APPENDIX A. OPINION of MASSACHUSETTS COURT of APPEALS

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-925

COMMONWEALTH

vs.

JAMES ATKINSON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial, the defendant, James Atkinson, was convicted of two counts of unlawful possession of a firearm, two counts of unlawful possession of ammunition, and two counts of unlawful possession of a large capacity feeding device. On appeal he contends, inter alia, that G. L. c. 140, § 131 (f) impermissibly burdens his rights under the Second Amendment to the United States Constitution. We affirm.

Background. On or about December 1, 2009, Sergeant Robert Tibert of the Rockport Police Department served the defendant at the Rockport police station with a letter from the Rockport Chief of Police. The letter advised the defendant that his license to carry a firearm was suspended "immediately."[1]

[1] The basis for the suspension appears to have been that the defendant was charged in a separate matter with larceny over

Sergeant Tibert further advised the defendant that he "[was] to turn [in] any weapons or ammunition that he has in his possession." Later that day, the defendant returned to the police station accompanied by his attorney. The defendant was carrying a duffel bag that contained firearms and ammunition. Sergeant Tibert took the bag from the defendant and then asked him, two times, whether he had any more ammunition or weapons. "After the second time the attorney . . . said, 'You've asked him to do something. He has complied.'"

Five days later, Sergeant Tibert and other police officers executed a search warrant at the defendant's home. During the search, "[u]pstairs near the bedroom area," officers saw a locked closet door that they could not access. They asked the defendant if he could allow them access so that they would not need to "break the door open." The defendant initially responded that "he would not provide a key," but subsequently directed the officers to a box where the key could be found. The officers retrieved the key, opened the closet door, and observed two blue bins containing several rounds of ammunition, two firearms, a rocket launcher, large capacity feeding devices,

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$250 and obstruction of justice. The facts underlying these charges were not introduced in evidence at trial by agreement of the parties.

and mace. On the other side of the room, officers also found another firearm in a green footlocker.[2]

Prior to trial, the defendant filed three motions to dismiss, contending, inter alia, that G. L. c. 140, § 131 (f) amounts to an arbitrary, capricious, and unconstitutional violation of his Second Amendment and due process rights; that the charges violated the rulings of the United States Supreme Court in District of Columbia v. Heller, 554 U.S. 570 (2008), and McDonald v. Chicago, 561 U.S. 742 (2010); and that the United States Constitution, made applicable to the States by operation of the Fourteenth Amendment, "provides immunity in regards to his keeping and bearing of bearable arms."[3] All three motions were denied.

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[2] The defendant was not charged with the illegal possession of the rocket launcher, mace, or third firearm.

[3] On May 16, 2016, the defendant filed a pro se motion to dismiss alleging that he possessed an "unexpired" firearm identification card (FID card). The judge did not act on this motion, presumably because the defendant was represented by counsel at the time. In any event, the defendant did nothing more than point to an outdated FID card -- issued for an indefinite period -- that had expired by operation of statute prior to the time of the suspension of his license to carry, prior to the execution of the search warrant at his home, and prior to his arrest. See G. L. c. 140, § 129B (9). No FID card was introduced or marked as an exhibit at trial. In addition, after jury empanelment, defense counsel represented to the trial judge that the defense was "not related to an existing license to carry or FID card." There is nothing in the record before us that supports the defendant's conclusory assertion in his appellate brief that he possessed a valid FID card at the time of his arrest. Instead, the record before us belies this claim.

The defendant neither testified at trial nor presented any witnesses (nor was he required to do so). The defense centered on the claim that the defendant "failed innocently to account for everything in his house." The defendant filed a timely notice of appeal of his convictions.

Discussion. At the outset, we note that the defendant's appellate brief does not specify the procedural bases for his claims. It is unclear whether he challenges rulings at trial, the denial of one of his myriad motions to dismiss, or the denial of any other motion in the underlying case. Even assuming that the defendant is claiming that a Superior Court judge erred in denying a motion to dismiss, he does not specify which motion was erroneously denied. In this regard, the appellant's contentions in his brief -- some supported by generalized factual assertions without reference to the record and others by arguments without citation to legal authority -- do not rise to the level of appellate argument and are waived. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019); K.A. v. T.R., 86 Mass. App. Ct. 554, 567 (2014). See also Kellogg v. Board of Registration in Med., 461 Mass. 1001, 1003 (2011); Hutchinson v. Hutchinson, 6 Mass. App. Ct. 705, 711 (1978).

Assuming, arguendo, that the arguments are properly before us, the defendant's principal one appears to be that the

Massachusetts licensing scheme and suitability provisions of G. L. c. 140, § 131 (f) impermissibly restrict his right to possess firearms in his home. Although he also argues that the Supremacy Clause of the United States Constitution prevents States from regulating firearms within the home or requiring any license or permit merely to possess firearms, this contention hinges on the merits of his Second Amendment claim. For the reasons stated below, the claim is unavailing.

To the extent that the defendant raises a facial challenge to the suitability requirement of G. L. c. 140, § 131 (f) on Second Amendment grounds, the Supreme Judicial Court has rejected such claims. See, e.g., Chief of Police of Worcester v. Holden, 470 Mass. 845, 860 (2015) (G. L. c. 140, § 131 does not violate Second Amendment by "confer[ring] excessive discretion in determinations of suitability").

To the extent that the defendant attempts to raise an as-applied challenge[4] to G. L. c. 140, § 131 (f), we note that he did not raise this claim in the District Court. "Section 131 (f) affords prompt, comprehensive postdeprivation review." Holden, 470 Mass. at 862. A person whose license to carry has been revoked, suspended, or restricted may seek judicial review

[4] We note that neither the words "as applied" nor any similar nomenclature denoting such a challenge appears in the defendant's brief.

in the District Court pursuant to G. L. c. 140, § 131 (f).[5] Here, the defendant could have appealed the police chief's decision pursuant to the provisions of the statutory licensing scheme, but failed to seek such review in the District Court. In these circumstances, any as-applied constitutional challenge is not properly before us. See Commonwealth v. Powell, 459 Mass. 572, 589-590 (2011) (defendant could not maintain constitutional challenge to G. L. c. 269, §§ 10 (a) and (h) where he had not attempted to obtain an FID card or license to carry and could have appealed any denial to District Court under statutory scheme). See also Holden, 470 Mass. at 852-853 (rejecting as-applied challenge to G. L. c. 140, §§ 131 [d] and [f]); Levine v. Chief Justice of the Dist. Court Dep't of the Trial Court, 434 Mass. 1014, 1014-1015 (2001) (petition seeking relief under G. L. c. 211, § 3 properly denied where plaintiffs "had the right to judicial review in the District Court [under

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[5] With respect to judicial review, G. L. c. 140, § 131 (f) provides, in relevant part, that

> "Any applicant or holder aggrieved by a denial, revocation, suspension or restriction placed on a license . . . may, within either 90 days after receiving notice of the denial, revocation or suspension . . . file a petition to obtain judicial review in the district court having jurisdiction . . . . If after a hearing a justice of the court finds that there was no reasonable ground for denying, suspending, revoking or restricting the license and that the petitioner is not prohibited by law from possessing a license, the justice may order a license to be issued or reinstated to the petitioner or may order the licensing authority to remove certain restrictions placed on the license."

G. L. c. 140, § 131 (f), and] raised no issue that could not have been raised in a District Court, reviewed in an action in the nature of certiorari, and addressed in the customary appellate process"); Yakus v. United States, 321 U.S. 414, 434 (1944) (passing on statutory challenge where "petitioners have failed to seek the administrative remedy and the statutory review which were open to them and . . . [did] not show[] that had they done so any of the consequences which they apprehend would have ensued to any extent whatever, or if they should, that the statute withholds judicial remedies adequate to protect petitioners' rights").

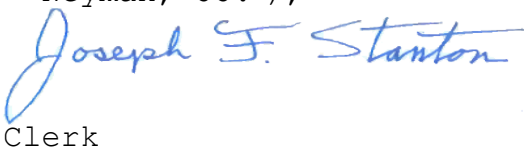
To the extent that the defendant raises a challenge predicated on a due process violation, we again note that "Section 131 (f) affords prompt, comprehensive postdeprivation review." Holden, 470 Mass. at 862. Here, as discussed, the defendant did not seek such review in the District Court, and thus any due process challenge is neither properly preserved nor persuasive.

Finally, many of the defendant's claims appear to be predicated on his contention that he possessed a valid FID card at the time of his arrest. For the reasons discussed, supra, at note 3, the record before us does not support this contention.

Accordingly, the convictions must stand.

Judgments affirmed.

By the Court (Meade, Blake & Neyman, JJ.[6]),



Clerk

Entered: April 13, 2022.

[6] The panelists are listed in order of seniority.