NO. 20-_____

In the Supreme Court of the United States

EDWARD B. FLEURY,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the Commonwealth of Massachusetts Appeals Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Edward Fleury is a retired police chief of Pelham, Massachusetts. He is a hunter, gun collector, and gunsmith. In 2014 local and state police conducted a search of his home to investigate an alleged assault with a firearm. During the course of search, the police seized Mr. Fleury's gun collection. The police claimed that his firearms were not properly stored, despite the presence of his wife in the home who was duly licensed to possess firearms. The charges were severed. In his first trial Mr. Fleury was tried upon the assault charge and five counts of Improper Storage. Three of the Improper Storage counts were directed out, and he was acquitted upon the remaining two, as well as the assault charge. In the second trial he was acquitted of ten counts of Improper Storage of a Large Capacity Firearm, a felony, but convicted upon twelve.

THE QUESTIONS PRESENTED ARE:

1. Whether Massachusetts gun storage law M.G.L. c. 140, § 131L, providing enhanced penalties for different types of firearms, is unconstitutionally vague on its face and in violation of the Second, Fifth and Fourteenth Amendments of the United States Constitution as a result of a failure to properly define the term "large capacity weapon.".

2. Whether the unit of prosecution for improper storage of firearm under M.G.L. c. 140, § 131L is ambiguous, thereby subjecting defendants to double jeopardy in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

LIST OF PROCEEDINGS

Supreme Judicial Court for the
Commonwealth of Massachusetts
No. FAR-27615
Commonwealth v. Edward B. Fleury
Date of Final Order: August 5, 2020

Commonwealth of Massachusetts Appeals Court
No. 18-P-303
Commonwealth v. Edward B. Fleury
Date of Final Order: June 11, 2020

Massachusetts Trial Court
No. 1480CR00193
Commonwealth v. Edward Fleury
Date of Conviction: December 16, 2014

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PETITION FOR A WRIT OF CERTIORARI

Edward Fleury, a resident of Pelham Massachusetts by and through counsel, Thomas E. Robinson, respectfully petitions this court for a writ of certiorari to review the judgment of the Appeals Court and Supreme Judicial Court of Massachusetts.

OPINIONS BELOW

The unpublished decision of the Appeals Court of Massachusetts affirming Edward Fleury's conviction, dated June 11, 2020, is included in the Appendix at App.2a. The conviction docket from the Massachusetts Trial Court is included at App.11a. The order of the Supreme Judicial Court of Massachusetts, dated August 5, 2020, denying a petition for further appellate review is included at App.1a.

JURISDICTION

Edward Fleury's petition for further appellate review with Supreme Judicial Court of Massachusetts was denied on August 5, 2020. Mr. Fleury invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the Supreme Judicial Court's judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. II

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

M.G.L. c. 121, select definitions

"ASSAULT WEAPON", shall have the same meaning as a semiautomatic assault weapon as defined in the federal Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. section 921 (a)(30) as appearing in such section on September 13, 1994, and shall include, but not be limited to, any of the weapons, or copies or duplicates of the weapons, of any caliber, known as: (i) Avtomat Kalashnikov (AK) (all models); (ii) Action Arms Israeli Military Industries UZI and Galil; (iii) Beretta Ar70 (SC–70); (iv) Colt AR–15; (v) Fabrique National FN/FAL, FN/LAR and FNC; (vi) SWD M–10, M–11, M–11/9 and M–12; (vi) Steyr AUG; (vii) INTRATEC TEC–9, TEC–DC9 and TEC–22; and (viii) revolving cylinder shotguns, such as, or similar to, the Street Sweeper and Striker 12; provided, however, that the term assault weapon shall not include: (i) any of the weapons, or replicas or duplicates of such weapons, specified in appendix A to 18 U.S.C. section 922 as appearing in such appendix on September 13, 1994, as such weapons were manufactured on October 1, 1993; (ii) any weapon that is operated by manual bolt, pump, lever or slide action; (iii) any weapon that has been rendered permanently inoperable or otherwise rendered permanently unable to be designated a semiautomatic assault weapon; (iv) any weapon that was manufactured prior to the year 1899; (v) any weapon that is an antique or relic, theatrical prop or other weapon that is not capable of firing a projectile and

which is not intended for use as a functional weapon and cannot be readily modified through a combination of available parts into an operable assault weapon; (vi) any semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition; or (vii) any semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine.

"LARGE CAPACITY FEEDING DEVICE", (i) a fixed or detachable magazine, box, drum, feed strip or similar device capable of accepting, or that can be readily converted to accept, more than ten rounds of ammunition or more than five shotgun shells; or (ii) a large capacity ammunition feeding device as defined in the federal Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. section 921(a)(31) as appearing in such section on September 13, 1994. The term "large capacity feeding device" shall not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber ammunition

'LARGE CAPACITY WEAPON", any firearm, rifle or shotgun: (i) that is semiautomatic with a fixed large capacity feeding device; (ii) that is semiautomatic and capable of accepting, or readily modifiable to accept, any detachable large capacity feeding device; (iii) that employs a rotating cylinder capable of accepting more than ten rounds of ammunition in a rifle or firearm and more than five shotgun shells in the case of a shotgun or firearm; or (iv) that is an assault weapon. The term "large capacity weapon" shall

be a secondary designation and shall apply to a weapon in addition to its primary designation as a firearm, rifle or shotgun and shall not include: (i) any weapon that was manufactured in or prior to the year 1899; (ii) any weapon that operates by manual bolt, pump, lever or slide action; (iii) any weapon that is a single-shot weapon; (iv) any weapon that has been modified so as to render it permanently inoperable or otherwise rendered permanently unable to be designated a large capacity weapon; or (v) any weapon that is an antique or relic, theatrical prop or other weapon that is not capable of firing a projectile and which is not intended for use as a functional weapon and cannot be readily modified through a combination of available parts into an operable large capacity weapon.

"SEMIAUTOMATIC", capable of utilizing a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and requiring a separate pull of the trigger to fire each cartridge.

M.G.L. c. 140, § 131L

(a) It shall be unlawful to store or keep any firearm, rifle or shotgun including, but not limited to, large capacity weapons, or machine gun in any place unless such weapon is secured in a locked container or equipped with a tamper-resistant mechanical lock or other safety device, properly engaged so as to render such weapon inoperable by any person other than the owner or other lawfully authorized user. It shall be unlawful to store or keep any stun gun in any place unless such weapon is secured in a locked container

accessible only to the owner or other lawfully authorized user. For purposes of this section, such weapon shall not be deemed stored or kept if carried by or under the control of the owner or other lawfully authorized user.

(b) A violation of this section shall be punished, in the case of a firearm, rifle or shotgun that is not a large capacity weapon, by a fine of not less than $1000 nor more than $7,500 or by imprisonment for not more than 1 1/2 years or by both such fine and imprisonment and, in the case of a large capacity weapon or machine gun, by a fine of not less than $2,000 nor more than $15,000 or by imprisonment for not less than 1 1/2 years nor more than 12 years or by both such fine and imprisonment.

(c) A violation of this section shall be punished, in the case of a rifle or shotgun that is not a large capacity weapon and the weapon was stored or kept in a place where a person younger than 18 years of age who does not possess a valid firearm identification card issued under section 129B may have access without committing an unforeseeable trespass, by a fine of not less than $2,500 nor more than $15,000 or by imprisonment for not less than 1 1/2 years nor more than 12 years or by both such fine and imprisonment.

(d) A violation of this section shall be punished, in the case of a rifle or shotgun that is a large capacity weapon, firearm or machine gun that was stored or kept in a place where a person younger than 18 years of age may have access without committing an unforeseeable trespass, by a fine of not less than $10,000 nor more than

$20,000 or by imprisonment for not less than 4 years nor more than 15 years or by both such fine and imprisonment.

(e) A violation of the provisions of this section shall be evidence of wanton or reckless conduct in any criminal or civil proceeding if a person under the age of 18 who was not a trespasser or was a foreseeable trespasser acquired access to a weapon, unless such person possessed a valid firearm identification card issued under section 129B and was permitted by law to possess such weapon, and such access results in the personal injury to or the death of any person.

(f) This section shall not apply to the storage or keeping of any firearm, rifle or shotgun with matchlock, flintlock, percussion cap or similar type of ignition system manufactured in or prior to the year 1899, or to any replica of any such firearm, rifle or shotgun if such replica is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition.

STATEMENT OF THE CASE

This case presents two questions regarding the firearms storage laws of Massachusetts: whether the term 'large capacity weapon' is vague and violates due process where the improper storage of such designated firearms imposes significant enhanced penalties and whether the unit of prosecution under the same statute is ambiguous, subjecting defendants to double jeopardy upon trials alleging multiple counts of Improper Storage for one course of conduct, occurring at the same place and time.

A. The Allegations of Improper Storage

On the morning of September 11, 2014, members of the State Police and various local police departments executed a search warrant for the residence of Edward Fleury located in Pelham, Massachusetts. The police were investigating an allegation that Mr. Fleury assaulted another person with a firearm. Mr. Fleury was not present at the time of the search. His wife who possessed a valid firearms license was at home. Mr. Fleury was an avid gun collector. At the time of the search he owned approximately two hundred firearms. The police claimed that the firearms were improperly stored.

Fleury filed a motion to dismiss challenging M.G.L. c. 140, § 131L on the grounds that it is unconstitutionally vague. The Trial Court conducted an evidentiary hearing. At the hearing Fleury presented testimony from Lewis Gordon, an expert in firearms. (App.17a). The Trial Court denied the motion with a

memorandum of decision reasoning that a person of ordinary intelligence would not have to guess at the meaning of the term 'large capacity weapon,' and stating that the law did not subject Mr. Fleury to arbitrary law enforcement.

Fleury's charges were severed. He was tried first on the charge of Assault with a Dangerous Weapon, a firearm, and five counts of Improper Storage. At trial he presented an affirmative defense of entrapment. At the close of evidence three of the Improper Storage charges were directed out. The jury acquitted Fleury on the remaining counts.

Fleury filed a motion to dismiss on the remaining twenty-two counts of Improper Storage, arguing that the second trial upon the same charges of Improper Storage of a Firearm subjected him to double jeopardy. The Trial Court denied the motion reasoning that the issue of improper storage was not necessarily decided in the first case where the jury could have rested their verdict based on the defense theory of entrapment.

At Fleury's second trial he was acquitted of ten counts of Improper Storage of a Firearm, and convicted upon twelve.

B. Direct Appeal

On direct Appeal, Fleury renewed his arguments that the term 'large capacity weapon' under M.G.L. c. 140, § 131L, is unconstitutionally vague and his conviction upon Improper Storage violates due process, and the unit of prosecution for improper storage of firearm under M.G.L. c. 140, § 131L is ambiguous, thereby subjecting him to double jeopardy.

In an unpublished opinion the Appeals Court of Massachusetts affirmed Fleury's convictions, dismissing his challenge to the vagueness of M.G.L. c. 140, § 131L, concluding that the defendant cannot seek relief on this basis where the statute falls outside of the scope of the right to bear arms under the Second Amendment. The Appeals Court also dispatched his double jeopardy challenge determining that 131L is not ambiguous with respect to the proper unit of prosecution. The Appeals Court concluded that the protection for double jeopardy was not implicated in the second trial where the prosecution was required to prove that the defendant improperly stored a separate set of guns.

Edward Fleury filed a petition for further appellate review with Supreme Judicial Court, renewing his arguments that M.G.L. c. 140, § 131L is unconstitutionally vague, and that he was subjected to jeopardy twice on his subsequent trial of Improper Storage of a Firearm where the unit of prosecution under the statute is ambiguous. The Supreme Judicial Court denied his petition on August 5, 2020 without comment.

REASONS FOR GRANTING THE PETITION

I. DUE PROCESS AND THE SECOND AMENDMENT SHOULD REQUIRE CONCISE STATUTORY LANGUAGE REGULATING THE STORAGE OF FIREARMS THAT PUTS CITIZENS ON NOTICE OF THE PENALTIES THEY FACE, AND THAT AVOIDS ARBITRARY LAW ENFORCEMENT.

The nature of a law determines the degree of vagueness that the Constitution tolerates, as well as the relative importance of fair notice and fair enforcement. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 445 U.S. 489, 498 (1982). When, as in the present case, criminal penalties are at stake, a relatively strict test is warranted. *Id.* at 498-99. Laws have been found unconstitutional even where the law does not impinge on a constitutional right other than the due process right not to be subjected to criminal penalties for conduct that is not clearly proscribed. *See Lanzetta v. New Jersey*, 306 U.S. 451, 452-53 (1939) (reviewing a law criminalizing gang membership), and *Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972) (reviewing a law punishing vagrancy).

If the enactment inhibits a constitutionally protected right, then a more stringent vagueness test should apply. *Id.* In the present case M.G.L. c. 140, §§ 121 and 131L impose criminally liability and impinge upon a constitutionally protected right, the right to bear arms under the Second Amendment of United States Constitution. As such, the Court should apply a stringent test and analysis of the vagueness in this case.

The Supreme Judicial Court of Massachusetts takes the position that M.G.L. c. 140, §§ 121 and 131L does not implicate the Second Amendment. However, regulatory schemes implicate the Second Amendment when they frustrate the core lawful purpose of the right. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2818 (2008). In this case the regulatory scheme in Massachusetts frustrates the right by exposing lawful gun owners, possessing firearms in their homes with enhanced penalties for a class of weapons that is not clearly defined or readily discernable.

The term "Large Capacity Weapon" under M.G.L. c. 140, §§ 121 and 131L is void for vagueness on its face because its prohibitions are not clearly defined and thereby violates Due Process under the Fifth and Fourteenth Amendments of the United States Constitution. Due Process requires fair notice of proscribed conduct. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). A law is unconstitutionally vague if it is not sufficiently explicit to give clear warnings as the proscribed conduct. *Id.* To satisfy constitutional requirements, laws must be susceptible to ready understanding by "men of common intelligence." *Commonwealth v. Gallant*, 373 Mass. 577, 589 (1977).

The definition of a Large Capacity Weapon, any firearm "that is semiautomatic and capable of accepting, or readily modifiable to accept, any detachable large capacity feeding device," does not clearly inform an ordinary reasonably intelligent citizen of what type of firearm will trigger the more harsh penalties provided in M.G.L. c. 140, § 131L. *See* M.G.L. c. 140, § 121, and *Sabetti v. Dipaolo*, 16 F.3d 16, 17 (1st Cir. 1994).

At hearing on Fleury's Motion to Dismiss Lewis Gordon, an expert in firearms, testified that the legality

of a lawfully purchased firearm would be uncertain under the large capacity statutory scheme. (App.25a, 26a, 29a, 31a). The mechanical design of a firearm does not determine whether it is capable of accepting a large capacity magazine. (App.24a, 25a). Instead it is the capacity of the magazine that determines whether or not a firearm is "large capacity." *Id.* A person in Massachusetts could purchase a firearm listed on the approved weapons roster of the CMR, and yet it is nevertheless capable of accepting a large capacity magazine. (App.25a-29a). Even in circumstances where a Massachusetts citizen purchases a firearm specifically designed to accept a magazine of ten or fewer rounds, it is impossible to know whether or not a manufacturer will produce a large capacity magazine, or whether a manufacturer will create a kit to modify the magazine itself to accept a larger number of rounds. *Id.*

Virtually any semiautomatic weapon under the current statutory scheme could classify as a large capacity weapon. (App.31a). A law enforcement official arresting an individual for improper storage of a firearm like Beretta Model CX4 Storm, the subject of Indictment 4, would have discretion to charge that individual either with improper storage of a firearm or improper storage of a large capacity firearm for the same gun. (App.23a, 31a).

M.G.L. c. 140, §§ 121 and 131L does not put a citizen on notice of the potential penalties they face should they improperly store a firearm, because they must guess at the meaning of the term "Large Capacity Weapon." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

In *Sabetti* the 1st Circuit specifically noted that [i]t is not enough" for the true meaning of the statute "to be apparent elsewhere," in extra-textual materials. *Sabetti*, 16 F.3d at 17. Ordinary individuals trying to conform to the law should be able to do so by reading the face of the statute. *Id.*

The General Laws require that the Secretary of Public Safety produce and publish a Large Capacity Weapons Roster. *See* M.G.L. c. 140, § 131 3/4. This roster lists firearms that the Secretary has determined qualify as large capacity. If the definition of large capacity weapon was clear and not subject to frequent change, then there would be no need for the Executive Office to compile a list, make determinations, hear petitions to amend the list, and publish it, as they do, three times a year. The statutory requirement of the roster highlights and underscores the vagueness of the definition of large capacity weapon.

By reference to non-statutory, extra-textual documents the statutory scheme further complicates and makes it more difficult to understand the meaning of the term, "large capacity weapon." To satisfy due process notice requirements, a penal statute must be clear on its face . . . It is not enough for the [legislative] intent to be apparent elsewhere if it is not apparent by examining the language of the statute. *United States v. Colon-Ortiz*, 866 F.2d 6, 9 (1st Cir.), *cert. denied*, 490 U.S. 1051 (1989).

The present statutory scheme is comparable to an ordinance in the City of Columbus, Ohio that was struck down by the Sixth Circuit Court of Appeals in 1998 on vagueness grounds. *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 353-36 (6th Cir. 1998). In *People Rights*, a city ordinance

defined an "assault weapon" as "any semiautomatic action center fire rifle or carbine that accepts a detachable magazine with a capacity of 20 rounds or more. *Id.* at 535. The Plaintiff challenged this provision on the grounds that it was unconstitutionally vague. *Id.* The Sixth Circuit noted the record indicating that any semiautomatic rifle that accepts a detachable magazine would accept a detachable magazine of any capacity that might exist. *Id.* The Sixth Circuit held that this provision was "little more than a trap for the unwary." *Id.* The Court reasoned that since the ordinance contained no scienter requirement, the lack of knowledge as to the high-capacity magazine's existence was of no consequence in prosecuting the offense. *Id.* at 536. Since the capacity was limited only by the availability of a large-capacity magazine, and not by actual possession, all owners with semiautomatic center-fire rifles and carbines with detachable magazines were in jeopardy of prosecution if a compatible large-capacity magazine was discovered or had ever been manufactured. The Sixth Circuit held that "[d]ue process demands more than this" and that this construction of the ordinance was not likely intended by the City. *Id.*

So, too, in the present case the statutory scheme under M.G.L. c. 140, §§ 121 and 131L creates variable criminal liability depending on the availability of a high capacity magazine or kit that converts a particular magazine or firearm to high capacity.

In addition to mandating notice the vagueness doctrine also prohibits imprecise statutes that give rise to arbitrary enforcement of the law. The legislature is constitutionally required to set forth minimum guidelines for the enforcement of criminal statutes to

avoid "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their own personal predilections." *Commonwealth v. Williams*, 395 Mass. 302, 304 (1985) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974). The current statutory scheme under M.G.L. c. 140, §§ 121 and 131L impermissibly delegates to the police a basic policy matter, whether or not enhanced penalties up to twelve years in prison applies to an improperly stored firearm. *See Grayned*, 408 U.S. at 108-109; *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). A police officer can decide on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory applications whether or not to seek enhanced charges against the owner of an improperly stored semiautomatic gun, relying on the fact that any semi-automatic firearm can either accept, or be modified to accept a high-capacity feeding device. (App.23a-30a).

M.G.L. c. 140, § 131L also does not have a scienter requirement. A statute without a scienter requirement is little more than a trap for those who act in good faith. *Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979). Because there is no scienter requirement, a gun owner's complete lack of knowledge about whether or not the firearm they possess can accept a high capacity magazine is of no consequence in Massachusetts. Law enforcement has an overly broad discretion to impose enhanced penalties on any citizen found to be improperly storing a firearm by simply claiming that the firearm could accept a large capacity magazine.

As such the current laws of the Commonwealth create an arbitrary trap for its citizens. For these reasons this Court should hold as a matter of law that the statutory scheme regulating storage of large

capacity firearms is void for vagueness and in violation of the United States Constitution.

II. DOUBLE JEOPARDY SHOULD BAR SUBSEQUENT PROSECUTIONS OF DEFENDANTS FOR THE SAME CRIME OCCURRING AT THE SAME TIME AND PLACE WHERE THE UNIT OF PROSECUTION IN THE APPLICABLE STATUTE IS AMBIGUOUS.

Edward Fleury was subjected to Double Jeopardy in a violation of his right under the Fifth and Fourteenth Amendments of the United States Constitution. An indictment is multiplicitous and in violation of the Fifth Amendment's Double Jeopardy Clause if it charges a single offense in more than one count. The dangers posed by a multiplicitous indictment are that a defendant may suffer multiple punishments for the same offense, and that the jury may be prejudiced by the appearance that the defendant has committed more crimes than the evidence supports." *U.S. v. Goldberg*, 913 F. Supp. 629 (D. Mass. 1996). In this case Mr. Fleury was indicted upon twenty-two counts of Improper Storage of a Firearm as a result of a single police search on one day at one location, his home. (App.34a-59a).

When the same statutory offense is charged as multiple counts, as occurred in Counts 2-23 of the Defendant's indictment, the questions for decision is the intent of the Legislature concerning the allowable unit of prosecution" for the offense of Improper Storage of a Large Capacity Firearm. *See United States v. Universal CIT Credit Corp*, 344 U.S. 218, 221 (1952), *Bell v. United States*, 349 U.S. 81, 82-83 (1955), and *Ladner v. United States*, 358 U.S. 169, 173 (1958). There is no language in the statute that expressly

allows multiple prosecutions in a single act of simultaneous failures to properly store large capacity firearms. It is further settled that any ambiguity in the statute must be construed strictly against the legislature. *Id.*

In considering the Double Jeopardy implications of the federal statute banning possession of firearms by felons, the United States Court of Appeals for the First Circuit held that possession of multiple firearms in one place at one time constituted only one violation of the statute. *U.S. v. Verrecchia*, 196 F.3d 294, 298 (1st Cir. 1999). In *Verrecchia*, the First Circuit Court of Appeals analyzed the language of 18 U.S.C. § 922 (g)(1) to determine the appropriate unit of prosecution. *Id.* at 297. This statute reads in relevant part:

> "It shall be unlawful for any person
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to . . . possess . . . any firearm or ammunition; . . . "

The First Circuit Court of Appeals held that this language was ambiguous regarding the unit of prosecution, focusing in particular on the phrase "any firearm." *Id.* at 298. The Court reasoned that the word "any" may encompass but not necessarily exclude plural activity and thereby fails to unambiguously define the unit of prosecution in singular terms. *Id.* quoting *United States v. Kinsley*, 518 F.2d 665, 668-70 (8th Cir. 1975). The Court noted that in "many of the cases" in which the courts have found ambiguity regarding the unit of prosecution the object of the offense has been prefaced by the word "any." *Id.*

By this reasoning the language of M.G.L. c. 140, Section 131L is likewise ambiguous in that it forbids the improper storage of "any firearm." The ambiguity of Section 131L is further compounded with the use of the singular form of the nouns: "firearm," "rifle," "shotgun", and "machine gun," but oddly shifting to the plural form for "large capacity weapons." Arguably, this language suggests that multiple "large capacity weapons" should be treated as one offense. At the very least the shift in singular and plural form is ambiguous regarding the allowable unit of prosecution. Where the legislature intends to allow multiple units of prosecution "it has no difficulty expressing its will." *U.S. v. Verrecchia*, 196 F.3d 294 (1st Cir. 1999). Based on statutory language similar to M.G.L. c. 140, § 131L, the First Circuit Court of Appeals held that simultaneous possession of multiple firearms in one place at one time was only one violation of 18 U.S.C. § 922(g)(1). *Id.*

Furthermore, the ambiguity in the Improper Storage Statute risks arbitrary enforcement. While there are other defendants in the Commonwealth who have been charged and convicted of multiple counts of improper storage on the same date, time, and place, there appears to be a great deal of discretion afforded to the Commonwealth as to whether multiple firearms are treated as one violation or many. The ambiguity of the law and the Commonwealth's broad discretion provides us with cases in which a defendant was prosecuted once for multiple firearms improperly stored, as well as cases like the instant one, where each improperly stored firearm is treated as distinct crime. Compare *Commonwealth v. Parzick*, 64 Mass. App. Ct. 846 (2005) (defendant improperly

stored "several rifles, but was charged with one count of improper storage) with *Commonwealth v. Tiscione*, 482 Mass. 485 (2019) (defendant charged with two counts of improper storage for two different firearms: a pistol and a shotgun). This variable treatment of similarly situated defendants under the same statute illustrates the ambiguity with respect to the allowable unit of prosecution in M.G.L. c. 140, § 131L, as well as the risk of arbitrary enforcement.

Where, as in the present case, there is ambiguity regarding the allowable unit of prosecution, then doubt will be resolved against turning a single transaction into multiple offenses. *Bell v. United States*, 349 U.S. 81, 84 (1955) (quoted in *Verrecchia*, 196 F.3d 298). The multiple charges for improper storage of a firearm in the present case violated Mr. Fleury's right to be free from double jeopardy, and as such the Court should reverse his convictions of Improper Storage of a Large Capacity Firearm.

CONCLUSION

For the foregoing reasons, Mr. Fleury respectfully requests that this Honorable Court issue a writ of certiorari to review the judgment of the Appeals Court of Massachusetts.

Respectfully submitted,

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