consulting with his attorney in all respects, but only ordered him not to discuss his ongoing testimony. Second, the court's order applied only during the brief midday lunch recess. As *Perry* made clear, a defendant does not have "a constitutional right to discuss [his] testimony while it is in process." *Perry*, 488 U.S. at 284. The trial court's order was designed to prevent just that—and only that. Furthermore, the court's order applied only during the short, midday lunch recess, during "which it is appropriate to presume that nothing but the testimony will be discussed[.]" *Id.*; *see Albrecht v. Horn*, 485 F.3d 103, 138 (3d Cir. 2007) ("[T]he two-hour prohibition over lunch time, which occurred in the middle of cross-examination, likely is tolerable under *Perry* insofar as the sole topic of discussion would have been the testimony itself.").

Addressing this precise scenario, the United States Court of Appeals for the Second Circuit held "that regardless of whether an absolute ban on communication would be permitted, a ban only on

attorney-client discussion of the defendant's ongoing testimony during an hour lunch break does not violate the Sixth Amendment." *Triumph Cap. Grp.,* 487 F.3d at 129. The government is unaware of any post-*Perry* case rejecting that conclusion, and numerous other courts have agreed with it. *See Ellison v. Commonwealth*, 2013-SC-000518-MR, 2014 WL 7238821, at *3 (Ky. Dec. 18, 2014) ("In the present case, the jury's lunch recess lasted for approximately 75 minutes. Therefore, this case is much more analogous to a brief recess as in *Perry* rather than the overnight recess in *Geders*."); *Wooten-Bey v. State*, 568 A.2d 16, 20 (Md. 1990) (finding no error where trial court ordered defendant not to discuss his testimony with anyone during a lunch recess); *State v. Hodge*, No. A-1177-13T2, 2016 WL 1706064, at *6 (N.J. Super. Ct. App. Div. Apr. 29, 2016) ("We nonetheless apply the *Perry* rule, as we conclude, given the facts, that the sequestration order withstands constitutional muster. Assuming the judge intended to bar counsel from talking to defendant at all over the luncheon recess, the break was during cross-examination and relatively brief."); *State v. Rodriguez*, 839 So. 2d 106, 121-24 (La. Ct. App. 2003) (finding no error where trial court ordered defendant and his attorneys "to have no contact with each other for any reason whatsoever

during a one hour and forty minute lunch recess"); *People v. Enrique*, 566 N.Y.S.2d 201, 206 (N.Y. App. Div. 1991) ("The luncheon recess declared herein by the trial court is the type of limited interruption during a defendant's testimony to which *Perry (supra)*, and not *Geders (supra)*, applies.").[3]

This Court's cases are not to the contrary. In *Jackson v. United States*, the Court held that an order preventing a defendant from discussing his testimony during a lunch recess "would not survive constitutional challenge." 420 A.2d 1202, 1205 (D.C. 1979) (en banc). That holding, however, was predicated on the Court's pre-*Perry* conclusion that a defendant "ha[s] the right to discuss the entire case, including his own testimony, with his attorney," *id.*, and that the length of the prohibition was immaterial, *id.* at 1204. As this Court has

[3] Although the Florida Supreme Court held that it is error for a trial court to prohibit a defendant from speaking to his attorney during a lunch recess, *Amos v. State*, 618 So. 2d 157, 161 (Fla. 1993), that opinion "construed the right to counsel as provided by article I, section 16, of the Florida Constitution, thus establishing Florida law regarding a criminal defendant's right to counsel independent of the Sixth Amendment." *Leerdam v. State*, 891 So. 2d 1046, 1049 (Fla. Ct. App. 2004).

recognized, these aspects of *Jackson* are no longer good law in light of the Supreme Court's decision in *Perry*:

> The sequestration order in *Jackson* covered a lunch break following the defendant's direct examination rather than an overnight recess, but the Court reasoned that an order barring the defendant from conferring with his lawyer violates the Sixth Amendment regardless of the brevity of the order's duration. . . . This aspect of the Court's reasoning . . . has been superseded by *Perry*[.]

Martin v. United States, 991 A.2d 791, 794 n.9 (D.C. 2010).

Martin likewise does not control the outcome here. There, the trial judge instructed the defendant not to discuss his testimony during a weekend break in the trial. *See Martin*, 991 A.2d at 794. Noting that "*Geders* and *Perry* hold that an order prohibiting a defendant from conferring with his counsel during an overnight (or other significant) interruption of his testimony is a denial of the defendant's Sixth Amendment right to counsel[,]" *id.* at 793, the Court held that the trial court's order "went further than the law permits," *id.* at 794 (quotation marks omitted). This was true even though the court's order was limited to the defendant's testimony: *Jackson*'s holding that a defendant has "'the right to discuss the entire case, including his own testimony, with his attorney' . . . remains valid and binding precedent in this jurisdiction with

respect to overnight recesses." *Id.* (quoting *Jackson*, 420 A.2d at 1205).[4] Nowhere did *Martin* discuss the constitutionality of such a limited order during a shorter break, such as the lunch recess at issue here.

Carruth nowhere addresses (or even cites) the Supreme Court's decision in *Perry*. He asserts that courts have "str[uck] down orders restricting all discussions between attorney and client during a one-hour lunch recess, and during brief routine recesses in the trial day" (Br. at 22), which was true before *Perry* but not after. For that reason, his reliance (at 22) on *Mudd v. United States*, 798 F.2d 1509 (D.C. Cir. 1986), is misplaced. *Mudd*, which was decided before *Perry*, asserted that "a trial court may not place a blanket prohibition on all attorney/client contact, no matter how brief the trial recess." 798 F.2d at 1511. That is no longer the law. Instead, the teaching of *Geders* and *Perry* is that "a

[4] Carruth asserts that a "similar issue is pending a decision in *Jeffrey Petty v. United States*[,] No. 22-CM-642" (Br. at 19 n.8). *Petty*, which was argued on November 8, 2023, before Judges Easterly, McLeese, and Senior Judge Thompson, involved an order preventing a defendant from discussing his testimony with his attorney during an overnight recess, which the trial court addressed the next day by allowing a two-hour, unrestricted consultation between the defendant and his attorney. Given these significant factual differences, it is unlikely that the Court's resolution of *Petty* will have any effect on this case.

ban only on attorney-client discussion of the defendant's ongoing testimony during an hour lunch break does not violate the Sixth Amendment." *Triumph Cap. Grp.,* 487 F.3d at 129.

III. D.C. Code § 22-4504(a-1) As Applied to Carruth Does Not Violate the Second Amendment.

Carruth argues that D.C. Code § 22-4504(a-1) is unconstitutional as applied to him (Br. at 5). According to Carruth, because he "had lawfully registered his firearm in the state of Ohio,"[5] it is "an unfair and undue burden to have him register his weapon in the District of Columbia if his ultimate goal was to travel to another jurisdiction where such similar carry was legal" (*id.*). This argument misapprehends D.C. law and is otherwise meritless.

Under D.C. Code § 22-4504(a-1), a person may not "carry within the District of Columbia a rifle or shotgun" "except as otherwise permitted by law[.]" The "except as otherwise permitted by law" caveat applies

[5] There was no evidence that Carruth registered his rifle in Ohio. To the contrary, Carruth testified that he did not need to do so (2/27/23 Tr. 70). Carruth's attorney argued to the trial court that Ohio has no firearm-registration requirement (*id.* at 36).

across a wide variety of circumstances. For example, "a person holding a valid registration for a firearm may carry the firearm:

> (1) Within the registrant's home;
>
> (2) While it is being used for lawful recreational purposes;
>
> (3) While it is kept at the registrant's place of business; or
>
> (4) While it is being transported for a lawful purpose as expressly authorized by District or federal statute and in accordance with the requirements of that statute.

D.C. Code § 22-4504.01. And, as discussed above (at 18-19), at the time of Carruth's offense, a person who had not registered his firearm in D.C. was "permitted to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry the firearm to any other place where he may lawfully possess and carry the firearm[,]" D.C. Code § 22-4504.02(a) (2021), so long as the firearm was "transported in accordance with" the requirements set forth in § 24-4504.02(b). Other exceptions to § 22-4504(a-1)'s prohibition on carrying a rifle are set forth in D.C. Code § 22-4505.

The requirements for registering a firearm are set forth in D.C. Code § 7-2502.01 et seq. As relevant here, none of the qualifications for registering a firearm require the registrant to live in the District. *See* D.C. Code § 7-2502.03. And the law exempts a nonresident from the

District's firearm-registration requirement if he is "participating in any lawful recreational firearm-related activity in the District, or on his way to or from such activity in another jurisdiction," so long as the person, among other things, transports the firearm "in accordance with § 22-4504.02[.]" D.C. Code § 7-2502.01(b)(3).

Notably, Carruth does not challenge the facial constitutionality of D.C. Code § 22-4504(a-1). Nor does he urge that it is unconstitutional as applied to D.C. residents. And Carruth does not argue that D.C.'s firearm-registration laws, which he was separately convicted of violating, are unconstitutional.

Instead, Carruth limits his argument to the claim that § 22-4504(a-1) "is unconstitutional as applied to Mr. Carruth's conviction" (Br. at 23). His asserted reason is that "the Second Amendment most certainly enshrined the right to carry a firearm in terms of transportation, and transporting such firearm from one legal place to another"; therefore, given that Carruth "had a right to carry [his] firearm in the state of Ohio, it is both an unfair and undue burden to have him register his weapon in the District of Columbia if his ultimate goal was to travel to another jurisdiction where such similar carry was legal" (Br. at 25).

Carruth, however, was not required to register his rifle in D.C. to be able to travel through the District with it. The affirmative defense set forth by D.C. Code § 22-4504.02 is not limited to firearms registered here. And the District's registration requirement expressly exempts nonresidents who are on their way to or from lawful firearm-related activities in other jurisdictions so long as the firearm is transported properly. *See* D.C. Code § 7-2502.01(b)(3). Those transportation requirements apply to D.C. residents and nonresidents alike. *See* D.C. Code §§ 22-4504.01(4), 22-4504.02. There is thus no merit to Carruth's argument that he was required to register his firearm in the District before he could travel through the District with it.

Nor would Carruth's conduct have been lawful if he had, in fact, registered his rifle. As noted above, under D.C. Code § 22-4504.01, a person who has registered a firearm may carry it "(1) Within the registrant's home; (2) While it is being used for lawful recreational purposes; (3) While it is kept at the registrant's place of business; or (4) While it is being transported for a lawful purpose as expressly authorized by District or federal statute and in accordance with the requirements of that statute." The first three provisions do not apply here: Carruth was

carrying his rifle in his truck, not within his home or business, and he was not using it for lawful recreational purposes. *Cf.* D.C. Code § 22-4505(c)(3) (defining "[r]ecreational firearm-related activity"). And, as discussed above (at 18-24), the jury appropriately concluded that Carruth was not transporting his rifle in accordance with the requirements set forth by the District's firearm-transportation statute (which is identical in relevant respects to the federal statute, 18 U.S.C. § 926A). Carruth's lack of a firearm registration in the District is thus irrelevant to his conviction under D.C. Code § 22-4504(a-1). Because Carruth did not have to register his rifle in the District to lawfully transport that firearm through D.C., and because Carruth's conduct would have violated D.C. Code § 22-4504(a-1) even if he had registered his rifle, Carruth's as-applied challenge premised on the burden of registering a firearm in D.C. necessarily fails.[6]

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[6] Given the limited nature of Carruth's claim and arguments, the government does not address the facial constitutionality of D.C. § 22-4504(a-1). We note, however, that the Second Amendment right is "subject to certain reasonable, well-defined restrictions." *N.Y. Sate Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 70 (2022).

Importantly, D.C. Code § 22-4504(a-1) places no restriction on *who* may carry a rifle or *where* they may carry it. Instead, the statute – in (continued . . .)

tandem with D.C.'s other gun laws – allows a rifle to be carried so long as it is done in a certain manner. As the Supreme Court has made clear, "[t]he historical evidence from antebellum America does demonstrate that *the manner* of public carry was subject to reasonable regulation." *Bruen*, 597 U.S. at 59.

Firearm licensing and registration schemes are likewise constitutional. *See, e.g.*, *id.* at 80 (Kavanaugh, J., concurring) (explaining that "shall-issue licensing regimes are constitutionally permissible," and that such regimes "may require a license applicant to undergo fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements"); *Bevis v. City of Naperville*, 85 F.4th 1175, 1199 (7th Cir. 2023) ("people who presently own the listed firearms or ammunition are entitled to keep them, subject only to a registration requirement that is no more onerous than many found in history."); *Baird v. Bonta*, No. 2:19-cv-00617-KJM-AC, 2023 WL 9050959, at *23 (E.D. Cal. Dec. 29, 2023) ("*Bruen* confirms a state like California may require a license without violating the Second Amendment. Other federal district courts have reached the same conclusion in adjudicating challenges to state licensing and registration laws after *Bruen*.") (listing cases).

CONCLUSION

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

Respectfully submitted,

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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, David H. Reiter, Esq., d.reiter.law@gmail.com, on this 4th day of June, 2024.

/s/
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