APPENDIX

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APPENDIX A

SJC-13315

COMMONWEALTH vs. CARLOS GUARDADO.

Middlesex. September 11, 2023. - October 26, 2023.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Firearms. License. Constitutional Law, Right to bear arms, Double jeopardy. Due Process of Law, Elements of criminal offense. Practice, Criminal, Instructions to jury, Reconsideration, New trial, Double jeopardy.

Indictments found and returned in the Superior Court Department on June 26, 2019.

A pretrial motion to suppress evidence was heard by C. William Barrett, J., and the cases were tried before Paul D. Wilson, J.

After review by this court, 491 Mass. 666 (2023), a motion for reconsideration was allowed in part.

Elaine Fronhofer for the defendant.

Jamie Michael Charles, Assistant District Attorney, for the Commonwealth.

GAZIANO, J. This is a companion case to Commonwealth v. Guardado, 491 Mass. 666 (2023) (Guardado I), concerning the proper remedy for the constitutional violations described therein. A Superior Court jury convicted the defendant of, among other things, unlawfully carrying a firearm, unlawfully carrying a loaded firearm, and unlawfully carrying ammunition. See id. at 667. On appeal, this court determined that, in light of the United States Supreme Court's decision in New York State Rifle &

Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022), which was issued after the defendant's convictions, absence of licensure is an essential element of those crimes. See Guardado I, supra at 690, 692. Accordingly, we held that the trial judge erred when he failed to instruct the jury that, to convict the defendant of those crimes, they would have to find that the defendant lacked a firearms license. See id. at 691. We vacated the defendant's convictions and ordered that the Superior Court judge enter judgments of not guilty on the indictments, precluding the Commonwealth from retrying the defendant on those charges. See id. at 694.

The Commonwealth has moved for reconsideration, arguing that because the constitutional rule established in Bruen, 142 S. Ct. at 2122, did not exist at the time the defendant was convicted, the Commonwealth should have an opportunity to retry the defendant. We conclude that the Commonwealth is correct. Ordinarily, the prohibition against double jeopardy bars retrial if, as the Commonwealth concedes, there was insufficient evidence at trial to establish an essential element of the crime. However, the Commonwealth had no reason to introduce evidence of the defendant's lack of licensure under then-prevailing law. Because the Commonwealth is not being given a second bite at the proverbial apple to supply evidence that it was required to muster in the earlier trial, double jeopardy does not bar retrial.

1. Background. a. Trial. In June 2019, a grand jury issued indictments charging the defendant with one count of illegal possession of a firearm, G. L. c. 269, § 10 (a); two counts of illegal possession of a large capacity feeding device, G. L. c. 269, § 10 (m); one

count of illegal possession of ammunition, G. L. c. 269, § 10 (h); and one count of illegal possession of a loaded firearm, G. L. c. 269, § 10 (n). The facts underlying those charges are recited in Guardado I, 491 Mass. at 668-673.

When the judge instructed the jury at trial, he did not include absence of a firearms license among the elements that the Commonwealth would have to prove for the jury to convict the defendant. The defendant did not object to this omission from the jury instructions.

In June 2021, the defendant was convicted on all counts except for one count of illegal possession of a large capacity feeding device. The defendant filed a timely notice of appeal, and we transferred the case to this court on our own motion.

b. Appeal. The defendant argued on appeal that the judge erred by failing to instruct the jury that absence of licensure is an essential element of the crimes of unlawful possession of a firearm and unlawful possession of ammunition. The defendant relied on the Supreme Court's holding in Bruen, 142 S. Ct. at 2122, that the Second Amendment to the United States Constitution protects an individual's right to carry a firearm outside the home. The defendant contended that, as a result of Bruen, his convictions of unlawful possession of a firearm, unlawful possession of ammunition, and unlawful possession of a loaded firearm should be reversed.

We reviewed the defendant's argument under a standard that ordinarily is reserved for issues preserved at trial. We reasoned that the defendant "did not have an adequate opportunity at the time of

his trial" to object to the jury instructions, because the Court's decision in Bruen had not issued until after the defendant had been convicted. Guardado I, 491 Mass. at 686. Under the "clairvoyance exception," which allows a defendant to raise an unpreserved issue on appeal "when the constitutional theory on which the defendant has relied was not sufficiently developed at the time of trial," Commonwealth v. Rembiszewski, 391 Mass. 123, 126 (1984), the defendant was entitled to review of the issue, Guardado I, supra.

We concluded, in light of Bruen, that absence of licensure is an essential element of the crimes of unlawful possession of a firearm and unlawful possession of ammunition. See Guardado I, 491 Mass. at 690. Accordingly, we held that the judge erred by omitting absence of licensure from his instructions on those crimes to the jury. See id. at 691. We vacated the defendant's convictions on the indictments charging unlawful possession of a firearm, unlawful possession of ammunition, and unlawful possession of a loaded firearm,[1] and we remanded the matter to the Superior Court for entry of judgments of not guilty on those indictments. See id. at 694.

c. Motion to reconsider. In May 2023, the Commonwealth moved for reconsideration of the remedy this court issued in Guardado I, 491 Mass. at 694. We granted the Commonwealth's motion for reconsideration in part and asked the parties to file

[1] A defendant may not be convicted of unlawful possession of a loaded firearm if he or she is not convicted also of unlawful possession of a firearm. See Commonwealth v. Tate, 490 Mass. 501, 520 (2022).

briefs on the following issue: "[W]hether the court should continue to hold that the remedy in [Guardado I] for an erroneous jury instruction relieving the Commonwealth of the burden of proving absence of firearm[s] licensure is vacatur of the conviction and remand for entry of a judgment of acquittal. . . . Or, should the court consider the jury instruction, which conformed to controlling precedent at the time, to be trial error that results in vacatur of the conviction and remand for a new trial."[2]

2. Discussion. Based on their differing applications of the double jeopardy principle, the parties disagree as to what the appropriate remedy should be for the erroneous jury instructions. The Commonwealth argues that we erred by ordering the Superior Court to enter judgments of not guilty on the defendant's convictions. According to the Commonwealth, because the evidence it presented at trial was insufficient only because of a postconviction change in the law, double jeopardy does not bar retrial. The defendant contends that, because the Commonwealth's evidence at trial was not sufficient

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[2] The Commonwealth raised in its motion additional issues, including whether to extend the license requirement to the crime of unlawful possession of a large capacity feeding device. See G. L. c. 269, § 10 (m). We grant the Commonwealth's motion to reconsider that issue, insofar as the Commonwealth requests that we not address whether absence of a license is an essential element of that offense. In the exercise of our discretion, we have decided to avoid answering an unpreserved constitutional claim. We leave for another day, with the benefit of full briefing and argument, the question whether large capacity feeding devices are "arms" protected by the Second Amendment following Bruen. See, e.g., Ocean State Tactical, LLC v. Rhode Island, 646 F. Supp. 3d 368, 385-388 (D.R.I. 2022).

according to the state of the law at the time of his appeal, double jeopardy requires the entry of judgments of acquittal.

"At its core, the prohibition against double jeopardy, which flows from the Fifth Amendment to the United States Constitution, as well as the statutory and common law of Massachusetts, provides that 'a person cannot twice be put in jeopardy for the same offense.'" Commonwealth v. Sanchez, 485 Mass. 491, 506 (2020), quoting Marshall v. Commonwealth, 463 Mass. 529, 534 (2012). This prohibition protects defendants against the possibility that "prosecutors could treat trials as dress rehearsals until they secure the convictions they seek." Currier v. Virginia, 138 S. Ct. 2144, 2149 (2018). It also ensures that defendants will not receive "multiple punishments" for the same offense. United States v. Ursery, 518 U.S. 267, 273 (1996). To prevent such injustices, double jeopardy protections forbid the Commonwealth from prosecuting the defendant for the same offense after a final verdict has been entered. See Commonwealth v. Brown, 470 Mass. 595, 603 (2015), quoting Marshall, supra.

The prohibition against double jeopardy generally precludes retrial if the Commonwealth presented insufficient evidence at the original trial to support the defendant's conviction. See Commonwealth v. Bolling, 462 Mass. 440, 453 (2012). See also United States v. Wacker, 72 F.3d 1453, 1465 (10th Cir. 1995), cert. denied, 523 U.S. 1035 (1998), citing Burks v. United States, 437 U.S. 1, 10 (1978) ("by reversing a conviction for insufficient evidence, the reviewing court is actually making a determination that the trial court erred in failing to direct a verdict of acquittal on

the evidence; accordingly, the defendant should be treated as though he or she were acquitted"). Otherwise, the Commonwealth would be able to take advantage of a trial error by presenting a stronger case the second time around, thereby "getting a second bite at the proverbial apple" (quotation and citation omitted). Commonwealth v. Claudio, 484 Mass. 203, 208 (2020). If, given the evidence presented at trial, no "trier of fact could have found the essential elements of the crime beyond a reasonable doubt," the Commonwealth does not get to try again (citation omitted). Commonwealth v. Brown, 479 Mass. 600, 608, 611 (2018).

The double jeopardy principle, however, "does not prevent the government from retrying a defendant who succeeds in getting his conviction set aside . . . because of some error in the proceedings leading to conviction." United States v. Acosta- Sierra, 690 F.3d 1111, 1123 (9th Cir. 2012), cert. denied, 568 U.S. 1183 (2013), quoting Lockhart v. Nelson, 488 U.S. 33, 38–39 (1988). See Commonwealth v. DiBenedetto, 414 Mass. 37, 45 (1992), S.C., 427 Mass. 414 (1998), 458 Mass. 657 (2011), and 475 Mass. 429 (2016) (double jeopardy did not bar retrial where conviction was vacated due to erroneous admission of deposition testimony). Where a guilty verdict is reversed because of "an error in the jury instructions," the proper remedy is to remand for "a new trial." Commonwealth v. Vargas, 475 Mass. 338, 349 (2016). This holds true even when the error in the jury instructions resulted in a misallocation in the burden of proof. See Commonwealth v. Skinner, 408 Mass. 88, 94-95, 99 (1990) (remand for new trial because jury instructions relieved "government of its burden of proof on an element of a crime"). See also United

States v. Godin, 534 F.3d 51, 61 (1st Cir. 2008) ("Generally, if an erroneous jury instruction is not harmless error, we vacate the conviction and remand for a new trial"). In such circumstances, a retrial does not impose on the defendant any of the evils from which the prohibition against double jeopardy is intended to protect. See Marshall, 463 Mass. at 534.

Here, the Commonwealth concedes that it did not present evidence at trial to indicate that the defendant lacked a firearms license. The Commonwealth therefore did not introduce sufficient evidence to establish beyond a reasonable doubt an essential element of the crimes at issue. See Guardado I, 491 Mass. at 690, 692 ("absence of a license is an essential element of the offense[s] of unlawful possession of a firearm" and "unlawful possession of ammunition"). Ordinarily, this would establish that the "[d]ouble [j]eopardy [c]lause forbids a second trial." See Commonwealth v. Lopez, 484 Mass. 211, 221 (2020), quoting Commonwealth v. Amado, 387 Mass. 179, 190 (1982).

We conclude, however, that this case does not present the same concerns. At the time of the defendant's trial, this court's precedent clearly had established that absence of licensure was not an essential element of any of the crimes with which the defendant was charged. See Commonwealth v. Allen, 474 Mass. 162, 174 (2016). Rather, proper licensure explicitly was recognized to be an affirmative defense. See Commonwealth v. Gouse, 461 Mass. 787, 804-806 (2012). Thus, given that the defendant did not "provide notice of intent to raise the defense of license" prior to trial, the Commonwealth proceeded at trial under the impression, created by this court's

decisions, that a conviction did not depend on whether the defendant possessed a firearms license. Commonwealth v. Humphries, 465 Mass. 762, 767 (2013). It only was after the defendant's trial that the Supreme Court issued its decision in Bruen, which in turn led this court to overturn its previous holdings and rule that absence of licensure is an essential element of the crimes. See Guardado I, 491 Mass. at 690.

Because the evidence against the defendant was insufficient only when viewed through the lens of a legal development that occurred after trial, the Commonwealth has not "been given [a] fair opportunity to offer whatever proof it could assemble" at trial. Burks, 437 U.S. at 16. Further, because absence of licensure was not recognized as an essential element at the time of trial, the resulting verdict did not resolve this element of the offenses charged. See Commonwealth v. Hebb, 477 Mass. 409, 413 (2017), quoting Brown, 470 Mass. at 603-604 ("where a verdict does not specifically resolve all the elements of the offense charged, it is defective . . . and thus does not trigger double jeopardy protections"). A new trial is warranted so that the Commonwealth may have "one complete opportunity to convict" the defendant under the new law. Hebb, supra, quoting Yeager v. United States, 557 U.S. 110, 118 (2009). See United States v. Houston, 792 F.3d 663, 670 (6th Cir. 2015) ("the government would not be seeking a second bite at the apple but a first bite under the right legal test").

Here, because the Commonwealth reasonably could not have known we would reverse our holdings in Gouse, 461 Mass. at 807808; Humphries, 465 Mass. at

767; and Allen, 474 Mass. at 174, a judgment of acquittal is not required by principles of double jeopardy. See Commonwealth v. Jefferson, 461 Mass. 821, 831-832 (2012) (retrial, rather than acquittal, was appropriate remedy where trial judge erroneously denied defendants their opportunity to raise affirmative defense, because otherwise Commonwealth would not have "opportunity to offer evidence in rebuttal"). Without the ability to gaze into the future of this court's and the Supreme Court's rulings, and without any notice from the defendant of an intent to raise the issue of licensure, the Commonwealth simply had no reason to believe that any evidence concerning licensure would be necessary. Were the judgments of acquittal to stand, we would be denying the Commonwealth a "first opportunity to prove what it did not need to prove before but needs to prove now." United States v. Harrington, 997 F.3d 812, 818 (8th Cir. 2021).

Neither Commonwealth v. Munoz, 384 Mass. 503 (1981), nor Commonwealth v. Beal, 474 Mass. 341 (2016), compels a different result. In Munoz, supra at 503, the defendant was convicted of operating an uninsured motor vehicle. The trial judge, over the defendant's objection and consistent with the model jury instructions at the time, had instructed the jury that they could presume the defendant's vehicle was uninsured unless the defendant proved otherwise. See id. at 505, 510. This court held that the judge erroneously relieved the Commonwealth of its evidentiary burden, as "insurance [was] an element of the crime charged." See id. at 507. Because the Commonwealth had not presented evidence that the defendant's vehicle was uninsured, we reversed the

defendant's conviction and entered judgment for the defendant. See id. at 509-510.

According to the defendant, Munoz establishes that retrial is barred on an insufficient showing of evidence on an essential element of the offense, even if that element was established only through precedent after trial. The defendant observes that this court entered judgment for the defendant in Munoz despite the Commonwealth's reliance during trial on the then-prevailing model jury instructions, which indicated that lack of insurance was not an essential element of the crime. See id.

We are not convinced that Munoz is on point. Munoz did not involve the creation of a new rule that was then applied to the defendant's case. Contrast Guardado I, 491 Mass. at 690 ("In the wake of Bruen, this court's reasoning in [previous decisions] is no longer valid"). In this case, a "new" rule "dictated by [a] decision" of the Supreme Court displaced the established and contrary law under the decisions of this court while the defendant's case was pending on direct review. Id. at 694. By contrast, in Munoz, 384 Mass. at 507-508, the defendant's trial involved an error that was contrary to the state of the law in the Commonwealth at the time of the defendant's trial. On review, this court clarified the state of the law given existing precedent. See id. See also Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 663-664 (2013), S.C., 471 Mass. 12 (2015) (distinguishing creation of "new constitutional rule" from "merely apply[ing] an established constitutional standard to a novel set of facts"). Moreover, in Munoz, supra at 505, the Commonwealth's error at trial was due not to a reliance on a directly contradictory line of

decisions from this court, but to a reliance on model jury instructions, which do not have the same force of law as this court's decisions, and the defendant challenged the erroneous instructions. The Commonwealth in Munoz therefore was required to prove at the time of trial that the defendant's vehicle was uninsured, and so was not owed a "second opportunity to prove what it should have proved earlier." United States v. Weems, 49 F.3d 528, 531 (9th Cir. 1995).

In Beal, 474 Mass. at 342, 345, the defendant received a sentencing enhancement under the Massachusetts armed career criminal act, G. L. c. 269, § 10G (ACCA), after the Commonwealth presented evidence of the defendant's certified convictions of assault and battery and assault and battery against a public official. We held, based on an intervening Supreme Court decision, that the evidence presented at trial was insufficient to prove that the defendant had committed a "violent crime" and that, as a result, double jeopardy precluded a retrial. See id. at 353-354.

Beal is not analogous. First, at the time the Commonwealth tried the defendant in Beal, the law was unsettled as to whether a certified conviction of assault and battery or assault and battery against a public official was sufficient under the ACCA, and, in fact, there was reason to suggest that it was not. See Johnson v. United States, 559 U.S. 133, 135, 140-142 (2010) (battery offense for "[a]ctually and intentionally touch[ing]" another did not qualify as violent crime under analogous Federal ACCA). See also United States v. Holloway, 630 F.3d 252, 257 (1st Cir. 2011), citing Shepard v. United States, 544 U.S.

13, 26 (2005) (conviction may serve as violent crime under Federal ACCA only if each possible type of offense of conviction qualifies as violent crime). Second, the defendant in Beal objected before trial to the use of certified copies of his convictions to prove that he had committed a categorically "violent crime," and yet the Commonwealth declined to offer additional proof despite having the opportunity to do so. Beal, 474 Mass. at 354 n.12.[3]

Other jurisdictions have held that "a defendant cannot make out a sufficiency challenge as to offense elements that the government had no requirement to prove at trial under then-prevailing law." United States v. Reynoso, 38 F.4th 1083, 1090-1091 (D.C. Cir. 2022). See Harrington, 997 F.3d at 817-818; United States v. Nasir, 982 F.3d 144, 176 (3d Cir. 2020), judgment vacated on other grounds, 142 S. Ct. 56 (2021); Houston, 792 F.3d at 669-670; United States v. Robison, 505 F.3d 1208, 1224-1225 (11th Cir. 2007), cert. denied sub nom. United States v. McWane, Inc., 555 U.S. 1045 (2008); United States v. Gonzalez, 93 F.3d 311, 322 (7th Cir. 1996); Weems, 49 F.3d at 531; People v. Ramirez, 2023 IL 128123, ¶¶ 28-31 (2023). But see United States v. Miller, 84 F.3d 1244, 1258 (10th Cir. 1996) ("we will remand for a new trial only

[3] We recognize that we noted in Beal, 474 Mass. at 354 n.12, that remand was inappropriate because "the dispositive issue . . . is sufficiency of the evidence; even if the judge had instructed the jury properly, the result on appeal would be no different because the evidence the Commonwealth introduced was insufficient." To the extent that Beal suggests that retrial is barred on double jeopardy grounds due to insufficient evidence, no matter the state of clearly established precedent, it is no longer valid precedent.

if the jury could have returned a guilty verdict if properly instructed").

For example, in United States v. Ellyson, 326 F.3d 522, 525-526 (4th Cir. 2003), the defendant was convicted of possessing child pornography under the Child Pornography Prevention Act of 1996 (CPPA), which defined child pornography to include any image that "appears to be [depicting] a minor engaging in sexually explicit conduct." The jury at the defendant's trial was instructed accordingly. See id. at 530. Following the defendant's trial, the Supreme Court held that the CPPA was "overbroad and unconstitutional" because its prohibition of "virtual images" reached beyond what is permissible under the First Amendment to the United States Constitution. See Ashcroft v. Free Speech Coalition, 535 U.S. (234) 248-249, 251, 258 (2002). The Court of Appeals for the Fourth Circuit held that, in light of the Supreme Court's decision in Free Speech Coalition, the jury instructions erroneously had "permitted the jury to convict [the defendant] on . . . [an] unconstitutional basis." Ellyson, supra at 531. Importantly, the Court of Appeals also held that the defendant could be retried, regardless of whether the evidence at trial was insufficient to establish that the images in the defendant's possession were real. See id. at 532. The court reasoned that there were no "double jeopardy concerns," because "[a]ny insufficiency in proof was caused by the subsequent change in the law under Free Speech Coalition, not the government's failure to muster evidence." Id. at 533. See United States v. Kim, 65 F.3d 123, 126-127 (9th Cir. 1995) (appellate court should not "examine the sufficiency of evidence of an element that the [g]overnment was not required to prove under the law . . . at the time of trial because

the [g]overnment had no reason to introduce such evidence in the first place").

The defendant cites decisions from several United States Courts of Appeals to support his proposition that acquittal is the proper remedy. See United States v. Bruno, 661 F.3d 733, 742-743 (2d Cir. 2011); United States v. Mount, 161 F.3d 675, 678 (11th Cir. 1998); United States v. Hightower, 96 F.3d 211, 215 (7th Cir. 1996); United States v. Smith, 82 F.3d 1564, 1567-1568 (10th Cir. 1996). However, a closer examination of these cases reveals that they are inapposite.

First, the Court of Appeals for the Second Circuit in Bruno, 661 F.3d at 743 & n.2, favorably cited much of the same Federal precedent that we cite supra but held that the "sound reasons" for remand did not apply where "the government conceded that it would present no new evidence if [the defendant] were retried." As such, a bar on retrial did not "deny the government an opportunity to present its evidence." Id. at 743. By contrast, here, the Commonwealth makes no such concession; to the contrary, it seeks the opportunity to present evidence of lack of licensure.

Second, the remaining three cases that the defendant cites -- that is, Mount, 161 F.3d 675; Hightower, 96 F.3d 211; and Smith, 82 F.3d 1564 -- all can be distinguished on the same grounds. In each case, the government argued at trial that it had presented sufficient evidence to convict the defendant either of using or carrying a firearm in connection with drug trafficking under 18 U.S.C. § 924(c). See Mount, supra at 678; Hightower, supra at 215; Smith, supra at 1566. While the defendants' cases were on appeal, the Supreme Court clarified the "use" prong of

the statute. See Bailey v. United States, 516 U.S. 137, 144 (1995), superseded by statute as stated in Welch v. United States, 578 U.S. 120, 134 (2016). Importantly, because the juries in these cases already had been instructed properly on the alternative "carry" prong, and because there was insufficient evidence to convict the defendants under this alternative theory, the proper remedy was vacating the defendants' convictions rather than remanding for a new trial. Mount, supra at 680-681. Hightower, supra. Smith, supra at 1568.

The defendant concedes that there are some circumstances in which a retrial may be the appropriate remedy for a posttrial legal development that causes the evidence at trial to be insufficient. In particular, where the posttrial legal development is not "constitutionally required," such that the court has discretion to apply the legal development only prospectively, the defendant allows that the double jeopardy principle does not preclude a retrial. See Commonwealth v. Ashford, 486 Mass. 450, 453 (2020) ("Where the statutory interpretation at issue is not constitutionally required, . . . we retain some discretion to apply the rule only prospectively"). The defendant argues, though, that acquittal is the proper remedy when the legal development is a new constitutional rule that must be applied to cases pending on direct review. See Commonwealth v. Dagley, 442 Mass. 713, 721 n.10 (2004), cert. denied, 544 U.S. 930 (2005), citing Griffith v. Kentucky, 479 U.S. 314, 322 (1987) ("newly declared constitutional rule must be applied to cases pending on direct review"). Because the Supreme Court's decision in Bruen, 142 S. Ct. at 2122, established a new

constitutional rule, the defendant contends, a retrial here would violate the double jeopardy principle.

We are not persuaded. The defendant's analysis appears to conflate, on the one hand, whether this court was constitutionally required to apply to his case the new rule in Bruen, 142 S. Ct. at 2122, and, on the other hand, what the proper remedy is for a violation of the constitutional rule. Because Bruen was decided after the defendant's trial but while the case was pending on appeal, he is entitled to the benefit of the new rule; that is, the right to have the Commonwealth prove that he lacked a license. The cited propositions from Ashford and Dagley do not assert that retrial is inappropriate in any instance where a new constitutional rule is applied to a case pending on direct review. See Ellyson, 326 F.3d at 533 (proper remedy for new rule mandated by Supreme Court's intervening interpretation of First Amendment was retrial).

3. Conclusion. For the reasons discussed, we conclude that this court erred when it remanded to the Superior Court for entry of judgments of not guilty on the indictments charging unlawful possession of a firearm, unlawful possession of ammunition, and unlawful possession of a loaded firearm. Accordingly, we vacate that portion of our prior order and remand to the Superior Court for a new trial on those indictments.

So ordered

APPENDIX B

SUPREME JUDICIAL COURT
for the Commonwealth of Massachusetts
Case Docket

COMMONWEALTH vs. CARLOS GUARDADO
SJC-13315

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10/26/2023 #51

ORDER: The Commonwealth's motion for reconsideration is allowed with respect to certain modifications of the opinion in Commonwealth v. Guardado, 491 Mass. 666 (2023) (Guardado I).

The following sentences appearing at 499 Mass. 668 are deleted:

Because there is no constitutional right to possess a large capacity magazine, we affirm the defendant's conviction of unlawful possession of a large capacity feeding device. See Commonwealth v. Cassidy, 479 Mass. 527, 540, cert. denied, 139 S. Ct. 276 (2018), quoting District of Columbia v. Heller, 554 U.S. 570, 625 (2008) (right to bear arms "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes").

The following paragraph appearing at 491 Mass. 693 is deleted:

Nonetheless, we decline the defendant's suggestion that we extend this holding to the crime of unlawful possession of a large capacity feeding device. See G. L. c. 269, § 10 (m). We previously have held that G. L. c. 140, § 131M, a statute that proscribes possession of large capacity feeding devices, "is not prohibited by the Second Amendment, because the right [to bear arms] 'does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.'" Cassidy, 479 Mass. at 540, quoting Heller, 554 U.S. at 625. See Worman v. Healey, 922 F.3d 26, 30, 40 (1st Cir. 2019), cert. denied, 141 S. Ct. 109 (2020) ("Massachusetts law proscribing the sale, transfer, and possession of certain semiautomatic assault weapons and large-capacity magazines" does not violate Second Amendment). Accordingly, we conclude that the defendant was not entitled to an instruction that licensure is an essential element of unlawful possession of a large capacity feeding device.

A footnote has been added after the following sentence appearing at 491 Mass 693:

Accordingly, we conclude that the defendant's rights under the Second Amendment and his rights to due process were violated when he was convicted of unlawfully possessing ammunition although the jury were not instructed that licensure is an essential element of the crime.[10]

The following footnote is added:

[10] Because the defendant does not argue that absence of licensure is an essential element of the crime of

unlawful possession of a large capacity feeding device, G. L. c. 269, § 10 (m), we do not reach that issue.

With the exception of the issue discussed in Commonwealth v. Guardado, 493 Mass. 1 (2023) (Guardado II), released on this date, in all other respects the parties' motions for reconsideration are denied. The Reporter of Decisions has been notified, and a copy of the revised opinion will be issued to the parties on this date.

APPENDIX C

SJC-13315

COMMONWEALTH vs. CARLOS GUARDADO.

Middlesex. December 5, 2022. - April 13, 2023.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Firearms. Search and Seizure, Motor vehicle, Probable cause. Constitutional Law, Search and seizure, Probable cause, Right to bear arms, Burden of proof, Retroactivity of judicial holding. Due Process of Law, Elements of criminal offense, Burden of proof. Probable Cause. Motor Vehicle, Firearms. License. Practice, Criminal, Motion to suppress, Instructions to jury, Presumptions and burden of proof, Retroactivity of judicial holding. Retroactivity of Judicial Holding.

Indictments found and returned in the Superior Court Department on June 26, 2019.

A pretrial motion to suppress evidence was heard by C. William Barrett, J., and the cases were tried before Paul D. Wilson, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Elaine Fronhofer for the defendant.

Jamie Michael Charles, Assistant District Attorney, for the Commonwealth.

Patrick Levin, Committee for Public Counsel Services, & Chauncey B. Wood, for Committee for Public Counsel Services & another, amici curiae, submitted a brief.

GAZIANO, J. In 2019, Boston police officers searched the defendant's vehicle without a warrant after having received a tip from a confidential informant, and discovered in the glove compartment a loaded firearm and a large capacity magazine. At the time of the search, the vehicle was parked in the parking lot of the business at which the defendant was employed.

Following a jury trial, the defendant was convicted of unlawfully carrying a firearm, unlawfully carrying a loaded firearm, unlawfully carrying ammunition, and unlawfully carrying a large capacity feeding device. The statute under which the defendant was convicted, G. L. c 269, § 10, contains two exemptions that are relevant here. First, it exempts anyone who, while in possession of a firearm, is present in or on his or her place of business. Second, the statute exempts someone who has been issued a firearms license. At the defendant's trial, the judge did not instruct the jury on either of these exemptions.

In this appeal, the defendant argues that there was no probable cause to search the glove compartment of his vehicle and that the judge erred in not instructing the jury on the two statutory exemptions. We conclude that there was probable cause to search the glove compartment, because the search was in response to a tip that was provided by an informant who had demonstrated reliability and who had personal knowledge of the firearm. We also conclude that there was no error in the judge's decision not to instruct on the place of business exemption, because the evidence was insufficient to establish that the parking lot where the vehicle was found was under

the exclusive control of the business where the defendant worked.

We agree, however, that the judge erred in not instructing the jury on the licensure exemption. In the wake of the United States Supreme Court's decision in New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022), in which the Court held that the Second Amendment to the United States Constitution protects an individual's right to carry a firearm in public, our existing precedent that licensure is an affirmative defense, and not an element of the offense the Commonwealth is required to prove, must be revisited. See Commonwealth v. Gouse, 461 Mass. 787, 807 (2012). Because possession of a firearm in public is constitutionally protected conduct, in order to convict a defendant of unlawful possession of a firearm, due process requires the Commonwealth prove beyond a reasonable doubt that a defendant did not have a valid firearms license. Accordingly, the defendant's convictions of unlawful possession of a firearm, unlawful possession of a loaded firearm, and unlawful possession of ammunition cannot stand. Because there is no constitutional right to possess a large capacity magazine, we affirm the defendant's conviction of unlawful possession of a large capacity feeding device. See Commonwealth v. Cassidy, 479 Mass. 527, 540, cert. denied, 139 S. Ct. 276 (2018), quoting District of Columbia v. Heller, 554 U.S. 570, 625 (2008) (right to bear arms "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes").[1]

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[1] We acknowledge the amicus brief submitted by the Committee for Public Counsel Services and the Massachusetts

1. Background. a. Motion to suppress. We recite the facts from the motion judge's findings, supplemented by other evidence in the record that supports the judge's conclusion and that was either explicitly or implicitly credited by the judge. See Commonwealth v. Jones-Pannell, 472 Mass. 429, 437-438 (2015).

On January 25, 2019, Lieutenant Mathew Pieroway of the Boston police department received information from a confidential informant, known as "Z," that an individual with the defendant's name was in possession of an unlicensed gun. At that point in time, Z was a "card-carrying" informant, which meant that Z had assisted Boston police in an investigation within the previous six months. In the prior year, information provided by Z in one instance had resulted in the seizure of narcotics and an arrest for a drug-related offense, and in a separate matter, Z had provided information that led to the recovery of a firearm that was stored near a playground.

Z informed Pieroway that the individual was in possession of a silver firearm and that the firearm was being stored in a black backpack in his vehicle. Pieroway was aware, from prior conversations with Z, that the individual operated a green Honda Accord with a Maine registration plate. Pieroway also knew the plate number. Z told Pieroway that the individual would be driving in the area of Watertown, in such a vehicle, later that day. Z also reported that the individual worked at a particular auto parts store, hereinafter referred to as "the Store."

Association of Criminal Defense Lawyers in support of the defendant.

While driving toward Watertown, Pieroway contacted other members of his unit, as well as Watertown police Detective Mark Lewis, whom Pieroway knew from prior investigations and prosecutions. Pieroway informed these officers that he had received information from a reliable informant that the defendant had a gun in his possession and that he would be in the Watertown area shortly.

Within an hour of speaking to the informant, Pieroway located the defendant a short distance from a mall in Watertown. Pieroway watched the defendant pull into the parking lot of the Store, get out of the green Honda with the Maine license plate, and enter the Store, where he appeared to be an employee. Other officers, including Lewis, arrived soon thereafter and set up surveillance around the car and the Store. While en route to Watertown, Lewis had had a license check conducted through Criminal Justice Information Services, which had revealed that the defendant did not have a license to carry a firearm, as well as a Criminal Offender Record Information check, which had indicated that the defendant had a prior firearm "incident" on his record.[2]

At roughly 6:45 P.M., Pieroway observed the defendant leave the Store and walk towards his vehicle. As the defendant was beginning to get into the vehicle, officers approached him, identified themselves, and asked him to move away from it. They also gave the defendant the Miranda warnings.

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[2] By the time of the hearing on the defendant's motion to suppress, Lewis could not recall anything about the nature of the incident or whether it had resulted in a conviction.

Lewis searched the vehicle while the defendant stood with an officer to the rear of it. Lewis was unable to locate either a gun or a black backpack in the vehicle. The glove compartment, which was the only part of the interior that was not searched at that time, was locked. Lewis then conducted a patfrisk of the defendant and found nothing other than the keys to the vehicle. Lewis used the keys to open the glove compartment. Inside was a silver Smith & Wesson nine millimeter firearm that was loaded with a fifteen-round magazine containing two rounds of ammunition. Also inside was another fifteen-round magazine that was loaded with ten rounds of ammunition.

When the defendant left the Store, Detective Sergeant John Claflin, one of the officers who had been surveilling the scene, was told to go into the Store to find out whether the defendant had left any personal belongings, in particular a black backpack, behind. After entering the Store and having been directed to an employee storage area, Claflin saw a black backpack that was identified by a Store employee as belonging to the defendant. Claflin picked up the backpack and could feel what he believed, on the basis of his experience and training, to be a gun storage box. Claflin opened the backpack and found an empty gun storage box. Claflin left the Store and saw the green Honda being searched; at that point, the defendant had not yet been pat frisked.[3]

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[3] John Claflin testified at the hearing that he did not think that the gun in the glove compartment had been found when he left the Store. The defendant contests this statement and argues that it was not established at the hearing on his motion to

Once the gun and magazine were found, the defendant was placed under arrest. Shortly thereafter, he said, "You got me for the gun. It's a [nine millimeter] and there shouldn't be one in the chamber." At the police station, the defendant again was given the Miranda warnings. He agreed to talk to police and told them that he had purchased the firearm for $650 from someone in Quincy and that he had been in possession of the gun for "awhile."

In June 2019, a grand jury issued indictments charging the defendant with one count of illegal possession of a firearm, G. L. c. 269, § 10 (a); two counts of illegal possession of a large capacity feeding device, G. L. c. 269, § 10 (m); one count of illegal possession of ammunition, G. L. c. 269, § 10 (h); and one count of illegal possession of a loaded firearm, G. L. c. 269, § 10 (n).[4]

In December 2019, the defendant filed a motion to suppress any evidence seized as a result of the search and seizure of his vehicle and person, on the grounds that he did not consent to a search of his person or of his automobile and the searches and seizure were in violation of his rights under the Fourth and Fourteenth Amendments to the United States

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suppress whether the backpack was searched prior to the discovery of the firearm. This question of timing is not pertinent to our analysis.

[4] Illegal possession of a loaded firearm, under G. L. c. 269, § 10 (n), is not an independent charge but, rather, "constitute[s] further punishment of a defendant who also [has] been convicted under G. L. c. 269, § 10 (a)." See Commonwealth v. Tate, 490 Mass. 501, 520 (2022).

Constitution and art. 12 of the Massachusetts Declaration of Rights.

At an evidentiary hearing on the motion to suppress, testimony was presented concerning the basis of Z's knowledge of the firearm. The prosecutor asked Pieroway whether "Z had actually seen [the] silver firearm that he or she described to you?" Pieroway responded that "Z had." Defense counsel objected and asked, "Was the officer there when Z saw the firearm? Did Z say he saw the firearm?." The motion judge, who was not the trial judge, commented, "That's fair," and asked whether Pieroway had learned that Z had seen the firearm "through a conversation." The prosecutor then asked Pieroway, "And how were you made aware that Z had seen the firearm?" Pieroway answered, "I had asked Z is the firearm real." The prosecutor inquired, "And what was Z's response?" Pieroway said, "Yes." The judge ultimately denied the defendant's motion to suppress.

b. Trial. A jury trial took place before a different Superior Court judge in June of 2021. At trial, witnesses were questioned repeatedly regarding the nature of the parking lot in which the defendant's vehicle had been parked. On cross-examination of Lewis, defense counsel asked whether Lewis had seen the defendant assisting a customer in the parking lot. Lewis responded that other investigators had observed the defendant doing so. At another point, defense counsel asked Lewis to confirm that the green Honda was not parked in the parking lot of a nearby business across the street from the Store. Lewis responded, "Well, it's not across the street, it's connected to that parking lot. . . . There's no street

that . . . intersect[s] . . . . It's one park -- it's a parking complex." Counsel then asked whether the vehicle was parked at "the [Store] parking spot." Lewis responded, "Yes." Similarly, during cross-examination of Pieroway, counsel asked whether the defendant had pulled into "a [Store] parking spot." Pieroway responded that that was correct. Boston police Officer Jason Nunez, another officer who had been at the scene, testified that the defendant's vehicle was parked in "the parking lot of the [Store]." When the prosecutor asked Nunez whether it was a large parking lot, Nunez responded, "I'm not sure the exact amount of spaces but it's definitely -- [twenty] plus vehicles maybe."

After the Commonwealth rested, the defendant moved for a required finding of not guilty on each of the charges. On the first charge, illegal possession of a firearm, the defendant argued that the statute under which he had been charged contained an exemption for possession while "being present in or on his residence or place of business," G. L. c. 269, § 10 (a) (1), and that the Commonwealth had proved only that he had possessed a firearm while "working at his place of business and on the property (i.e.[,] parking lot) of his place of business."[5] The prosecutor responded that the defendant did not have the firearm on his person while he was working, but, rather, it was in his vehicle, which "was not in the [Store] area, [nor was it] in [a Store] employee-only spot. . . . [S]everal witnesses testified it was a fairly large parking lot for lots of businesses." The judge noted that he found the

[5] The defendant's arguments with respect to the remaining charges are not relevant to any issue on appeal.

prosecutor's argument "persuasive," and denied the defendant's motion.

In his closing argument, defense counsel said, "In terms of the first indictment, one of the things that [the prosecutor has] to prove is that [the firearm possession] was outside somebody's home or place of business." During a sidebar following closing arguments, the prosecutor argued that defense counsel had misstated the law. The judge agreed, stating, "I made a ruling on the [motion for a required finding of not guilty] that I don't think one can reasonably interpret the law to cover this factual situation, because the law about being on or in your business was not meant to apply under these facts." The prosecutor, however, did not object to the closing argument.

After further discussion at sidebar, defense counsel told the judge that he had just re-read the model jury instructions on possession of a firearm without a license outside an individual's home or business and that the instruction provided states that "if there is evidence that [the possession occurred in] the defendant's residence or place of business," then the judge should instruct the jury that an additional element of the crime is that "the [d]efendant possessed the firearm outside of his place of business." Counsel said that he "did offer evidence that [the firearm possession] was [at the defendant's] place of business." Accordingly, counsel argued that an instruction should be given to the jury. The judge denied the request on the ground that it was untimely, because the jury were about to enter the court room to hear the final charge. The judge also noted that the statute did "not cover the factual situation before this

jury, because the Legislature, in putting those words into the statute, did not intend to cover this situation of a . . . firearm in a locked glove box of a car parked in a parking lot, not in the business itself." Defense counsel responded, "I just want to make clear that I did offer evidence through cross-examination that this was strictly [a Store] parking lot, and I think it was thoroughly covered that [the vehicle was in the defendant's] possession. . . .It was in the glove box, for which the keys were found . . . [in] his possession. That's his place of business. I want to make that clear." The judge stated, "Fair enough. Noted." In his final charge, the judge instructed:

> "Indictment Number 1 charges [the defendant] with knowingly possessing a firearm unlawfully. In order to prove the Defendant guilty of this offense the Commonwealth must prove the following three things beyond a reasonable doubt. First, that the Defendant possessed a firearm or that he had a firearm under his control in a vehicle. Second, that what the Defendant possessed or had under his control in a vehicle met the legal definition of a firearm. And third, that the Defendant knew he possessed a firearm or had a firearm under his control in a vehicle."

Soon after the jury began deliberations, they submitted a note asking:

> "In their closing arguments, the Defense lawyer mentioned that firearm possession, Indictment Number 1, must meet the criteria of being 'outside a home or business.' This is not indicated in your written instructions to us. Can you please clarify if we need to consider this in our deliberations."

Following a discussion, the attorneys and the judge came to an agreement on how the judge would respond to the question. The judge had the jury return to the court room and explained,

> "Yes, the statute has an exemption in it . . . for having a weapon at home or at work. However, earlier in this case, outside of your hearing, as a matter of law, I ruled that that exemption does not apply in this case. It's not available to [the defendant]. And therefore that's why I didn't include anything about it in the instructions."

The jury found the defendant not guilty of one count of illegal possession of a large capacity feeding device and guilty of all other counts. The defendant filed a timely notice of appeal, and we transferred the case to this court on our own motion.

2. Discussion. The defendant argues that police did not have probable cause to search the glove compartment of his vehicle and, thus, the motion judge erred in denying his motion to suppress evidence seized as a result of the warrantless search of his vehicle and person. The defendant also argues that the trial judge erred in not instructing the jury on the place of business exemption. In addition, the defendant maintains that the trial judge erred by not instructing the jury that the Commonwealth was required to prove beyond a reasonable doubt that the defendant did not have a firearms license when the firearm and magazine were discovered.

a. Motion to suppress. "In reviewing the denial of a motion to suppress, we accept the judge's findings of fact absent clear error" (citation omitted). Commonwealth v. Mubdi, 456 Mass. 385, 388 (2010).

In particular, we accord deference to "findings drawn partly or wholly from testimonial evidence." Commonwealth v. Tremblay, 480 Mass. 645, 655 (2018). "We then conduct an independent review of [the judge's] ultimate findings and conclusions of law" (quotation and citation omitted). Mubdi, supra.

A warrantless search is presumed to be unreasonable under the Fourth Amendment and art. 14 of the Massachusetts Declaration of Rights. Commonwealth v. Ortiz, 487 Mass. 602, 606 (2021). This presumption, however, may be surmounted "if the circumstances of the search fall within an established exception to the warrant requirement" (citation omitted). Id. "One of those exceptions, commonly known as 'the automobile exception,' applies to situations where the police have probable cause to believe that a motor vehicle parked in a public place and apparently capable of being moved contains contraband or evidence of a crime" (citation omitted). Commonwealth v. Dame, 473 Mass. 524, 536, cert. denied, 580 U.S. 857 (2016). This exception exists because "the inherent mobility of automobiles creates an exigency that they, and the contraband there is probable cause to believe they contain, can quickly be moved away while a warrant is being sought." Ortiz, supra, quoting Commonwealth v. Motta, 424 Mass. 117, 123 (1997).

To establish that a search falls within the automobile exception, "[t]he Commonwealth bears the burden of proving the existence of . . . probable cause to believe that the automobile contained contraband" (quotation and citation omitted). Commonwealth v. Garden, 451 Mass. 43, 47 (2008). To meet this burden, the Commonwealth must establish that "the

information possessed by police, at the time of the proposed warrantless search, provide[d] a substantial basis for the belief that there [was] a timely nexus or connection between criminal activity, a particular person or place to be searched, and particular evidence to be seized" (citation omitted). Dame, 473 Mass. at 536-537. Probable cause does not require an absence of uncertainty; rather, we ask whether a "reasonable and prudent" person could have acted on such a belief. See Commonwealth v. Agogo, 481 Mass. 633, 637 (2019), quoting Commonwealth v. Cast, 407 Mass. 891, 895-896 (1990).

i. Aguilar-Spinelli test. The defendant contends that the motion judge erred in allowing the confidential informant's tip to be used to establish probable cause. An informant's tip may be used to establish probable cause only if the Commonwealth satisfies the Aguilar-Spinelli test. Commonwealth v. Tapia, 463 Mass. 721, 729 (2012). See Spinelli v. United States, 393 U.S. 410, 415 (1969); Aguilar v. Texas, 378 U.S. 108, 114 (1964). This test requires the Commonwealth to "demonstrate some of the underlying circumstances from which (a) the informant gleaned his information (the 'basis of knowledge' test), and (b) the law enforcement officials could have concluded the informant was credible or reliable (the 'veracity' test)" (citation omitted). Tapia, supra. "Both prongs must be separately considered and satisfied" (quotation and citation omitted). Id. According to the defendant, the Commonwealth failed to satisfy either prong of the Aguilar-Spinelli test. The Commonwealth maintains that both prongs were satisfied.

The Commonwealth can satisfy the basis of knowledge prong by showing that "the information provided [by an informant] springs from [the] informant's firsthand observations or knowledge." Commonwealth v. Arias, 481 Mass. 604, 618 (2019). Here, the motion judge found that Z had told Pieroway that he had seen the firearm in the black backpack, and that that was the basis for his knowledge of the location of the firearm. This finding would be sufficient to satisfy the basis of knowledge prong, as it establishes that "the informant was reporting his own observation of the gun[ ] in question." See Commonwealth v. Alfonso A., 438 Mass. 372, 374 (2003). The defendant argues, however, that the judge's finding was clearly erroneous.

According to the defendant, a reasonable fact finder could not have found, on the basis of Pieroway's testimony, that Z had had firsthand knowledge of the firearm in the backpack. This is so, the defendant maintains, because Pieroway's later statement that Z told him the firearm was "real" supplanted Pieroway's earlier statement that Z had said he had seen the firearm. The defendant argues, therefore, that the Commonwealth did not demonstrate how "the informant gleaned [the] information" that he reported to Pieroway. See Tapia, 463 Mass. at 729.

"A judge's finding is clearly erroneous only where there is no evidence to support it or where the reviewing court is left with the definite and firm conviction that a mistake has been committed" (quotation and citation omitted). Commonwealth v. Colon, 449 Mass. 207, 215, cert. denied, 552 U.S. 1079 (2007). In reviewing the judge's findings, we recognize that "[t]he determination of the weight and

credibility of the testimony is the function and responsibility of the [motion] judge who saw the witnesses, and not this court" (citation omitted). Commonwealth v. Isaiah I., 448 Mass. 334, 337 (2007), S.C., 450 Mass. 818 (2008). Accordingly, a motion judge is "not required to discard testimony that appears to contain internal inconsistences, but may credit parts of a witness's testimony and disregard other potentially contradictory portions." United States v. González-Vélez, 587 F.3d 494, 504 (1st Cir. 2009), quoting United States v. Lara, 181 F.3d 183, 204 (1st Cir.), cert. denied, 528 U.S. 979 (1999). "The burden is on the appellant to show that a finding is clearly erroneous." Pointer v. Castellani, 455 Mass. 537, 539 (2009).

We conclude that the motion judge's findings here were not clearly erroneous. Pieroway testified that after he was asked to clarify how he knew that Z had seen the firearm, Z had said the firearm was "real." In this context, it was reasonable for the judge to infer that Z knew the firearm to be real because he had seen the firearm. See Commonwealth v. Carr, 458 Mass. 295, 303 (2010) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous" [citation omitted]). There was no clear error in the judge's decision to draw such an inference. See Colon, 449 Mass. at 224 (no clear error where factual findings "were supported by the evidence admitted or based on logical inferences drawn therefrom").

The defendant also argues that, even if there were a basis of knowledge for the informant's tip, that basis was negated once police failed to find a backpack in the defendant's vehicle, at which point the informant's

tip was proved inaccurate by the absence of a backpack. See Mubdi, 456 Mass. at 397. This argument misses the mark. The Commonwealth can establish a basis of knowledge under the Aguilar-Spinelli test through two independent means. First, an informant's basis of knowledge can be inferred if there was sufficient "independent police corroboration of the details of the informant's tip." Commonwealth v. Bakoian, 412 Mass. 295, 298 (1992). Second, the informant's basis of knowledge can be established where it is "apparent that the informant was reporting his own observation." Alfonso A., 438 Mass. at 374. Here, we rely on the motion judge's finding that the informant personally had observed the firearm in the defendant's backpack. The basis of knowledge test therefore survives the police failure to corroborate certain details in the informant's tip. See Tapia, 463 Mass. at 729 ("First-hand receipt of information through personal observation satisfies the basis of knowledge prong . . ." [citation omitted]).

The defendant also contends that the Commonwealth failed to satisfy the veracity prong of the Aguilar-Spinelli test. "To satisfy the veracity test, the Commonwealth needs to show either that the [informant] had a demonstrated history of reliability, . . . or the existence of circumstances assuring trustworthiness on the particular occasion of the information's being furnished" (quotation and citation omitted). Commonwealth v. Pinto, 476 Mass. 361, 365 (2017). A history of reliability can be demonstrated by a showing that "the informant provided accurate information in the past as to seizures, pending cases, convictions, or other such information which would indicate reliability." Commonwealth v. Warren, 418 Mass. 86, 89 (1994).

We conclude that the Commonwealth satisfied the veracity prong. Z's reliability was established by a previous instance in which Z supplied "information [that] led to the confiscation of illegal narcotics." See Commonwealth v. Mendes, 463 Mass. 353, 365 (2012). The defendant argues that one such occasion is insufficient to satisfy the veracity test.[6] To support this proposition, he points to Commonwealth v. Melendez, 407 Mass. 53, 59 (1990), in which we stated that "[t]he fact that the informant gave information on one occasion in the past which led to the arrest of two individuals is insufficient to satisfy the veracity test." In Melendez, however, the issue was not that the informant had only provided information on one occasion. Rather, the veracity test failed in that case because the fact of the arrests, without more, did not establish the accuracy of the information that had caused police to make those arrests. See Commonwealth v. Perez-Baez, 410 Mass. 43, 46 (1991) ("a clerk-magistrate [is] not entitled to infer from . . . a statement [that a prior tip led to arrests] that [the] prior tip had proved to be accurate"). Here,

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[6] The motion judge found that the information Z provided to Boston police had resulted in two separate arrests. The defendant argues that this was clear error because, in his testimony, Pieroway referred to only one arrest that was made on the basis of information provided by Z. We agree. Accordingly, we base our analysis on Pieroway's testimony in which he stated that Z's information led to a drug-related arrest, along with the seizure of narcotics and, separately, the recovery of a firearm near a playground. The defendant further contends that the discovery of the firearm near the playground did not bolster Z's reliability, because no testimony was given as to whether the firearm was an instrument of unlawful activity. Because we conclude that veracity is established here on the basis of the seizure of narcotics, we do not address this argument.

Z supplied information that led not only to an arrest for a drug-related offense, but also to the seizure of narcotics. The seizure was sufficient proof that Z had "provided information in the past which has proved to be accurate." See id. at 45.

ii. Probable cause to search the glove compartment. The defendant argues that, even if Z's tip satisfied the Aguilar-Spinelli test, it did not establish probable cause to search the glove compartment of his vehicle. According to the defendant, it would not have been reasonable for police to expect to find his backpack in the glove compartment.

Where there is probable cause to search a vehicle, "the permissible scope of the search [is] not limitless." Garden, 451 Mass. at 50. Rather, "a valid search is limited to 'any area, place, or container reasonably capable of containing the object of the search.'" Id. at 51, quoting Commonwealth v. Signorine, 404 Mass. 400, 405 (1989). Hence, in determining whether the warrantless search of a vehicle was lawful, we ask whether the search was restricted to the "part[s] of the vehicle where there [was] probable cause to believe the object may be found." See Commonwealth v. Davis, 481 Mass. 210, 220 (2019).

We begin by considering whether Lewis had probable cause to conduct his initial search of the vehicle. Lewis was made aware, on the basis of a tip from a reliable informant with firsthand knowledge, that the defendant was in possession of a firearm that day. See Cast, 407 Mass. at 897, 900-901. Contrast Commonwealth v. Hart, 95 Mass. App. Ct. 165, 167-168 (2019) (no timely nexus between informant's observation of firearm and location to be searched because firearm was observed two months before

search warrant application). The informant had asserted that the firearm would be in the defendant's vehicle and had identified the make, model, and registration plate of the vehicle. See Cast, supra at 901-902, quoting United States v. Ross, 456 U.S. 798, 813 (1982) ("the police must have probable cause to believe a particular automobile contains contraband, not just probable cause regarding a specific container whose relationship to an automobile is 'purely coincidental'"). Moreover, based on the license check he conducted prior to encountering the defendant, Lewis had reason to believe that the defendant did not have a license to carry a firearm. Contrast Commonwealth v. Alvarado, 423 Mass. 266, 269 (1996), quoting Commonwealth v. Toole, 389 Mass. 159, 163-164 (1983) ("mere possession of a handgun [is] not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun"). Lewis therefore had sufficient basis to "warrant a prudent [person] in believing that the defendant had committed, or was committing, an offense" and that evidence of that offense would be found in the identified vehicle (citation omitted). See Commonwealth v. Hernandez, 473 Mass. 379, 383 (2015).

Once Lewis failed to find the firearm during his initial search of the vehicle, there existed probable cause to search the glove compartment, where a firearm readily could be concealed. "[I]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." See Commonwealth v. Moses, 408 Mass. 136, 145 (1990), quoting Ross, 456 U.S. at 825. Up to an hour had elapsed between the time that Z informed police

of the existence of the firearm and when they located the defendant driving in Watertown. The defendant therefore had had ample time to move any firearm in his possession to the glove compartment of his vehicle. See Cast, 407 Mass. at 902 (probable cause existed to search entire vehicle because, after watching defendant place contraband in trunk of vehicle, agents "lost the defendant from their sight . . . for some six hours before he reappeared in view[,] . . . at any point during which [contraband] could have been placed elsewhere in the car"). Moreover, the defendant had parked his vehicle in a public lot outside his workplace**.** Under such circumstances, it would have been reasonable to suspect that the defendant might have secured an unlawfully possessed firearm in a locked glove compartment in order to avoid its detection by passersby. Contrast Garden, 451 Mass. at 51 ("The search of the [defendant's] trunk . . . exceeded the permissible scope of the search because [the officer] could not reasonably have believed that the source of the smell of burnt marijuana would be found in the trunk").

The defendant maintains that, when officers are apprised that a precise location within a vehicle contains contraband, they must limit their search of the vehicle to that location. Because the informant's tip specified a particular location -- the defendant's backpack -- in which the firearm would be found, the defendant contends that the scope of a lawful search was limited to areas in which the backpack reasonably could be stored and that it would not have been reasonable to suspect that the backpack would be stored in the glove compartment. This argument, however, misconstrues our jurisprudence. Where an informant's tip specifies a particular location within a

vehicle in which contraband may be stored, that does not necessarily preclude the possibility that there is probable cause to search for the contraband in another part of the vehicle. See Commonwealth v. Wunder, 407 Mass. 909, 913 (1990).

Here, Lewis reasonably could have believed that the object of his search -- the silver firearm described by Z -- was located in the glove compartment. See Cast, 407 Mass. at 896, quoting Commonwealth v. Alessio, 377 Mass. 76, 82 (1979) ("in determining whether probable cause exists . . . , '[r]easonable inferences and common knowledge are appropriate considerations'"). As discussed, there was probable cause to believe that the firearm was in the defendant's vehicle. See Bostock, 450 Mass. 616, 624 (2008), quoting Cast, supra at 908 ("As a general matter, . . . the 'lawful warrantless search of a motor vehicle . . . extends to all containers, open or closed, found within"). The defendant had had ample opportunity to transfer the firearm to the glove compartment, and reason to do so given the public location of the vehicle. See Garden, 451 Mass. at 50 (officer had probable cause to search glove compartment of vehicle because "any contraband hidden on the passengers' person[s] easily could have been transferred to a location in the passenger compartment when they were ordered to get out"). Accordingly, we conclude that Lewis had probable cause to search the glove compartment of the defendant's vehicle.

iii. Patfrisk. The defendant argues that, even if there was probable cause to search the glove compartment, the firearm and magazine should have been excluded at trial because their discovery resulted from an unconstitutional patfrisk of his person. We

conclude that Lewis's search of the defendant's person was a lawful patfrisk and that, thus, the exclusionary rule did not prohibit the introduction of the firearm and magazine. See Commonwealth v. Long, 476 Mass. 526, 535-536 (2017).

A patfrisk is a "'carefully limited search of the outer clothing of [a] person[ ] . . . to discover weapons' for safety purposes." Commonwealth v. Torres-Pagan, 484 Mass. 34, 36 (2020), quoting Terry v. Ohio, 392 U.S. 1, 30 (1968). "The only legitimate reason for an officer to subject a suspect to a patfrisk is to determine whether he or she has concealed weapons on his or her person." Torres-Pagan, supra at 39. For this reason, a "patfrisk is permissible only where an officer has a 'reasonable suspicion,' based on specific articulable facts, 'that the suspect is [both] armed and dangerous.'" Commonwealth v. Garner, 490 Mass. 90, 92 (2022), quoting Torres-Pagan, supra at 36.

The motion judge found that Lewis conducted a patfrisk of the defendant because he was "in fear for his safety due to the potential presence of a gun." The defendant points out that there was no testimony suggesting that Lewis feared for his safety when he conducted the patfrisk. If an officer has reasonable suspicion that a person is carrying an illegal firearm, however, that is a sufficient basis upon which to conclude that the person is armed and dangerous so as to justify a patfrisk. See Commonwealth v. DePeiza, 449 Mass. 367, 371 (2007).

The defendant also argues that there was no basis to believe that he was carrying an unlicensed firearm on his person, because Z's tip indicated only that a firearm would be found in his vehicle. See DePeiza, 449 Mass. at 374. Reasonable suspicion, however,

may be grounded in "reasonable inferences" drawn from "specific, articulable facts" (citation omitted). Id. at 371. As discussed, Lewis had probable cause to believe that the defendant was in unlawful possession of a firearm. Just as Lewis reasonably could have inferred, upon failing to find the firearm elsewhere in the vehicle, that it was in the glove compartment, he also reasonably could have inferred that the firearm instead was located on the defendant's person. See Gouse, 461 Mass. at 793 ("When the firearm [that the police had been warned the defendant likely carried] was not found on the defendant's person, police appropriately concluded that it was likely located in the automobile").

Moreover, Lewis was justified in removing the set of keys from the defendant's person and using them to unlock the glove compartment. In order to "dispel reasonable suspicions that the stopped suspect may be armed with a weapon," an officer may retrieve from the suspect any "hard object" that could be a "potential weapon." See Commonwealth v. Pagan, 440 Mass. 62, 68-69 (2003). We previously have held that it is "self-evident" that keys constitute a hard object that may be seized as a potential weapon. See Commonwealth v. Blevines, 438 Mass. 604, 608 (2003). Lewis therefore was justified in retrieving the defendant's keys as a means of disarming him. See Commonwealth v. Wilson, 441 Mass. 390, 396 (2004). In addition, because there was probable cause to believe that the firearm was in the glove compartment, Lewis also was justified in using the keys, once retrieved, to gain access to the interior of the glove compartment. Contrast Blevines, supra at 609-610 (police were not permitted to use keys seized from defendant during patfrisk to unlock his vehicle

because there "was no evidence that the police had any basis for suspecting that any contraband . . . would be found in the automobile").

b. Instruction on place of business exemption. The defendant contends that the trial judge should have instructed the jury that, to convict the defendant, the Commonwealth had to prove that he was not in or on his place of business when the firearm and magazine were discovered. This is because, the defendant argues, whether he was in or on his place of business at the time the firearm was seized was a question for the jury. "Trial judges have considerable discretion in framing jury instructions . . ." (quotation and citation omitted). See Commonwealth v. Kelly, 470 Mass. 682, 688 (2015). "Instructions that convey the proper legal standard, particularly when tracking model jury instructions, are deemed correct." Green, petitioner, 475 Mass. 624, 629 (2016).

General Laws c. 269, § 10 (a), "makes it an offense to 'knowingly' possess a firearm outside of one's residence or place of business without also having a license to carry a firearm." Commonwealth v. Powell, 459 Mass. 572, 588 (2011), cert. denied, 565 U.S. 1262 (2012). We have held that this language exempts an individual from the requirement of obtaining a firearms license if the location of the individual's firearm is restricted to his or her residence or place of business. See Commonwealth v. Harris, 481 Mass. 767, 780 (2019). "We treat the existence of a statutory exemption as equivalent to an affirmative defense." Commonwealth v. Kelly, 484 Mass. 53, 67 (2020).

While the Commonwealth carries the burden of proving each element of a charged crime, it "has no burden of disproving an affirmative defense unless

and until there is evidence supporting such defense." Commonwealth v. Cabral, 443 Mass. 171, 179 (2005). If a defendant raises a defense that is "supported by sufficient evidence," however, the defendant is "entitled to have a jury instruction" on that defense. Id. Where a judge does not instruct the jury on an affirmative defense, the judge errs "if the evidence, viewed in the light most favorable to the defendant, provided support for the affirmative defense." Kelly, 484 Mass. at 67.

The defendant does not ask us to upend our established precedent that the place of business exemption is an affirmative defense, and we discern no compelling reason to do so. Here, therefore, the judge erred in not instructing on the place of business exemption only if sufficient evidence was introduced that the defendant was in or on his place of business when the firearm was discovered. See Commonwealth v. Dunphy, 377 Mass. 453, 459-460 (1979) (if no evidence is provided that defendant was "within the limits of his property or residence at the time of the alleged offense . . . , it should be presumed that none existed").[7]

To determine whether sufficient evidence was introduced that the defendant was in or on his place

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[7] The model jury instructions on possession of a firearm without a license outside an individual's home or business state that, "[i]f there is evidence that [the firearm possession] was in the defendant's residence or place of business," the judge should instruct that one element of illegal possession of a firearm is that "the defendant possessed the firearm outside of his (her) residence or place of business." See Instruction 7.600 of the Criminal Model Jury Instructions for Use in the District Court (rev. Jan. 2013).

of business, we first must delineate the extent of the "place of business" exemption, which we have not yet been required to address. We start by examining the related exemption for place of residence, which we previously have addressed. See Commonwealth v. Anderson, 445 Mass. 195, 214 (2005). We have understood the residence exemption in accordance with the Legislature's intent to balance an individual's interest in self-defense and the public's interest in crime deterrence and public safety. See Commonwealth v. Seay, 376 Mass. 735, 741-743 (1978). With these differing interests in mind, we have reasoned that "[t]he interest of an apartment dweller in defending him[- or her]self . . . is clearly attenuated when he [or she] passes his [or her] doorway to enter a common area offering easy retreat." Id. at 742-743. Accordingly, "[w]e have defined the term 'residence' to include" only those areas "over which the [individual] retains exclusive control." Commonwealth v. Coren, 437 Mass. 723, 734 (2002). The residence exemption, therefore, does not apply where a defendant possesses or controls a firearm in the "[p]ublic streets, sidewalks, [or] common areas [of an apartment building] to which occupants of multiple dwellings have access." Id. Moreover, if a defendant's firearm is stored within his or her vehicle, the residence exemption applies only if the vehicle is located within or on the defendant's residence. See Harris, 481 Mass. at 780.

This reasoning "applies with equal force to the exemption for a person's place of business." See Commonwealth v. Belding, 42 Mass. App. Ct. 435, 438 (1997). An individual has an interest in protecting his or her place of business, but that interest is attenuated when the individual enters an area that is

not within the exclusive control of that business. See id. See also Prince George's County v. Blue, 206 Md. App. 608, 621 (2012), aff'd, 434 Md. 681 (2013) ("The display of a weapon by a security guard indoors could halt violence by unarmed patrons inside the establishment. However, drawing a handgun to chase a malefactor across a parking lot, where he or she may have a weapon hidden in a car, invites possible battlefield-type carnage"). Accordingly, given the Legislature's intent to "protect the public from the potential danger incident to the unlawful possession of [firearms]," a firearm located within a parking lot falls within the place of business exemption only if the parking lot is within the exclusive control of the business. See Commonwealth v. Lindsey, 396 Mass. 840, 842-843 (1986). See also Sherrod v. State, 484 So. 2d 1279, 1281 (Fla. Dist. Ct. App. 1986) (residence exception to firearm statute was inapplicable to individual who carried concealed weapon in "the parking lot of a multiple unit apartment dwelling"); Blue, supra at 623 (place of business exemption is limited to "the interior of the business establishment"); Bryant v. State, 508 S.W.2d 103, 104 (Tex. Crim. App. 1974) (residence exception in firearm statute was inapplicable to resident "with a pistol in his hand in a parking lot shared by other occupants of the apartment complex").

Applying the exclusive control standard here, we conclude that the defendant did not introduce sufficient evidence at trial to support an affirmative defense that the firearm was in or on his place of business. See Anderson, 445 Mass. at 214. Although officers testified that the vehicle was located in the parking lot of the Store, none of this testimony supports a determination that this parking lot was

under the Store's exclusive control.[8] See Bryant, 508 S.W.2d at 104 (parking lot was not within defendant's premises because "parking spaces were not assigned to tenants and a tenant used whatever space was available"). To the contrary, testimony was introduced that suggested the parking lot was not within the exclusive control of the defendant's employer. During cross-examination of Lewis, he indicated that the parking lot in front of the Store was part of a larger parking complex. No evidence was presented to indicate that the Store's section of the parking complex was cordoned off, marked with signage, or under the Store's control in any sense. See Sherrod, 484 So. 2d at 1281 (quoting Florida Attorney General's advisory opinion stating that exception did not apply to "a large parking lot which serves an entire shopping area").

The defendant also argues that, because Pieroway testified that he had observed the defendant carrying out his job duties while in the parking lot, the parking lot was his "place of business." "Our primary duty in interpreting a statute is to effectuate the intent of the Legislature in enacting it" (quotation and citation omitted). Commonwealth v. Curran, 478 Mass. 630, 633 (2018). "Where the plain language [of a statute] is unclear or ambiguous, we strive to discern the legislative intent in enacting [it] 'from all its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective, consonant with sound reason and common sense.'" Commonwealth v. Newberry, 483 Mass. 186,

[8] Given this, we need not reach the defendant's argument that the "residence or place of business" exemption also extends to G. L. c. 269, § 10 (m) and (n).

192 (2019), quoting Seideman v. Newton, 452 Mass. 472, 477 (2008). Here, the Legislature cannot have intended that one's "place of business" be anywhere that one conducts business activities. The residence or place of business exemption restricts an individual's unlicensed possession of a firearm to areas where the firearm poses a lesser degree of risk to the public. See Seay, 376 Mass. at 742. "[T]he rule for which [the] defendant contends," however, "would permit one to wander [armed with a firearm] about [public areas] inhabited by hundreds of persons simply because" one is engaged in a business activity (citation omitted). See id. Moreover, G. L. c. 269, § 10 (a) (4), and G. L. c. 140, § 129C (l), (o), provide that certain individuals are exempt from firearms licensure requirements if they possess a firearm in the course of particular business activities. The defendant's reading of the statutory language would render this provision entirely superfluous, as it would exempt any individuals who are engaged in business activities, contrary to our long-standing canon of statutory construction that a statute "must be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous" (quotation and citation omitted). Commonwealth v. Keefner, 461 Mass. 507, 511 (2012).

Because no evidence was introduced at trial to support a determination that the firearm was located in or on the defendant's place of business, the defendant was not entitled to an instruction on the place of business exemption.[9]

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[9] Because we conclude that there was no error, we need not reach the Commonwealth's argument that the place of business

c. Instruction on exemption for possession of license. The defendant also argues that his convictions should be reversed because the jury were not instructed that, to find him guilty of unlawful possession of a firearm, the Commonwealth had to prove that he did not have a firearms license. Although he did not seek such an instruction at trial, the defendant now contends that the absence of one violated his rights to due process and his rights under the Second Amendment.

"We do not normally consider on appeal issues that were not fairly raised below . . . ." Commonwealth v. Hilton, 443 Mass. 597, 618 n.12 (2005), S.C., 450 Mass. 173 (2007). This rule, however, "is not without qualification. We have excused the failure to raise a constitutional issue at trial . . . when the constitutional theory on which the defendant has relied was not sufficiently developed at the time of trial . . . to afford the defendant a genuine opportunity to raise his claim." Commonwealth v. Rembiszewski, 391 Mass. 123, 126 (1984). This is known as the "clairvoyance exception." See Commonwealth v. Connolly, 454 Mass. 808, 830 (2009). Here, the defendant's argument depends upon the United States Supreme Court's holding in Bruen, 142 S. Ct. at 2122, in which the Court established the right to possess a firearm outside the home. The defendant's trial took place in 2021, prior to the release of this decision. The defendant, therefore, did not have an adequate opportunity at the time of his trial to raise the present issue. See Commonwealth v. Johnson, 461 Mass. 44, 54 n.13 (2011). We therefore "conclude

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exemption is applicable only where the individual is the owner or proprietor of the business.

that the defendant is entitled" to our review of this issue. See Commonwealth v. Hinckley, 422 Mass. 261, 266-267 (1996).

For each of the crimes of which the defendant was convicted -- illegal possession of a firearm, illegal possession of a large capacity feeding device, illegal possession of ammunition, and illegal possession of a loaded firearm -- the defendant would not have been in violation of the law if he had obtained a proper license to engage in the proscribed activity. See Cassidy, 479 Mass. at 532 (G. L. c. 269, § 10 [m]); Johnson, 461 Mass. at 58 (G. L. c. 269, § 10 [a], [h], [n]). Under the current statutory regime, however, "licensure is an affirmative defense, not an element of the crime." Commonwealth v. Allen, 474 Mass. 162, 174 (2016), quoting Commonwealth v. Norris, 462 Mass. 131, 145 (2012). General Laws c. 278, § 7, provides that "[a] defendant in a criminal prosecution, relying for his [or her] justification upon a license . . . shall prove the same; and, until so proved, the presumption shall be that [the defendant] is not authorized." Accordingly, this court has held that, to convict a defendant under G. L. c. 269, § 10, "the Commonwealth does not need to present evidence to show that the defendant did not have a license or firearm identification card." Colon, 449 Mass. at 226. Rather, as is the case for the place of business exemption, "the burden [has been] on the defendant to come forward with . . . evidence" that he or she has a license to possess a firearm (quotation and citation omitted). Id. Once the defendant does so, the burden then shifts to the Commonwealth "to persuade the trier of facts beyond a reasonable doubt that the [license] does not exist." Commonwealth v.

Humphries, 465 Mass. 762, 769 (2013), quoting Gouse, 461 Mass. at 802.

As discussed, States may place "on defendants the burden of proving affirmative defenses." Gouse, 461 Mass. at 804, quoting Gilmore v. Taylor, 508 U.S. 333, 341 (1993). The due process clause of the Fourteenth Amendment, however, "requires the Commonwealth to prove every essential element of the offense beyond a reasonable doubt." Commonwealth v. Brown, 477 Mass. 805, 815 (2017), cert. denied, 139 S. Ct. 54 (2018), quoting In re Winship, 397 U.S. 358, 364 (1970). "Instructions to the jury that would lead them to believe otherwise are constitutional error." Commonwealth v. Cruz, 456 Mass. 741, 752 (2010). Hence, while an affirmative defense may "excuse[ ] conduct that would otherwise be punishable," it may not "controvert any of the elements of the offense itself." Smith v. United States, 568 U.S. 106, 110 (2013), quoting Dixon v. United States, 548 U.S. 1, 6 (2006). Otherwise put, "an affirmative defense may not, in operation, negate an element of the crime which the government is required to prove." United States v. Johnson, 968 F.2d 208, 213 (2d Cir.), cert. denied, 506 U.S. 964 (1992).

Thus, to address the defendant's argument, we must determine whether, since the United States Supreme Court's decision in Bruen, 142 S. Ct. at 2122, the failure to obtain a valid firearms license is now an essential element of unlawful possession of a firearm. If so, the defendant's rights to due process were violated when the judge placed upon him the onus of presenting evidence of licensure, and we must reverse his convictions. See Walton v. Arizona, 497 U.S. 639, 650 (1990) (State cannot allocate burden of proof in

way that "lessen[s] the State's burden to prove every element of the offense charged"); Commonwealth v. Mills, 436 Mass. 387, 398 (2002) ("A criminal conviction cannot be affirmed on appeal where the jury were not instructed on the elements of the theory of the crime").

In answering this question, we cannot simply look to the plain statutory language. If, through amending statutory language, the Legislature were able to determine which elements of a crime the Commonwealth would be required to prove, it "could undermine [due process] without effecting any substantive change in its law." See Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). Rather, we must engage in "an analysis that looks to the 'operation and effect of the law as applied and enforced by the [Commonwealth],' . . . and to the interests of both the [Commonwealth] and the defendant as affected by the allocation of the burden of proof." Id. at 699, quoting St. Louis S.W. Ry. v. Arkansas, 235 U.S. 350, 362 (1914).

For instance, in Commonwealth v. Munoz, 384 Mass. 503, 503 (1981), the defendant was convicted of operating an uninsured motor vehicle. The judge had instructed the jury that "the defendant has the responsibility and the obligation of showing that, as a matter of fact, [the vehicle he was operating] was insured." Id. at 505. The Commonwealth argued that this instruction was correct, "because G. L. c. 278, § 7, which places the burden on the defendant to produce evidence of license or authority," implied that the defendant bore the "burden of producing some evidence of automobile insurance." Id. at 506. We concluded that G. L. c. 278, § 7, did not apply to the

crime of operating an uninsured vehicle, as "noninsurance is an element, in fact, the central element of [such] a prosecution." Id. at 507. Accordingly, because "insurance is an element of the crime charged, not a mere license or authority[,] . . . the issue of insurance cannot be viewed as an affirmative defense and, [therefore], it cannot be removed from jury consideration." Id. at 507. Thus, obtaining a conviction required the Commonwealth to prove beyond a reasonable doubt that the vehicle was uninsured. Id. at 508. See Cabral, 443 Mass. at 179 ("Because the absence of lawful authority or justification is an element of each of the crimes charged, the Commonwealth must prove beyond a reasonable doubt that each defendant acted without lawful authority or justification").

In Gouse, 461 Mass. at 801-802, we held that licensure is not an essential element of unlawful possession of a firearm. We reasoned, rather, that under G. L. c. 269, § 10 (a), and G. L. c. 278, § 7, the "holding of a valid license brings the defendant within an exception to the general prohibition against carrying a firearm." Id. at 802, quoting Commonwealth v. Jones, 372 Mass. 403, 406 (1977). That decision followed two United States Supreme Court decisions in which the Court ruled on the extent of the protections provided by the Second Amendment. In Heller, 554 U.S. at 635, the Court held that the Second Amendment protects the right to possess an operable firearm in the home. Then, in McDonald v. Chicago, 561 U.S. 742, 750 (2010), the Court held that the "Second Amendment Right is fully applicable to the States." The defendant in Gouse, supra at 801, argued that "the allocation of burdens under [G. L. c. 278, § 7,] contravenes the [United

States Supreme Court's] holdings [in] McDonald and Heller by permitting a presumption of criminality from constitutionally protected conduct -- the possession of a firearm." We concluded that Heller and McDonald established only a "right 'to possess a handgun in the home for the purpose[ ] of self-defense.'" Gouse, supra at 801, quoting McDonald, supra at 791. The prohibition against possessing a firearm outside the home therefore "[did] not implicate this right." Gouse, supra at 802. Therefore, requiring that a defendant who was charged with unlawful possession outside the home "produce some evidence of a license at trial -- and recognizing a consequent presumption of unauthorized possession where [the defendant] fails to do so -- [did] not infringe on constitutionally protected conduct." Id.

Since our decision in Gouse, 461 Mass. at 807-808, the United States Supreme Court has determined that the Second Amendment right to possess a firearm applies outside the home. See Bruen, 142 S. Ct. at 2134. In Bruen, supra at 2122, 2134, the Court concluded that the Second Amendment's protection of "the individual right to possess and carry weapons in case of confrontation" requires that one have a "right to carry handguns publicly" (citation omitted). The Court reasoned that "the Second Amendment guarantees an 'individual right to possess and carry weapons in case of confrontation,' and confrontation can surely take place outside the home." Id. at 2135, quoting Heller, 554 U.S. at 592.

In the wake of Bruen, this court's reasoning in Gouse, 461 Mass. at 802, is no longer valid. It is now incontrovertible that a general prohibition against carrying a firearm outside the home is

unconstitutional. See Bruen, 142 S. Ct. at 2134. Because possession of a firearm outside the home is constitutionally protected conduct, it cannot, absent some extenuating factor, such as failure to comply with licensing requirements, be punished by the Commonwealth. See id. at 2122-2123. Accordingly, the absence of a license is necessary to render a defendant's possession of a firearm "punishable." See Smith, 568 U.S. at 110, quoting Dixon, 548 U.S. at 6. (affirmative defense does not negate element of crime where it "excuse[s] conduct that would otherwise be punishable"). It follows, then, that failure to obtain a license is a "fact necessary to constitute" the crime of unlawful possession of a firearm. See Smith, supra, quoting In re Winship, 397 U.S. at 364.

We therefore conclude that the absence of a license is an essential element of the offense of unlawful possession of a firearm pursuant to G. L. c. 269, § 10 (a). General Laws c. 278, § 7, which provides that licensure is an affirmative defense, is no longer applicable to G. L. c. 269, § 10 (a). See Munoz, 384 Mass. at 506, quoting Jones, 372 Mass. at 405 (G. L. c. 278, § 7, applies only "to situations where '[a]s [a] matter of statutory construction, the prohibition is general, the license is exceptional'"). Rather, to convict a defendant of unlawful possession of a firearm, the Commonwealth must prove "as an element of the crime charged" that the defendant in fact failed to comply with the licensure requirements for possessing a firearm. See Munoz, supra at 507.

The District of Columbia Court of Appeals employed similar reasoning in Herrington v. United States, 6 A.3d 1237, 1239-1240 (D.C. 2010), a case that was cited with approval in Gouse, 461 Mass. at 802. In

that case, the defendant's conviction of unlawful possession of ammunition "was based solely on evidence that he possessed handgun ammunition in his home." Herrington, supra at 1239. Under the relevant statute, the defendant had the burden of establishing that he had complied with "valid registration and licensing requirements." Id. at 1241-1242. The court determined that the statute was unconstitutional under the due process clause and the Second Amendment, because "[w]here the Constitution -- in this case, the Second Amendment -- imposes substantive limits on what conduct may be defined as a crime, a [L]egislature may not circumvent those limits by enacting a statute that presumes criminality from constitutionally-protected conduct and puts the burden of persuasion on the accused to prove facts necessary to establish innocence." Id. at 1244.

Here, as stated, the jury convicted the defendant of unlawful possession of a firearm without being instructed that, to do so, they must have determined that the defendant did not have a firearms license. See Neder v. United States, 527 U.S. 1, 10 (1999) ("improperly omitting an element from the jury . . . precludes the jury from making a finding on the actual element of the offense" [emphasis in original]). As a result, the defendant was convicted of a crime solely on the ground that he had engaged in the constitutionally protected conduct of possessing a firearm in public. This violated the defendant's rights to due process and rights under the Second Amendment. See Montana v. Egelhoff, 518 U.S. 37, 54 (1996), citing In re Winship, 397 U.S. at 364.

The Commonwealth argues that the defendant's due process rights were not violated because the Second Amendment does not prevent the States from imposing licensing requirements on the possession of firearms. See Bruen, 142 S. Ct. at 2157 (Alito, J., concurring) ("Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun"). The Second Amendment certainly does not "imperil every law regulating firearms." See Powell, 459 Mass. at 586, quoting McDonald, 561 U.S. at 786. The issue we confront here, however, is the burden of proof that must accompany such laws. The Commonwealth may impose licensing requirements upon the possession of firearms, but in enforcing those requirements, it must prove beyond a reasonable doubt that a defendant failed to comply with them. See Herrington, 6 A.3d at 1245.

The Commonwealth also points to our language in Commonwealth v. Loadholt, 460 Mass. 723, 727 (2011), where we said that "[n]othing in the McDonald and Heller decisions has altered or abrogated the state of the law concerning the statutory presumption set forth in G. L. c. 278, § 7." The Commonwealth asserts that, if McDonald and Heller did not alter the state of the law concerning the burden of proof regarding proper licensure, then Bruen does not either. In Loadholt, supra at 726-727, however, we stated that we would "not address the defendant's claims that . . . G. L. c. 278, § 7, creates an unconstitutional presumption," because "[t]he defendant did not raise these arguments at trial or in his original brief on direct appeal" (footnote omitted). See Commonwealth v. Mathews, 450 Mass. 858, 871 (2008) (discounting dicta as precedent).

In addition, we cannot abandon the requirement that the Commonwealth prove each essential element of a crime simply because obtaining a conviction would be "a heavy burden for the prosecution to satisfy." See Mullaney, 421 U.S. at 701. In Gouse, 461 Mass. at 806, we noted that it would be a "daunting task" for the Commonwealth to prove beyond a reasonable doubt that a defendant had no such license. We reasoned that, "[o]n the other hand, placing the onus on the defendant to produce some evidence at trial that he was licensed to carry a firearm would involve the very simple task of produc[ing] that slip of paper indicating [such authorization]" (quotations and citations omitted). Id. As we indicated, however, this reasoning is not applicable where the Second Amendment requires that licensure is an essential element of the crime. See id. at 801-802. The Commonwealth's burden of proving the essential element of a crime "cannot be altered because of any difficulty the Commonwealth may have in proving [the element] as compared to the relative ease with which the defendant could prove [its negative]." See Munoz, 384 Mass. at 509-510.

The defendant argues that licensure is also an essential element of the crime of unlawful possession of ammunition under G. L. c. 269, § 10 (h). We agree. In Heller, 554 U.S. at 630, the United States Supreme Court concluded that a requirement that firearms kept in the home "be rendered and kept inoperable at all times" violated the Second Amendment, because the requirement made it "impossible for citizens to use [their firearms] for the core lawful purpose of self-defense." A general prohibition on ammunition similarly would render it impossible for citizens to use their firearms for purposes of self-defense; in the

absence of ammunition, a firearm is effectively inoperable. See United States v. Miller, 307 U.S. 174, 179-180 (1939) (citing Seventeenth Century commentary on gun use in America that "[t]he possession of arms also implied the possession of ammunition"). See, e.g., Association of N.J. Rifle & Pistol Clubs v. Attorney Gen. N.J., 910 F.3d 106, 116 (3d Cir. 2018), quoting Jackson v. City & County of San Francisco, 746 F.3d 953, 967 (9th Cir. 2014), cert. denied, 576 U.S. 1013 (2015) ("Regulations that eliminate 'a person's ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose'"); Jackson, supra, quoting Ezell v. Chicago, 651 F.3d 684, 704 (7th Cir. 2011) ("'the right to possess firearms for protection implies a corresponding right' to obtain the bullets necessary to use them"); Herrington 6 A.3d at 1243 ("from the Court's reasoning [in Heller], it logically follows that the right to keep and bear arms extends to the possession of handgun ammunition"). Because a general prohibition on ammunition would violate the Second Amendment, the reasoning that we have applied to G. L. c. 269, § 10 (a), must apply as well to G. L. c. 269, § 10 (h). Accordingly, we conclude that the defendant's rights under the Second Amendment and his rights to due process were violated when he was convicted of unlawfully possessing ammunition although the jury were not instructed that licensure is an essential element of the crime.

Nonetheless, we decline the defendant's suggestion that we extend this holding to the crime of unlawful possession of a large capacity feeding device. See G. L. c. 269, § 10 (m). We previously have held that G. L. c. 140, § 131M, a statute that proscribes possession of large capacity feeding devices, "is not prohibited by

the Second Amendment, because the right [to bear arms] 'does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.'" Cassidy, 479 Mass. at 540, quoting Heller, 554 U.S. at 625. See Worman v. Healey, 922 F.3d 26, 30, 40 (1st Cir. 2019), cert. denied, 141 S. Ct. 109 (2020) ("Massachusetts law proscribing the sale, transfer, and possession of certain semiautomatic assault weapons and large-capacity magazines" does not violate Second Amendment). Accordingly, we conclude that the defendant was not entitled to an instruction that licensure is an essential element of unlawful possession of a large capacity feeding device.

Finally, we conclude that our holding here should not be applied retroactively to convictions that became final prior to the United States Supreme Court's decision in Bruen, 142 S. Ct. at 2122. "The retroactivity of a constitutional rule of criminal procedure turns on whether the rule is 'new' or 'old.'" See Commonwealth v. Perry, 489 Mass. 436, 463 (2022), quoting Commonwealth v. Ashford, 486 Mass. 450, 457 (2020). A case "announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final" (emphasis in original). Commonwealth v. Bray, 407 Mass. 296, 301 (1990), quoting Teague v. Lane, 489 U.S. 288, 301 1989)). The rule we announce today is dictated by the Court's decision in Bruen. Accordingly, our holding applies prospectively and to those cases that were active or pending on direct review as of the date of the issuance of that decision. See Perry, supra at 464.

3. Conclusion. The defendant's convictions on the indictments charging unlawful possession of a

firearm, unlawful possession of ammunition, and unlawful possession of a loaded firearm are vacated and set aside, and the matter is remanded to the Superior Court for entry of judgments of not guilty on those indictments. The defendant's conviction on the indictment charging unlawful possession of a large capacity feeding device is affirmed.

So ordered.

LOWY, J. (concurring, with whom Georges, J., joins). I agree with the court's reasoning and its conclusion that, in light of the United States Supreme Court's decision in New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022), a defendant's lack of a valid firearms license must be treated as an essential element of the offense of unlawful possession of a firearm pursuant to G. L. c. 269, § 10 (a), which the Commonwealth must prove beyond a reasonable doubt as part of its case-in-chief.

I write separately to address certain evidentiary issues concerning the admissibility of firearms licensing records that will likely arise in pending and future cases as a result of this ruling. I recognize that the issues I discuss here have not been directly addressed in the record or the arguments in this case; nor have the issues been vetted by the full court. Accordingly, everything that I suggest will need to be tested and refined in the crucible of future litigation or rulemaking. Nevertheless, given the high volume of cases involving charges for unlicensed possession of a firearm or ammunition that are handled by our courts,[1] I venture these suggestions to offer some guidance.

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[1] According to data published by the Trial Court's Department of Research and Planning, in fiscal year 2022, over 6,000 charges for carrying a firearm without a license, carrying a loaded firearm without a license, and possession of a firearm or ammunition without a firearm identification card, in violation of G. L. c. 269, § 10, were filed in the District Court and Boston Municipal Court, and over 2,400 such indictments were returned in the Superior Court. See https://public.tableau.com/app/profile/drap4687/viz/MassachusettsTrialCourtChargesDashboard/AllCharges [https://perma.cc/25AT-JY2V].

In general, as I explain in further detail infra, properly authenticated firearms licensing records that have been made and kept in the normal course of an agency's affairs should ordinarily be admissible under the official records and business records exceptions to the rule against hearsay. The admission of these records should not ordinarily violate a defendant's rights under confrontation clause[2] of the Sixth Amendment to the United States Constitution because such records were not "made with the primary purpose of creating an out-of-court substitute for trial testimony" (quotation and citation omitted). Commonwealth v. Rand, 487 Mass. 811, 815 (2021). Indeed, depending on how the records are kept, and the witness's level of familiarity with the records, it may well be that the absence of the defendant's name from such records would constitute prima facie evidence of a lack of a license.

Agency certificates or affidavits stating that there is no record of a firearms license issued to a defendant, unlike agency lists, are more problematic. Although such certificates of the nonexistence of an official record are admissible under an exception to the rule against hearsay, their admission at trial without a testifying witness from the agency responsible for keeping such records, and who is familiar with how the records are kept, made, and stored, will likely be

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[2] See Sixth Amendment to the United States Constitution ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009) (Sixth Amendment applies to States via Fourteenth Amendment of United States Constitution). See also art. 12 of the Massachusetts Declaration of Rights ("every subject shall have a right . . . to meet the witnesses against him face to face").

deemed a violation of a defendant's rights under the confrontation clause.

1. Records of firearms licensing. "In Massachusetts, local police departments are responsible for the issuance of firearms licenses to individuals who reside or have a place of business within the jurisdiction." Commonwealth v. Adams, 482 Mass. 514, 531 (2019).[3] Local police departments are required to make certain records regarding firearms licenses and to forward copies of applications, issued licenses, and notices of revocation and suspension to the Department of Criminal Justice Information Services, where those records are collected by the firearms records bureau.[4]

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[3] "Most licenses are issued by municipal police departments. The State Police issues Gun Club Licenses and is also responsible for Licenses to Carry for active and retired troopers. The Firearms Records Bureau issues non-resident licenses and resident alien permits." Executive Office of Public Safety and Security, Data About Firearms Licensing and Transactions, https://www.mass.gov/info-details/data-about-firearms-licensing-and-transactions [https://perma.cc/L7SE-FFJK]. See G. L. c. 140, § 121 (defining "licensing authority" as "the chief of police or the board or officer having control of the police in a city or town, or persons authorized by them"); G. L. c. 140, § 129B (1) ("Any person residing or having a place of business within the jurisdiction of the licensing authority . . . may submit to the licensing authority an application for a firearm identification card, or renewal of the same . . ."); G. L. c. 140, § 131 (d) ("A person residing or having a place of business within the jurisdiction of the licensing authority . . . may submit to the licensing authority or the colonel of state police an application for a license to carry firearms, or renewal of the same").

[4] See Commonwealth v. Gouse, 461 Mass. 787, 805 (2012) (local police departments required to record all issued licenses and notify Department of Criminal Justice Information Services); G. L. c. 140, § 129B (4) ("Notices of revocation and

2. Admissibility under exceptions to the rule against hearsay. If properly authenticated, firearms licensing records like those described supra would likely qualify for admission under the "official records" exception to the rule against hearsay. See G.

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suspension shall be forwarded to the commissioner of the department of criminal justice information services and the commissioner of probation and shall be included in the criminal justice information system"); G. L. c. 140, § 129B (13) ("Upon issuance of a firearm identification card under this section, the licensing authority shall forward a copy of such approved application and card to the executive director of the criminal history systems board . . ."); G. L. c. 140, § 131 (f) ("Notices of revocation and suspension shall be forwarded to the commissioner of the department of criminal justice information services and the commissioner of probation and shall be included in the criminal justice information system"); G. L. c. 140, § 131 (n) ("Upon issuance of a license to carry or possess firearms under this section, the licensing authority shall forward a copy of such approved application and license to the commissioner of the department of criminal justice information services . . ."); Municipal Records Retention Schedule (updated Sept. 1, 2022), at 89, https://www.sec.state.ma.us/arc/arcpdf/Municipal_Retention_Schedule_20220901.pdf [https://perma.cc/C9TT-7N53] (providing for retention by municipalities of firearm identification cards and license to carry applications until superseded); Executive Office of Public Safety and Security, Data about Firearms Licensing and Transactions, https://www.mass.gov/info-details/data-about-firearms-licensing-and-transactions#license-applications-&-active-licenses [https://perma.cc/MS43-M2XW] ("The Firearms Records Bureau is the Commonwealth's repository for all firearms license and transaction data Massachusetts's electronic license check system . . . is updated by police departments, which process license applications and update license statuses, and by firearms dealers, who enter records of their transactions"); Firearms Records Bur. v. Simkin, 466 Mass. 168, 168 n.2 (2013) (firearms records bureau is part of Department of Criminal Justice Information Services).

L. c. 233, § 76; Mass. R. Crim. P. 40 (a), 378 Mass. 917 (1979); Mass. G. Evid. § 803(8)(A) (2022). The Reporter's Notes to Mass. R. Crim. P. 40 (a) define "official records" as "including records of any governmental entity, . . . and more particularly as 'all documents prepared by public officials pursuant to a duty imposed by law or required by the nature of their offices'" (citation omitted).

Firearms licensing records may also be admissible under the business records exception to the rule against hearsay, where the records have been made in good faith in the regular course of business before the beginning of the proceeding in which they are offered and it was the regular course of the agency to make such records at the time of the transaction or within a reasonable time thereafter. See G. L. c. 233, § 78; Commonwealth v. Fulgiam, 477 Mass. 20, 39-42, cert. denied, 138 S. Ct. 330 (2017) (ten-print fingerprint cards made by police were properly admissible under business records exception); id. at 47 (Lowy, J., concurring); Mass. G. Evid. § 803(6)(A).

The exceptions to the rule against hearsay and the rules of criminal procedure also permit the absence of a firearms license in the defendant's name to be shown by an authenticated written statement from the legal custodian of the firearms licensing records, or a deputy, that after diligent search, no record could be found of a valid firearms license issued in the name of the defendant at the time of the offense. See Mass. R. Crim. P. 40 (b), 378 Mass. 917 (1979) (properly authenticated "written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement . . . is admissible as evidence that the records contain no

such record or entry"); Mass. G. Evid. § 803(10) ("certification under [§] 902 . . . that a diligent search failed to disclose a public record or statement is admissible in evidence if the testimony or certification is offered to prove that [A] the record or statement does not exist, or [B] a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind"); Mass. G. Evid. § 902(b) ("An official record kept within the Commonwealth, or an entry therein, when admissible for any purpose, may be evidenced . . . by a copy attested by the officer having legal custody of the record, or by that officer's deputy").[5]

Finally, I note that under the exceptions to the rule against hearsay, witness testimony may also suffice to show the absence of an official record, such as the record of a firearms license, as provided in Mass. G. Evid. § 803(10). Care should be taken in relying on such testimony alone for at least two reasons: (1) there must be an adequate foundation for the

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[5] Technically, a statement as to the nonexistence of an agency record is not hearsay, because it does not involve an out-of-court assertion:

> "As a general rule, silence is not classified as hearsay. Logically, therefore, the absence of an entry in a public record should not be considered hearsay when offered for that purpose, and should be admissible over a hearsay objection as a basis to infer that the event did not occur or the condition did not exist."

5 C.S. Fishman & A. Toomey McKenna, Jones on Evidence § 34:54 (7th ed. 2023). Nevertheless, to avoid any confusion, the drafters of the Federal Rules of Evidence treated testimony or certifications concerning the nonexistence of a public record as an exception to the rule against hearsay, see id., and the Massachusetts Guide to Evidence has taken the same approach.

witness's testimony explaining his or her sufficient familiarity with how the record was created, maintained, and accessed; and (2) insofar as the witness testifies as to the contents of computer-stored records, those records may constitute hearsay. See Commonwealth v. Royal, 89 Mass. App. Ct. 168, 169-173 (2016) (State police trooper's testimony that he checked motor vehicle registry database and defendant's license was listed as suspended was inadmissible hearsay because such records were computer-stored, but "the Commonwealth could have proved the element of license suspension without implicating the rule against hearsay if it had introduced a properly certified copy of a registry driving history record showing that the defendant's license had been suspended").

3. Admissibility under confrontation clause. The fact that a firearms licensing record, or a certificate attesting to the nonexistence of such a record, may be admissible under exceptions to the rule against hearsay does not suffice to show that the record or certificate of its nonexistence can also meet the distinct requirements of the confrontation clause in a criminal case. See Commonwealth v. Greineder, 464 Mass. 580, 585 n.4, cert. denied, 571 U.S. 865 (2013) ("There is an important distinction between satisfying the mandates of common-law evidentiary rules and satisfying the mandates of the confrontation clauses of the Federal and State Constitutions. In criminal cases, out-of-court statements are only admissible if they satisfy both; failure to satisfy either the applicable rules of evidence or the Federal and State Constitutions will result in the exclusion of evidence").

In Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), the United States Supreme Court held that the petitioner's rights under the confrontation clause were violated where sworn written certificates from State laboratory analysts, describing the substance seized from the petitioner as cocaine, were admitted in lieu of live testimony at the petitioner's trial on charges of cocaine distribution and trafficking. See id. at 308-311, 329. In reaching this conclusion, the Court reasoned:

> "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because -- having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial -- they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here -- prepared specifically for use at petitioner's trial -- were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment."

Id. at 324. Thus, the critical question, for purposes of determining whether admission of an agency record violates the confrontation clause, is whether the record was created in the normal course of the agency's affairs, or whether it is "testimonial," that is, whether it was created for the purpose of proving some fact at trial.

It is also noteworthy that the Melendez-Diaz Court cited a line of cases where "the prosecution sought to admit in[ ] evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it." Id. at 323. In

those cases, the Court indicated, the clerk's statement was testimonial in effect because it "would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched," and consequently "the clerk was . . . subject to confrontation." Id.[6]

In accord with Melendez-Diaz, this court has held that the admission of documents at trial that were made contemporaneously with the underlying event in the regular course of a business's or an agency's affairs does not violate the confrontation clause because such documents are not testimonial. See, e.g., Fulgiam, 477 Mass. at 43 (admission of ten-print fingerprint cards made by State police did not violate confrontation clause); Commonwealth v. Siny Van Tran, 460 Mass. 535, 552 (2011) (admission of passenger manifest and ticket inquiry made by airline did not violate confrontation clause).

But where a document is subsequently created by an agency to establish a fact at trial, this court has held that it is testimonial and its admission violates the confrontation clause, even though the document is based on preexisting agency records. For example, in Commonwealth v. Parenteau, 460 Mass. 1 (2011), where the defendant had been charged with driving after his license had been revoked, this court held that

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[6] Later that year, the Supreme Court also vacated a decision of the United States Court of Appeals for the Ninth Circuit, which had held that a clerk's certificate as to the nonexistence of a record was not testimonial, and remanded the case "for further consideration in light of Melendez-Diaz." See United States v. Norwood, 555 F.3d 1061, 1066 (9th Cir.), vacated and remanded, 558 U.S. 983 (2009). See also United States v. Norwood, 595 F.3d 1025, 1030 (9th Cir. 2010) (on remand).

the admission of a certificate from the registry of motor vehicles created after the defendant's arrest and attesting that a notice of license revocation had been mailed to the defendant violated the confrontation clause where it was presented at the defendant's trial to prove that he had received notice of the revocation without any other testimony from the registry. See id. at 2-3. The court noted that the actual notice of the defendant's license revocation constituted a business record that had been made and kept in the ordinary course of the registry's affairs, but it did not show that the notice actually had been mailed on the date when it was created. See id. at 10. If the registry had made a contemporaneous record of the mailing as part of the administration of its regular business affairs, then it would have been properly admissible at the defendant's trial. But the registry certificate that was presented at trial was dated two years later, three months before the trial. The court therefore concluded that it had been created for the purpose of establishing an essential fact at trial and did not constitute a nontestimonial business record. See id.

Since Melendez-Diaz, this court has not had occasion to consider whether admission of a certificate as to the nonexistence of a record would violate the confrontation clause, but a number of other courts have. Most pertinently for purposes here, the Supreme Court of New Jersey has held that, where a defendant was tried on various gun charges, his confrontation right was violated by the admission of an affidavit from a nontestifying witness attesting that a search of the State's firearm registry database produced no evidence that a handgun permit had been issued to the defendant. See State v. Carrion, 249 N.J.

253, 263-264, 272-274 (2021). The court observed that, although the underlying firearm license database was not itself testimonial in character, the creation of a document attesting to a search of that database for the purpose of prosecuting the defendant was. Id. at 272. The defendant's confrontation right was violated because, "[w]ith only the affidavit, and with no opportunity to question the officer knowledgeable about how the search of the database was performed, [the defendant] could not explore whether the officer used the correct date of birth, name, or other identifying information such as a [S]ocial [S]ecurity number in order to generate a correct search of the database, and what information that search produced." Id. at 272. Other courts have similarly held since Melendez-Diaz that the confrontation clause is violated by the admission in a criminal trial of an affidavit attesting to the nonexistence of a record without testimony from a witness.[7] This case law indicates that admission of an

[7] See, e.g., Government of Virgin Islands v. Gumbs, 426 Fed. Appx. 90, 93–94 (3d Cir. 2011), cert. denied, 565 U.S. 1125 (2012) (lower court erred in admitting certificate as to nonexistence of gun license without affording defendant opportunity to confront person who prepared certificate); United States v. Orozco-Acosta, 607 F.3d 1156, 1161 n.3 (9th Cir. 2010), cert. denied, 562 U.S. 1154 (2011) (overruling prior decisions that had held that certificates of nonexistence of records were not testimonial because those decisions were inconsistent with Melendez-Diaz); United States v. Martinez- Rios, 595 F.3d 581, 586-587 (5th Cir. 2010) (admission of certificate of nonexistence of record, which indicated that defendant had not received consent to reenter United States, violated defendant's confrontation right where no testimony was presented from analyst who conducted records search); Tabaka v. District of Columbia, 976 A.2d 173, 175-176 (D.C. 2009) (department of motor vehicles certificate that its records revealed no evidence of operator's permit having been

affidavit stating that a diligent search of the firearms records did not disclose any record in the name of a defendant would likely violate the confrontation clause if presented without testimony from a witness.

Instead, to meet the requirements of the confrontation clause, the Commonwealth would likely have to present a witness who actually undertook a search of the firearms licensing records and determined that the defendant lacked a license. As the court pointed out in Carrion, the confrontation clause was violated in that case because the defendant was not given an "opportunity to question the officer knowledgeable about how the search of the database was performed." Carrion, 249 N.J. at 272. See Bullcoming v. New Mexico, 564 U.S. 647, 661-663 (2011) (surrogate testimony by analyst who did not actually perform blood alcohol test did not meet requirements of confrontation clause); Commonwealth v. Sullivan, 478 Mass. 369, 376-377 (2017) (evidence that deoxyribonucleic acid [DNA] profile extracted from crime scene matched defendant's DNA in national database was improperly admitted hearsay because those responsible for

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issued to appellant was testimonial and therefore inadmissible over objection without corresponding testimony by official who had performed search); Washington v. State, 18 So. 3d 1221, 1223-1224 (Fla. Dist. Ct. App. 2009) (certificate of contractor's nonlicensure was testimonial, and its admission violated his confrontation rights); State v. Jasper, 174 Wash. 2d 96, 113-116 (2012) ("A substantial majority of courts have held since Melendez-Diaz that clerk certifications attesting to the nonexistence of a public record are testimonial statements subject to confrontation"; citing cases and following suit).

conducting database testing did not testify and were not subject to cross-examination).[8]

For example, testimony from a representative from the firearms records bureau or a police officer, who is familiar with the firearms licensing records and how they are kept, and who undertook a search of those records and did not find a license in the defendant's name, might well meet the requirements of the confrontation clause. Whether such a witness is qualified to testify about the search is a preliminary question for the trial judge to decide. See Mass. G. Evid. § 104(a).

On the other hand, the admission of properly authenticated copies of preexisting firearms licensing records that were made and kept in the ordinary course of business would not violate the confrontation clause, because they are not testimonial. Such records

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[8] This is not to say, however, that the testifying witness must necessarily be the same person who conducted the original search of the firearms licensing records that led to the charge against the defendant. See United States v. Soto, 720 F.3d 51, 59 n.5 (1st Cir.), cert. denied, 571 U.S. 930 (2013), citing Bullcoming, 564 U.S. at 666, 674 ("In part IV of the Supreme Court's Bullcoming opinion, joined only by Justice Scalia, Justice Ginsburg observed that the [S]tate could have avoided a Sixth Amendment violation when it realized that the original scientist was unavailable to testify 'by asking [the testifying analyst] to retest the sample, and then testify to the results of his retest rather than to the results of a test he did not conduct or observe.' . . . Justice Kennedy, with Chief Justice Roberts, Justice Breyer, and Justice Alito, in dissent, concluded that testimony from a knowledgeable lab representative is sufficient under the Sixth Amendment. . . . Thus, it appears that six justices would find no Sixth Amendment violation when a second analyst retests evidence and testifies at trial about her conclusions about her independent examination").

might be used, for example, to show that a defendant's name did not appear in the record, that a defendant's firearms license application was denied, or that the license was suspended or revoked, or that it expired.

It is also conceivable, depending on how the records are compiled, or may be compiled in the future in response to this court's decision today, that a copy of an excerpted alphabetical list of firearms licenses might reveal the absence of a license held by a defendant. Moreover, depending on how such records are complied, such a list may constitute prima facie evidence that the defendant is not licensed to carry a firearm.

In a criminal case in the Commonwealth, "[p]rima facie evidence means that proof of the first fact [(basic fact)] permits, but does not require, the fact finder, in the absence of competing evidence, to find that the second fact [(resultant fact)] is true beyond a reasonable doubt." Mass. G. Evid. § 302. " Where there is contrary evidence, the first fact continues to constitute some evidence of the fact to be proved, remaining throughout the trial probative on issues to which it is relevant." Id. Put another way, "[i]n criminal cases, when evidence 'A' is prima facie evidence of fact 'B,' then, in the absence of competing evidence, the fact finder is permitted but not required to find 'B' beyond a reasonable doubt." Commonwealth v. Maloney, 447 Mass. 577, 581 (2006). "The designation of prima facie evidence in this context is 'structurally the same as' a 'permissive inference'" that "satisfies the Commonwealth's burden of production as to one or more elements of a crime." Commonwealth v. Littles, 477 Mass. 382, 386 (2017), quoting Commonwealth v. Pauley, 368 Mass. 286,

293-293 (1975). I recognize that most, if not all, prima facie designations in the criminal context in the Commonwealth are a creation of statute. See Mass. G. Evid. § 302(c) note.[9] And of course, the Legislature is free to enact such a statute in the context of firearm licenses, if it so chooses. As such, in the context of charges relating to unlicensed firearms, it is conceivable that, depending on how records are complied, an excerpted alphabetical list of firearms licenses that did not contain a defendant's name may well constitute prima facie evidence that would "permit[ ] but not require[a jury] to find [the defendant to be unlicensed] beyond a reasonable doubt." Maloney, supra.

4. Notice-and-demand procedure. In Melendez-Diaz, 557 U.S. at 326, the Supreme Court also noted that many States have adopted "notice-and-demand statutes," which "require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial," or otherwise forfeit that right. The Court made clear that these statutes do not violate the defendant's rights, because "[t]he defendant always has the burden of raising his

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[9] "There are numerous statutes that designate certain evidence as having prima facie effect. See, e.g., G. L. c. 22C, § 39 (certificate of chemical analysis of narcotics); G. L. c. 46, § 19 (birth, marriage, or death certificate); G. L. c. 90, [§ 24 (4)] (court record of a prior conviction if accompanied by other documentation); G. L. c. 185C, § 21 (report of inspector in housing court); G. L. c. 233, § 79F (certificate of public way); G. L. c. 269, § 11C (firearm with obliterated serial number)." Mass. G. Evid. § 302(c) note.

Confrontation Clause objection," and "notice-and-demand statutes simply govern the time within which he must do so" (emphases in original). Id. at 327.

In 2013, rule 803(10) of the Federal Rules of Evidence was amended to "incorporate[ ], with minor variations, a 'notice-and- demand' procedure that was approved by the Melendez-Diaz Court." 2013 Advisory Committee Note to Fed. R. Evid. 803. The amended rule provides that the rule against hearsay does not exclude a certification that a diligent search failed to disclose a public record or statement if, among other prerequisites, "in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least [fourteen] days before trial, and the defendant does not object in writing within [seven] days of receiving the notice -- unless the court sets a different time for the notice or the objection." Fed. R. Evid. 803(10)(B).

Similarly, in Carrion, the New Jersey Supreme Court adopted a practice of requiring a defendant to inform the judge and the prosecution of a demand to have the State produce an appropriate witness to testify to a search of the State firearms permit database. Failure to make such a demand waives the defendant's confrontation right. See Carrion, 249 N.J. at 273-274. The court said that this practice would address the State's "valid administrative concern" that "[r]equiring in-person testimony by the person who conducted a search of firearm registry records that yielded no results under a defendant's name for a gun permit -- in every firearm possession prosecution -- could be burdensome and could lead to administrative inconvenience and waste of resources." Id. at 273.

I suggest that courts handling prosecutions for possession of a firearm without a license should consider adopting a procedure similar to that in Fed. R. Evid. 803(10)(B) as a discovery order and in the filing of pretrial conference reports. This would provide an orderly and uniform procedure for determining whether the Commonwealth may rely on a certificate that there is no firearms license in the name of the defendant, and give the prosecution sufficient time to secure a testifying witness if the defendant objects.[10] This procedure might also serve to mitigate, to some extent, the burden on the Commonwealth that would otherwise result if it were required to produce a testifying witness in every trial involving a charge of unlicensed possession of a firearm.

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[10] Of course, it may well be that the Commonwealth, nonetheless, calls witnesses who have reviewed the records, and offers documents in which the defendant's name does not appear, in recognition of its burden of persuasion. And it may well be that defendants prefer admission of a certificate of the nonexistence of a record to testimony from witnesses and documentation better to advance their arguments as to reasonable doubt.

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX SUPERIOR COURT

Docket No. 1981CR00263

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COMMONWEALTH OF MASSACHUSETTS

v.

CARLOS GUARDADO

****

JURY TRIAL
BEFORE THE HONORABLE PAUL D. WILSON

Woburn, Massachusetts
June 3, 2021

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THE COURT: All right. Mr. Thompson's handed me a written motion for required finding of not guilty.

MR. THOMPSON: So, Your Honor, my motion is nine pages long, including my signature line spilling over to the side.

THE COURT: Okay.

MR. THOMPSON: I would encourage the Court to read it before we argue it. I don't know if we might want to send the jury out back and then that would give opposing Counsel a chance to read it. It is quite thorough. These charges are very technical when it comes to what the evidence is. And so I would ask the Court to take a moment to read it before I argue it, and give Attorney McCormick a chance to read it --

THE COURT: All right --

MR. THOMPSON: -- as well, because it is not a typical cookie-cutter Latimore motion.

THE COURT: It is not.

It does break the argument down into five pieces, or maybe four pieces, because of the four different charges -- types of charges. Five indictments.

So let's do them one by one. I'm going to take a minute and Ms. McCormick can take a minute to read your legal argument about Indictment 001 where the heading says, "The jury was only presented with evidence that Mr. Guardado possessed the firearm at his place of business, which is specifically exempted by the statute from criminal liability." So let me read your argument here.

(Pause.)

THE COURT: All right. I read it. And you're correct, the statute does say that there's an exemption for people who are present in his -- in or on his premised residence or place of business. So -- and you say he had it at his -- in or on his place of business?

MR. THOMPSON: That's correct. I think the testimony was quite clear from Detective Lewis that Mr. Guardado was working at AutoZone, he was wearing his AutoZone red shirt, he was wearing his AutoZone gray shirt. Officer Pieroway testified that he saw Mr. Guardado assisting customers for approximately the one hour of surveillance there.

There was testimony that the car was parked in an AutoZone parking lot, not some parking lot belonging to -- not -- somebody else. So where it is in fact found is at his place of business.

The Commonwealth's direct examination of Officer Pieroway did not completely lock in that he had been under direct surveillance for the entire period of time that he was at AutoZone, thus foreclosing any argument that he may have had the gun in his car before he arrived at his place of work or place of business. So, you know, without a doubt, it's under his or her control in a vehicle, it's an area of his exclusive control. I expect the Commonwealth to argue strenuously in their closing argument that Mr. Guardado knew about the gun because he, A, admitted to it. B, his print is on the outside of the gun. But also because, even without those statements, it is found in a locked glove box of a car that Mr. Guardado was observed driving by Officer Pieroway and that the keys to that glove box were retrieved by Detective Lewis from Mr. Guardado.

So it's at his residence or place of business. And Mr. Guardado had exclusive control over that glove box. It was unclear from the testimony whether Detective Lewis believed that the car -- or excuse me -- Officer Pieroway observed that the car had been locked. But suffice to say that that glove box was certainly locked. There was testimony that they searched the car, but they could not get into the glove box.

THE COURT: I'm not sure the glove box being locked is relevant to the argument, so let me turn to Ms. McCormick and say what about this. He was present -- was he present in or on his residence or place of business.

MS. MCCORMICK: Thank you, Your Honor. I ask you deny the Defendant's motion. I think the spirit of this exemption is certainly for people who require the firearm at their place of business. The Defendant is

not licensed to carry a firearm. And, furthermore, the firearm was not present with him while he was working.

So if his job requirements required him to have a firearm, which I would argue that working at AutoZone and assisting customers with windshield wipers does not require such a weapon, that he didn't have it with him, it was in his car. His car was not in the AutoZone area, it was not in an AutoZone employee-only spot. There's no evidence of that, that it -- both -- several witnesses testified it was a fairly large parking lot for lots of businesses.

I think the spirit of that exemption is to allow people to have firearms, obviously, legally in their own homes and at their place of business. I think the absurd result of allowing everyone to bring a firearm to work, even if their job has no -- if they're not properly licensed and if there's no requirement that they have that firearm at their job, I think that's -- that would be result, if he was to be found not guilty, simply because he was parked near his job.

THE COURT: And I would add to that -- I find that persuasive, Ms. McCormick. And I also think that the spirit of the law was intended to allow people a right of self-defense, if you will. They can keep a gun in their residence for that reason, they can keep a gun with them -- within reach at work, if they're -- you know, working in a convenience store maybe, you know, they want a gun under the counter just in case someone tries to rob them. That's not the fact situation here. I don't think having it in a locked glove box in your car in the parking lot of your place of business is what the Legislature had in mind. So I'm going to deny the motion as to Count 1.

Let's move on to Count 2. Because there was no evidence presented -- your heading says, "There was no evidence presented to the jury that Mr. Guardado was aware that the feeding device was capable of accepting or could be readily modifiable to accept more than ten rounds of ammunition." Okay. So let me read the argument. (Pause.)

THE COURT: And you've got the same argument with regard to Indictment Number 3.

MR. THOMPSON: So the law's, of course, the same but it's a slightly different factual argument.

THE COURT: All right. So let's -- thank you for the clarification. Let's deal with the argument in item -- as to Indictment Number 2 first. Go ahead.

MR. THOMPSON: So for B -- so I drafted this before we whittled down the terminology, so this one is for the device loaded inside the --

THE COURT: Mm-hm.

MR. THOMPSON: -- Smith & Wesson, if you will.

THE COURT: Yep.

MR. THOMPSON: So, "The Defendant possessed an item." So that's the high-capacity magazine inside the Smith & Wesson. "The item meets the legal definition of a large-capacity feeding device." Okay, so there was testimony that it could hold 15 but the rule is more than ten.

"The Defendant knew that he possessed that feeding device." While there's testimony from Detective Lewis that you could see the feeding device -- from my cross-examination, you can see the feeding

device in the Smith & Wesson, located inside the handgrip. So those are all established.

However, the fourth element -- that the Defendant knew that the feeding device met the legal definition of a large-capacity feeding device in that it was capable of holding more than ten rounds. I did a -- pardon for the -- the phrase -- I did a very thorough cross-examination of Detective Lewis --

THE COURT: Mm-hm.

MR. THOMPSON: -- when it came to what can you see with that. I cite recent case law from the last three years of cases exactly on this point. I cite Commonwealth v. Cassidy, which provides us with the model instruction we're going to be using in this case. I cite Commonwealth v. Marrero, and I also -- I don't think I cited anybody else in there. But the case makes it clear that we do not impose criminal responsibility on a 10M case where it is not proven that the Defendant knew that it was capable of accepting more than ten rounds or was readily modifiable --

THE COURT: Mm-hm.

MR. THOMPSON: -- to accept more than ten rounds. There's another case on point where they say that -- it distinguishes a revolver. So a revolver -- you know, you could see the cylinder that -- from behind -- or, sometimes from the front -- that there are bullets in there. And -- well, you can tell that it's loaded. But here, the testimony from Detective Lewis on my cross-examination was that you cannot tell by sight alone that that weapon is loaded.

THE COURT: Was there testimony that -- one of the officers -- I forget -- maybe it was the ballistician,

actually -- describing the magazine, said something about it said, "no more than 15," or something like that, on the side of the --

MR. THOMPSON: That's going to go towards my --

THE COURT: -- device?

MR. THOMPSON: That's going to go to Count 3, when I address that.

THE COURT: Well, why doesn't that refute this argument about Count 2?

MR. THOMPSON: Because the -- there has been no evidence proffered whatsoever as to Mr. Guardado's knowledge about anything to do with the magazine that was loaded into the --

THE COURT: Mm-hm.

MR. THOMPSON: -- Smith & Wesson. There's been -- none of it. You can tell by sight that a magazine is loaded --

THE COURT: Mm-hm.

MR. THOMPSON: -- but -- okay, so, factually perhaps the jury could believe that, yes, it's a 15-round clip. That's fine. Is there any evidence that they put forward that Mr. Guardado knew that it was capable of accepting more than ten rounds?

THE COURT: Well, if it said on its side "15 rounds max" --

MR. THOMPSON: So --

THE COURT: -- or something.

MR. THOMPSON: So -- I understand that, but the case law makes it clear that they have to prove that

he knew that. The case law -- the facts here -- "I bought the gun from a guy in Quincy" --

THE COURT: Mm-hm.

MR. THOMPSON: -- $600, a statement about the -- "I'm now putting it in a glove box," and -- I forget the other one, I forgot (indiscernible; low audio at 15:48:09) but -- but --

THE COURT: Well, but none of -- it seems to me, what's relevant here is whether he knew these were 15-round magazines. It said on the side of the magazine "these are 15-round magazines." And let me point out that Cassidy -- you're right, Cassidy was -- the 2018 SJC case -- was very clear that there is a fourth element that the Superior Court judge in that case had left out of his instructions. About the knowledge that it could hold or be modified to hold 15 -- or more than ten rounds.

But, nonetheless, in Cassidy, the Court said -- the Court affirmed the conviction, as I recall. So even though the instruction was not a model of clarity, they said -- and then it proposed an instruction that you propose to me, and I've accepted, because I think it's the right instruction to give, given that Cassidy says, "Look at our appendix, here's the instruction." And it ends -- the last paragraph of that instruction is all about how the jury can -- well, I'm paraphrasing here. The message of that last paragraph is, basically, apply your common sense, draw inferences if you want, ladies and gentlemen of the jury, about this particular fourth element, this knowledge.

MR. THOMPSON: So I think that that could come into play perhaps with the third indictment but as to this one there's been no evidence that he has test-fired

the weapon himself. There's a case that I did not cite -- Drapaniotis, which is a relatively new case -- I think it's 2017, 2018 -- that was tried out of this Court, where hearsay -- double hearsay was used to show that it was a working firearm. I believe the conviction was overturned. But there's been no evidence that Mr. Guardado said he had test-fired it, that anybody -- that he knew that it was a working firearm, that he knew it was capable of --

THE COURT: Mm-hm.

MR. THOMPSON: -- holding more than ten.

Now, you could assume that it could hold a few bullets in it but that's just -- that's just an assumption. Looking at the gun itself, the Commonwealth quite literally has offered zero evidence that that magazine had ever been taken out.

THE COURT: But I think that's a matter of inference the jury can make. And, by the way, I'm a little bit worried that if you're right, that -- and in any case in which the Defendant has not testified, how does the Commonwealth show the Defendant's knowledge, because they can't call the Defendant to testify and ask him the question, "Did you know that this magazine could hold more than ten rounds?"

MR. THOMPSON: That's their problem. They -- he -- and he spoke with the officers as well.

THE COURT: Yeah.

MR. THOMPSON: They --

THE COURT: Well, I --

MR. THOMPSON: That's on them who they -- like they have -- they're sup -- the law enforcement's

supposed to find these people and hunt them down. It's not --

THE COURT: I hear you.

MR. THOMPSON: This is not supposed to be easy.

THE COURT: Yeah.

MR. THOMPSON: He's looking at minimum mandatory time on this, Your Honor. And it's not supposed to be easy to take away somebody's freedom, to punish them.

THE COURT: Yeah.

MR. THOMPSON: It is --

THE COURT: On this one --

MR. THOMPSON: -- very hard, quite deliberately.

THE COURT: I certainly agree with you on all of that. But on this one I think there is -- there's certainly more than adequate evidence in this record for the jury to reasonably infer that these magazines can accept more than ten rounds and that he knew it. So I'm going to deny as to Indictment Number 2. Does that also dispose -- well, let's read the argument about Indictment Number 3.

Here your heading says -- well, it's the same heading -- "there is no evidence that he was aware that it was capable of accepting or could be modified to accept more than ten rounds."

So you said there was a factual difference here?

MR. THOMPSON: Yeah, so the factual difference here is that the magazine is not loaded into a gun. You cannot see, you know, that it -- you know, that you

could -- just by eyesight, and maybe it could hold more than --

THE COURT: Mm-hm.

MR. THOMPSON: -- 15 but there's ten bullets in the weapon already. Maybe there's enough room to squeeze a few more in.

THE COURT: Yeah.

MR. THOMPSON: So it is factually different. However, same with Indictment Number 2, there's no evidence in the record to show that Mr. Guardado was aware of that second clip.

THE COURT: Yeah.

MR. THOMPSON: And the reason for that -- again, (indiscernible; at 15:52:21) "you got me for the gun," "there shouldn't be one in the chamber" --

THE COURT: Mm-hm.

MR. THOMPSON: -- and then the statements at the police station --

THE COURT: Yeah.

MR. THOMPSON: -- we already talked about. There's no testimony about the second magazine. There was testimony -- I think it was Detective Lewis -- I was imagining it coming in through Trooper Callahan, but I think from Detective Lewis that it says -- it doesn't actually say "15-round capacity" but there -- but he was talking about was stamps on the side of the magazine. So there's like, little holes. You can see how many bullets are in the gun. That's what he was referencing.

But even still there's no evidence that the Commonwealth has put forward to show that Mr. Guardado knew that -- he makes no statements about that second clip. He talks about the gun --

THE COURT: Yeah.

MR. THOMPSON: -- while Detective Lewis is trying to, you know, render it safe, and then he goes to the station and makes a confession.

THE COURT: Yeah.

MR. THOMPSON: But here -- Cassidy says we're not going to impose a penalty on somebody for something that it has not been proven, and I --

THE COURT: Well, I --

MR. THOMPSON: We're not supposed to care how hard it is.

THE COURT: Yeah, I understand that.

MR. THOMPSON: I mean, I'm trying a double confession case where it's in the guy's glove box and --

THE COURT: I understand that but on --

MR. THOMPSON: All right. So this is hard -- this is extremely hard for me.

THE COURT: On the record, before this jury, they could reasonably find that he was aware that the -- that both clips could hold more than ten rounds. And so I'm going to deny as to Indictment Number 3.

Indictment Number 4, your heading says, "No evidence presented to the jury that Mr. Guardado knew that there was ammunition inside the detached feeding device."

So the possession of ammunition charge is the bullets inside the second magazine, the one that was in the glove box loose.

MR. THOMPSON: Correct.

THE COURT: And you say there was no evidence that he knew that there was any ammunition in that magazine.

MR. THOMPSON: Correct. So for the same reason that I was arguing against the high-capacity -- the separate high-capacity, there's no -- (indiscernible; low audio at 3 15:54:24) no testimony about the bullets. For whatever it's worth -- I don't think it's worth a lot, but for whatever it's worth, there's no fingerprints found on those bullets. He makes no statements about that. Yes, it's in the glove box, but who is to say that he is the one who put it in there?

THE COURT: Yeah. All right. Let me --

MR. THOMPSON: He buries himself enough by admitting to the gun, but he doesn't make an admission about the magazine.

THE COURT: All right. So --

MR. THOMPSON: So they --

THE COURT: -- let me ask Ms. McCormick, what about that?

MS. MCCORMICK: Your Honor, I think the argument is the same, that it's found inside his glove box, he's presumed to have knowledge of it, it's presumed that he knows that there are bullets in there, that Detective Lewis testified that there were nine rounds in the one next to it. I think it's the same argument. The jury can certainly draw an inference.

And the fact that he did admit that he knows that it's a nine-millimeter gun -- I think it's a reasonable inference that he knew what types of bullets to put inside both of those magazines. And there is testimony that they are identical to each other.

THE COURT: Yeah. I think the jury can infer from where this was found and the fact that -- well, just from where it was found, I think they could infer -- I think, again, you've got something you can certainly argue about -- the lack of any direct evidence from that -- that he knew, but there -- I think they can infer it. So I'm going to deny as to Indictment Number 4.

And as to Indictment Number 5, your heading says, "No evidence that he knew that the alleged firearm was loaded." Okay, I'm going to read this.

(Pause.)

THE COURT: Okay. Go ahead, Mr. Thompson.

MR. THOMPSON: So on this one -- this one has more of the recent case law that I referenced to. A lot of these 10Ms and 10Ns seem to have come up to the appeals -- made their way through the Appeals Court around the same time, in the last --

THE COURT: Mm-hm.

MR. THOMPSON: -- two or three years.

The seminal case on this is Commonwealth v. Brown. They do have to prove that he knew that it was a loaded firearm.

THE COURT: Mm-hm.

MR. THOMPSON: There is no proof of that. The only statement is that "there should not" -- or

"shouldn't," but -- "should not" -- just to avoid the contraction -- "should not be one in the chamber."

It is not "there is one in the chamber" -- excuse me -- on the -- "Be careful, that thing is loaded" --

THE COURT: Mm-hm.

MR. THOMPSON: -- it is "there shouldn't be one in the chamber."

THE COURT: Right. That's all he's reported to have said. And it's a negative -- there was no ammunition -- the chamber at least was not loaded.

MR. THOMPSON: Correct.

THE COURT: The magazine -- we know from the detective's testimony -- was but the question is whether he -- what evidence the jury has that he knew that there were rounds in the magazine that was in the grip of the gun.

So, Ms. McCormick?

MS. MCCORMICK: Your Honor, I would argue that that statement shows that his knowledge of the gun -- certainly the state of the gun, the fact that he knows there's not one in the chamber, he knows what types of bullets to put into it, as well as the fact that it's found in his glove box -- I think Trooper Callahan and Detective Lewis both testified that a firearm is loaded when the magazine is in the gun, with live ammunition. It doesn't have -- I asked them both several times, "Is a gun loaded even when there's not one in the chamber?" and they said yes several times.

THE COURT: Yeah.

MS. MCCORMICK: I think it's essentially a very similar argument. He admits knowledge of the gun. I

think the jury can certainly infer and certainly find that he knew the state of the gun, that he knew that it was loaded.

THE COURT: We also heard evidence, I would add, that he bought the gun months ago, some time ago -- he couldn't specify -- from the guy in Quincy, and it strains credulity to believe that in all that time he'd never looked inside a magazine that was in the butt of the gun. Maybe he didn't but I think that's a question of fact. I think the jury can -- based on the evidence before the jury, can infer reasonably, if it chooses to, that he knew that it was loaded.

I also hear what Ms. McCormick's saying about he knew -- he said he knew -- it wasn't that the chamber wasn't loaded, and that does suggest he knows in general what was and wasn't loaded. Again, jury doesn't have to find that, but I think that they could, and that's the standard here on this motion. So I'm going to deny it as to Count 5 -- Indictment Number 5 as well.

So motion denied. You may have some interesting issues for the Appeals Court to talk about some day, because, as you say, there's a lot of 10M and 10N cases going up these days. But I think, based on the record here, I have to deny this motion.