No. 23-CF-0344

(Superior Court No. 2021-CF3-004336)

IN THE
DISTRICT OF COLUMBIA
COURT OF APPEALS

E.L.P.,

APPELLANT

v.

UNITED STATES,

APPELLEE

Appeal from the Superior Court of the District of Columbia
Criminal Division
(Hon. Robert Okun, Trial Judge)

CORRECTED BRIEF FOR APPELLANT

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STATEMENT OF INTERESTED PARTIES

Appellant E.L.P. and Appellee the United States are the only parties in this matter. According to the docket, E.L.P. was represented in the Superior Court in this matter by attorneys Bryan T. Bookhard, Thomas R. Healy, and Rachel E. McCoy. The government was represented by the United States Attorney's Office for the District of Columbia and its attorneys.

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STATEMENT OF JURISDICTION

This court has jurisdiction to hear this matter because this is a timely appeal of a final judgment entered after a criminal conviction. The trial court's judgment constituted a final decision by that court which is appealable to this court.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Appellant E.L.P. presents the following issue for review:

- Whether improper and prejudicial remarks by the prosecutor about E.L.P.'s silence before his testimony require reversal.
- Whether E.L.P.'s firearms convictions must be vacated because the relevant statutes are unconstitutional.
- Whether certain convictions should be merged.

STATEMENT OF THE CASE

This is E.L.P.'s appeal of his convictions after a jury trial in the Superior Court. He was convicted of one count each of aggravated assault while armed, assault with a dangerous weapon, assault with significant bodily injury while armed, carrying a pistol without a license, possession of an unregistered firearm, and unlawful possession of ammunition. He was also convicted of three counts of possession of a firearm during a crime of violence. The Jury acquitted E.L.P. of assault with intent to kill while armed and an associated possession of a firearm

during a crime of violence charge. The trial court's total sentence for all the convicted offenses (all sentences run concurrently) was ten years incarceration, with all but six years suspended. The sentence was imposed pursuant to the Youth Rehabilitation Act.

STATEMENT OF FACTS

The Shooting and Its Immediate Aftermath

In the early morning hours of July 30, 2021, Edwin Hernandez was shot in the chest in the N.W. quadrant of the District of Columbia. Tr. 1-5-23 at 5-6, 19.[1] Hernandez was injured and hospitalized. E.L.P. admitted to the shooting but testified that he had acted in self-defense.

The victim, Hernandez, was found on the street, in the immediate vicinity of a 14th Street restaurant or nightclub called Johanas. *Id.* at 19. Hernandez testified that he had been at Johana's in the early morning hours with Selvin Amaya, a close friend who he referred to as his brother, when a fight broke out between several women at the club. *Id.* at 52-54, 64. After the fight, he left the club because "everyone" was being "kicked out." *Id*. at 54. According to Hernandez, the next thing he remembered was "waking up on the ground" inside Johanas, after the shooting. *Id.* at 56. Hernandez did not know who shot him. *Id*. at 66.

[1] Citations in the format Tr. [date] at [page number] refer to the transcripts in this case.

Hernandez's injury was serious. Eric Corder, a medical doctor who had treated Hernandez, testified for the government that, if Hernandez had not been treated, he would likely have died. Tr. 1-11-23 at 26. Hernandez remained in the hospital for five days. *Id.* at 28. He testified that he eventually made a full recovery and that his injury was no longer affecting him, "not at all." Tr. 1-5-23 at 61.

The government presented expert testimony that indicated that E.L.P.'s DNA had been found on a gun that had been recovered near the scene of the shooting. Tr. 1-10-23 at 126. And another government expert testified that a shell casing found near the shooting was consistent with having come from that firearm. *Id.* at 80.

Called by the government, Selvin Amaya gave an account of what had happened inside Johana's that was consistent with Hernandez's. Tr. 1-5-23 at 83-84. On cross-examination, Amaya acknowledged that a third person was also with himself and Hernandez. *Id.* at 126. He further testified that, after leaving the club, he and Hernandez walked toward the car in which they had arrived. *Id.* at 84-85. But before they could get to the car a man in an orange shirt and black pants, who was also leaving the club, and who was walking in front of them, suddenly turned around, lifted his shirt, and, from about six to eight feet away, and without saying anything, pulled out a handgun and fired a single shot into Hernandez's chest. *Id.*

at 87-93. The shooter was not with anyone else. *Id.* at 117. Amaya and Hernandez then ran back to Johanas. *Id*. at 93-94. The police subsequently took Amaya to a location where they had E.L.P. detained. After asking the police to shine a light on E.L.P.'s face, Amaya identified E.L.P. as the shooter. *Id.* at 107-08.

Testifying in his own defense, E.L.P. provided a different version of the events outside of Johanas. He said he had been at Johanas with Gixele, his ex-girlfriend. Tr. 1-11-23 at 89. Throughout the evening, there was "tension" between Gixele and another woman who was also at the club because of a comment made to Gixele by that woman. *Id.* at 92. At one point a large man with tattoos and a beard, one of several people with the woman with whom Gixele was in "tension," tried to trip Gixele. *Id.* at 93. E.L.P. and the tattooed man then had a verbal altercation. *Id.* at 95. The man said that he wanted to fight E.L.P. *Id.* A fight then broke out between Gixele and the woman with whom she was in tension. *Id.* at 95-96. The fight escalated, with others joining in, including E.L.P., who threw several punches, including at least one at a woman. *Id.* at 96. Then E.L.P., Gixele, and others were kicked out of the club. *Id.* at 97.

E.L.P. and Gixele separated and E.L.P. began walking towards his car. *Id.* at 97. Hearing people yelling threats behind him, he turned around and saw the tattooed individual and two others "rushing" towards him. *Id.* at 98-99. One of the

individuals yelled at him "you're going to pay for what you did to my girl, bitch." *Id.* at 100. The onrushing men came within three or four feet of him and E.L.P. explained what happened next:

> They was reaching out to their pants, like – I don't know if they was grabbing -- like, putting their pants up, fixing their pants or grabbing -- going to reach down for something. Like, my thought was -- my thought was that they was reaching for a knife or a weapon.

Id. at 102. One of the individuals reached out toward him. *Id.* at 104. E.L.P. thought that he "was going to get jumped or stabbed or, shit." *Id.* at 103. Fearing for his life, he pulled out a gun he had on his person and fired a single shot. *Id.* at 104.

E.L.P. acknowledged that, on the day of the shooting, he had lied to the police, falsely denying that he had shot anyone. *Id.* at 142.

Trial Issues

In its cross-examination of E.L.P., the government suggested that E.L.P., having supposedly long insisted that he did not shoot Hernandez, was only now changing his story because he had, at trial, heard the government's evidence. *See* Tr. 1-11-23 at 142 (Q [by prosecutor]: "now your story is, well, yeah, okay, I had the gun and I shot him"). E.L.P.'s counsel objected, stating that E.L.P. had learned about the evidence against him from "conversations with counsel." *Id.* at 143. Counsel added that the prosecutor was "saying he's changed what he said from

what he told the police to what he said in court after listening to what had been -- after listening to the testimony that had been offered in court" and that the only way to rebut this and show that E.L.P.'s self-defense claim was not a recent invention would be through providing the jury with information about attorney-client communications, which would be a violation of the privilege. *Id.* at 143-44. The trial court did not rule on the objection. It did, however, tell the prosecutor not to ask more questions "about this," but that the government was free to "make arguments" on this point in closing. *Id.* at 145. Subsequently, in his closing, the prosecutor told the jury that "only after you heard all that evidence did the defendant tell you, okay, yeah, I'm the shooter." Tr. 1-12-23 at 70.

After it began its deliberations the jury sent the court a question: "Are we able to see or be informed of the defendant's original response/answer/plea to the government's charges?" Tr. 1-13-23 at 3. The trial court's answer was "no, because the defendant's original response/answer/plea to the government's charges is not evidence in this case." *Id.* at 12.

Before the trial, E.L.P. moved to dismiss the weapons charges (carrying a pistol without a license, possession of an unregistered firearm and unlawful possession of ammunition) on the grounds that the relevant statutes were

unconstitutional. R. pdf 191 (Nov. 2, 2022 Motion).[2] E.L.P. had been twenty years old at the time of these offenses and had no criminal history. *Id.* (citing presentence report). D.C. law, however, provides that adults under 21 cannot legally possess a handgun and restricts the access of such individuals to ammunition. E.L.P. contended that this violated the right to bear arms guaranteed by the Second Amendment. The trial court disagreed and denied the motion in a written order. R. pdf 1311, Limited App. 1 (Dec. 14, 2022 Order).

SUMMARY OF ARGUMENT

During the trial, the prosecutor made remarks, over defense counsel's objections, about E.L.P.'s silence that were unfair and inconsistent with this court's precedent. This precedent remains valid even though a panel of this court has purported to overrule it—absent unusual circumstances, not present here, one panel cannot overrule the decisions of a prior panel. The prosecutor's improper remarks require reversal of each of E.L.P.'s convictions.

Additionally, E.L.P.'s convictions for violating firearms statutes must be vacated because those statutes are unconstitutional. They prohibit adults under twenty-one—including E.L.P. at the time of the offense—from carrying handguns.

[2] Citations in the form "R. pdf [page number]" refer to the principal record and to the PDF pagination of that document.

Recent Supreme Court cases interpreting the Second Amendment make it clear that such a prohibition is not constitutionally permissible.

ARGUMENT

I. PERMITTING THE GOVERNMENT TO COMMENT ON E.L.P.'S SILENCE BEFORE HIS TESTIMONY WAS REVERSIBLE ERROR

The prosecutor's conduct in this case was inconsistent with *Jenkins v. United State*s, 374 A.2d 581, 584 (D.C. 1977). In that case, as in this case, the prosecutor told the jury that the defendant's testimony should not be believed because the defendant had only testified after the prosecution concluded its case, allowing the defendant to tailor his testimony to the evidence presented. *Id.* at 584. The fairness concerns arising from such comments are self-evident. The prosecutor is taking the defendant to task for something he cannot do—although the jury may not know it, a defendant cannot take the stand before the government completes its case. Unsurprisingly, *Jenkins* held that such comments were "improper" and must not be permitted. *Id.* at 584. If *Jenkins* applies, the government's conduct in this case was error.

But, in a subsequent case, *Teoume-Lessane v. United States*, 931 A.2d 478 (D.C. 2007), a panel of this court purported to overrule *Jenkins*. *Teoume-Lessane* recognized that, normally, "a division of this court may not overrule the prior decision of another." *Id.* at 584 (citing *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971)). But it nevertheless contended that overruling was appropriate because

Jenkins "was a constitutional decision" and that the Supreme Court's post-*Jenkins* decision in *Portuondo v. Agard*, 529 U.S. 61 (2000), had held that a prosecutor adversely commenting on a defendant's pre-testimony silence did not violate the Fifth Amendment's guarantee against self-incrimination. *Id.* at 494. Because *Portuondo* had, according to the *Teoume-Lessane*, been based on the now-rejected premise that such comments violated the Constitution, *Jenkins* was no longer good law. But it is clear from *Jenkins*'s text that the rule set out in that case was not based on the Constitution.

Significantly, the error in *Jenkins* was deemed harmless, a circumstance that sheds light on whether the court in that case thought it was correcting a constitutional error. If it had thought the prosecutorial comments it deemed improper were constitutional violations it would have been required to base its harmless error analysis on *Chapman v. California*, 386 U.S. 18, 24 (1967), the case that sets the standard for determining whether constitutional error is harmless. In accordance with *Chapman*, it would have been required to find that the government had shown "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24; *see also Oliver v. United States*, 384 A.2d 642, 645 (D.C. 1978) (case contemporaneous with *Jenkins* explaining that "under the *Chapman* test" issue is "whether we can say" that the error was harmless "beyond a reasonable doubt").

Moreover, the ruling in *Jenkins* that is relevant to this case—that the prosecutor should not have argued that the defendant's credibility was undermined by the timing of the defendant's testimony—was not an isolated holding. It was contained in a broader discussion of statements in the government's closing that *Jenkins* deemed improper on grounds of fairness. Little in this discussion suggests that the court thought that constitutional violations had occurred. It observed that the "prosecutor's remarks clearly reflected his own opinion as to appellant's lack of veracity," and that this was impermissible. *Id.* at 584. But this was surely not a holding that such remarks are unconstitutional. Then, in the same paragraph, the court added that the prosecutor had also wrongly "sought to have the jury draw adverse inferences from appellant's exercise of his right to confront the witnesses against him. *Cf. Griffin v. California*." *Id.* at 584 (footnote omitted). At the end of this sentence (before the "*cf.*") the court inserted a footnote that referred to another form of improper (but not unconstitutional) prosecutorial misconduct conduct it thought analogous to the error in its case: "comments … on a defendant's demeanor in the courtroom while off the witness stand." *Id.* at 584 n.5. The only indication that the Court was thinking about the Constitution was the

cf. citation to *Griffin*, 380 U.S. 609 (1965).[3] That case held, on a very different fact pattern, that there is generally a constitutional violation if a prosecutor suggests to the jury that it can use a defendant's failure to testify to support a finding of guilt. 380 U.S. at 615.[4] In context, it is clear that *Griffin* was concerned about the requirements of procedural fairness applicable to trials in this jurisdiction, not constitutional norms.

Because *Jenkins* was not based on the constitution, it was not undermined by *Portuondo* and, as the earlier decision, *Jenkins*, not *Portuondo*, governs. *See Thomas v. United States*, 731 A.2d 415, 420 n.6 (D.C. 1999) ("Where a division of this court fails to adhere to earlier controlling authority, we are required to follow the earlier decision rather than the later one."). Consequently, the prosecutor's remarks about E.L.P.'s pre-testimony silence was error.[5]

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[3] "*Cf.*" is not an assertion that the cited authority directly supports a particular proposition. The Bluebook explains that this signal means that the "[c]ited authority support a proposition different from the main proposition but sufficiently analogous to lend support. Literally, "*cf.*" means 'compare.'" *The Bluebook: A Uniform System of Citation* 23(Columbia Law Review Ass'n et al. eds. 17th ed. 2000).

[4] In *Griffin*, the prosecutor's argument to the jury that the defendant would have testified if he could provide a non-inculpatory account of what had happened was bolstered by a jury instruction which said that the defendant's failure to testify *could* be used against him. 380 U.S. at 610-11.

[5] *Smith v. United States*, 175 A.3d 623, 632 n.10 (D.C. 2017), applied *Teoume-Lessane* in a footnote under facts similar to those in this case. But that

(footnote continued next page)

There is nothing incongruous about the fact that the prosecutor's conduct in this case did not violate the Constitution but was nevertheless error. As Justice Stevens pointed out in his concurrence, while *Portuondo* held that it was not a constitutional violation for a prosecutor to argue that a testifying defendant had an opportunity to tailor his testimony, unfair prosecutorial conduct that does not "cross[] the high threshold that separates trial error" from constitutional error may, nevertheless, not be proper and permissible. 529 U.S. at 76 (Stevens, J., concurring). Questions and argument impugning a defendant for doing what he was obligated to do—remaining silent during trial until it was the turn of the defense to present its case—are grossly unfair and "should be discouraged rather than validated." *Id.* at 76. "States or trial judges" retain "the power either to prevent such argument entirely or to provide juries with instructions that explain the necessity, and the justifications, for the defendant's attendance at trial." *Id.* This court has recognized that it has supervisory authority to establish procedural requirements meant to ensure fairness, and it has done so in *Jenkins* and in other cases. *See Boyd v. United States*, 586 A.2d 670, 678 n.14 (D.C. 1991) (collecting

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decision did not analyze whether *Jenkins* had been properly overruled. *See Richman Towers Tenants' Ass'n v. Richman Towers LLC*, 17 A.3d 590, 610 (D.C. 2011) ("The rule of *stare decisis* is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the precise question." (citing *District of Columbia v. Sierra Club*, 670 A.2d 354, 360 (D.C. 1996)) (brackets omitted)).

cases); *see also, e.g., Fortune v. United States*, 59 A.3d 949, 955 (D.C. 2013) ("In the exercise of our supervisory power this court has articulated the appropriate procedures … to follow" when a defendant seeks to waive a jury trial).

The prosecutorial statements in this case were particularly unfair because E.L.P. did not initially remain silent, as was apparently the case with the *Portuondo* defendant. The day of his arrest he told an admittedly false narrative. As defense counsel pointed out to the trial court, the jury could readily have concluded from the prosecutor's remarks that he had stuck to his false story for the year and a half between his initial statement and his trial, only belatedly changing his account after several days of testimony. Indeed, based on the jury's note asking for information on E.L.P.'s "original response/answer/plea to the government's charges," it is likely that is exactly what the jury suspected. But the jury was not told that, before trial, there was no forum at which E.L.P. would have been expected to address the veracity of his initial statements and that any competent attorney would have advised him not to speak before his trial testimony.

Moreover, E.L.P. was left with no effective way of countering what the government insinuated. As a matter of practical reality, he could not, for example, offer testimony from his own attorneys—who could not be trial witnesses and who could not be expected to disclose privileged conversations—as to when E.L.P. had

first stated that what he initially told the police was wrong and that he had shot Hernandez in self-defense.

This error was not harmless. The government's improper questioning and remarks in closing gravely undermined E.L.P.'s credibility. And this case was essentially a credibility contest between E.L.P. and Selvin Amaya, the only witness who disputed E.L.P.'s account of what had happened.

II. E.L.P.'S FIREARMS CONVICTIONS ARE BASED ON UNCONSTITUTIONAL STATUTES

The District of Columbia prohibits adults aged 18-20 from carrying handguns. This is inconsistent with recent Supreme Court precedent interpreting the Second Amendment, including *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

A. D.C.'s Statutory Scheme Prohibits Adults Under 21 From Carrying Handguns

To convict E.L.P. for carrying a pistol without a license, the government was required to prove that he possessed a pistol and that he did not have "a license [to carry a pistol] issued pursuant to District of Columbia law." D.C. Code § 22-4504(a).[6] To convict for possession of an unregistered firearm the government was

[6] In E.L.P.'s case he was charged with carrying a pistol "outside his home or place of business," a subset of the broader carrying a pistol without a license offense that carries an enhanced penalty. *See id.*

required to prove that E.L.P. "receive[d], possess[ed], [or] control[ed]," a "firearm" and that, at that time, he did not "hold [a] a valid registration certificate for the firearm." D.C. Code § 7-2502.01(a). And to convict E.L.P. for unlawful possession of ammunition, the government was required to prove that he "possess[ed]" ammunition and was not the "holder of a valid registration certificate for a firearm." D.C. Code § 7-2506.01(a)(3).

To be issued a license to carry a pistol a person must be "at least 21 years of age." D.C. Code § 7-2509.02(a)(1). To be issued a registration certificate the person must, among other requirements, be "21 years of age or older," except that "an applicant between the ages of 18 and 21 years old, and who is otherwise qualified" may be issued a registration certificate "if the application is accompanied by a notarized statement of the applicant's parent or guardian" that indicates that the parent or guardian has given permission for the person to "own or use the firearm to be registered" and that "[t]he parent or guardian assumes civil liability for all damages resulting from the actions of such applicant in the use of the firearm to be registered." D.C. Code § 7-2502.03(a)(1). The effect of the statutory scheme is that, with parental permission (and assumption of liability), a person between 18 and 21 can own or possess an otherwise lawful firearm other than a pistol, such as a long gun, because he can receive a registration certificate

for such a weapon. But the person is categorically prohibited from carrying a handgun.[7]

B. The Statutory Scheme is Unconstitutional

The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. It "protect[s] an individual right to keep and bear arms for self-defense," including "an individual's right to carry a handgun for self-defense outside the home." *Bruen*, 142 S. Ct. at 2122, 2125. This is a "fundamental" constitutional right. *Id.* at 2151; *see also McDonald v. City of Chi.*, 561 U.S. 742, 778 (2010) (right is "fundamental").

The question in this case is whether the Second Amendment's guarantee of the right to carry a handgun is consistent with the D.C. statutes under which E.L.P. was convicted. These statutes prevent persons who are eighteen, nineteen or twenty years of age from possessing a handgun. The answer should be obvious. Legislatures may not deny adults under twenty-one their fundamental constitutional rights on account of their age. A law that prohibited a nineteen-year-old from criticizing elected officials, or requiring parental permission to do so, would violate the First Amendment's guarantee of the freedom of speech. *See*

[7] The statutory definition of a "pistol"—"any firearm originally designed to be fired by use of a single hand or with a barrel less than 12 inches in length"—encompasses virtually any handgun. D.C. Code § 7-2501.01(12).

Bruen, 142 S. Ct. at 2130 (framework used by Courts to protect First Amendment and Second Amendment rights is similar). And a statute permitting warrantless searches of the homes of adults under twenty-one would undoubtedly violate the Fourth Amendment. Divesting those under 21 of their Second Amendment rights is equally unconstitutional. *See Fraser v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, No. 3:22-cv-410, 2023 U.S. Dist. LEXIS 82432, at *35-36, __ F.Supp.3d __ (E.D. Va. May 10, 2023) ("If the Court were to exclude 18-to-21-year-olds from the Second Amendment's protection, it would impose limitations on the Second Amendment that do not exist with other constitutional guarantees. It is firmly established that the rights enshrined in the First, Fourth, Fifth, Eight[h], and Fourteenth Amendments vest before the age of 21."); *Bruen*, 142 S. Ct. at 2156 ("The constitutional right to bear arms in public for self-defense is not a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." (quotation marks omitted)).

In several recent cases federal district courts, applying *Bruen*, have ruled unconstitutional state and federal statutes which, like the D.C. statutes challenged in this case, restricted the availability of firearms to 18-20-year-olds. *See Rocky Mountain Gun Owners v. Polis*, No. 23-cv-01077, 2023 U.S. Dist. LEXIS 137087, at *2, *49-52 (D. Colo. Aug. 7, 2023) (preliminarily enjoining likely unconstitutional Colorado statute making it "unlawful for a person who is less than

twenty-one years of age to purchase a firearm"); *Fraser*, 2023 U.S. Dist. LEXIS 82432, at*5, *56 (finding unconstitutional "an interlocking collection of federal law and regulations that prevent 18-to-20-year-olds from purchasing handguns from [Federal Firearm Licensed Dealers]"); *Worth v. Harrington*, No. 21-cv-1348, 2023 U.S. Dist. LEXIS 56638, at *1-2, __ F.Supp.3d __ (D. Minn. Mar. 31, 2023) (Minnesota law that "requires a person to obtain a permit to lawfully carry a handgun in public, but does not issue permits to anyone under the age of twenty-one" is unconstitutional); *Firearms Policy Coalition, Inc. v. McCraw*, 623 F. Supp. 3d 740, 758 (N.D. Tex. 2022) (declaring unconstitutional Texas statute that "prohibits law-abiding 18-to-20-year-olds from carrying handguns for self-defense outside the home").

Bruen established a two-part framework for reviewing the constitutionality of firearms restrictions:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.

142 S. Ct. at 2129-30 (quotation marks omitted).

Here, the statutes at issue are presumptively unconstitutional because the first part of the *Bruen* test is met. They prohibited E.L.P. from keeping and bearing arms, exactly what the Constitution says cannot be prohibited.

The government argued to the contrary in the trial court—its apparent position was that the Second Amendment only protects "the people" and persons under 21 are not "part of 'the people' whom the Second Amendment protects." R. pdf 1266. But this view—that the readily understandable term "the people" means "the people except for certain people"—cannot be reconciled with the Supreme Court's teaching that constitutional provisions, including the Second Amendment, were "written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008).

Moreover, the government cited no authority indicating that the Founders thought that people under 21 were not among "the people." Instead, it emphasized that, "at the time of the Constitution's ratification, the age of majority at common law was 21 years." R. pdf 1262. But this does not mean that the Founders thought that persons under 21 were not protected by the Second Amendment or other constitutional provisions. And, in any event, the age of majority in 1789 is of little current relevance: today "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Fraser*, 2023 U.S. Dist.

LEXIS 82432, at *34 (quoting *Roper v. Simmons*, 543 U.S. 551, 574 (2005)). Eighteen-to-twenty-year-olds are fully protected by the Constitution.

Indeed, post-*Bruen* decisions appear to have uniformly found that 18-21-year-olds are members of "the people" and, consequently, presumptively protected by the Second Amendment. *See Fraser*, 2023 U.S. Dist. LEXIS 82432, at *36 ("the Second Amendment's protections apply to 18-to-20-year-olds"); *McCraw*, 623 F. Supp. 3d at 748 ("law-abiding 18-to-20-year-olds are a part of 'the people' referenced in the Second Amendment"); *Worth*, 2023 U.S. Dist. LEXIS, at *21-22 (18-to-20-year-olds protected: "Defendants offer no authority to support the proposition that the voters who adopted the Second Amendment would have used the phrase 'the people' … to express a limitation based on the general common law age of majority"); *Polis*, 2023 U.S. Dist. LEXIS 137087, at *27 ("The Court is persuaded … that an interpretation of 'the people' in the Second Amendment should begin with the assumption that every American is included.").

Because E.L.P.'s possession of a firearm is protected by the Second Amendment's plain language, the challenged statutes can only survive if the government meets its affirmative burden of "demonstrating" that the District's statutory scheme is "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2129-30. The government failed to meet this burden in the trial court, identifying not a single statute from the period

immediately before or after the adoption of the Bill of Rights that restricted the firearms access of those under 21.[8] Examples of gun-related age limits imposed form the late nineteenth century onward do little to illuminate the scope of the right to bear arms in 1789 that the Second Amendment provides must not be "infringed." *See Bruen*, 142 S. Ct. at 2136 ("we must … guard against giving postenactment history more weight than it can rightly bear"); *see also id.* at 2137 ("because post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.'" (quoting *Heller*, 554 U. S., at 614)).

C. Reversal Is Required

Because the firearms statutes on which E.L.P. was convicted were unconstitutional, his convictions under these statutes must be reversed.

[8] In *Fraser*, which addressed essentially the same issue as that in this case, the court noted that the government (the same government as in this case) had acknowledged that "there were no laws …from 1776 to 1789 explicitly prohibiting the sale of firearms or handguns to individuals under the age of 21" and had not "offered evidence of such regulation between then and 1791 or in relevant proximity thereafter. For that reason alone, it has failed to meet the burden imposed on it by Bruen." 2023 U.S. Dist. LEXIS 82432, at *47-48 (brackets omitted).

III. CERTAIN OFFENSES MERGE

"Merger issues are reviewed de novo." *Nero v. United States*, 73 A.3d 153, 159 (D.C. 2013).

E.L.P.'s conviction for three counts of possession of a firearm during a crime of violence must be merged into a single conviction. "[M]ultiple PFCV [possession of a firearm during a crime of violence] convictions will merge … if they arise out of a defendant's uninterrupted possession of a single weapon during a single act of violence." *Matthews v. United States*, 892 A.2d 1100, 1106 (D.C. 2006). That is the case here. E.L.P. had a single weapon which he used to fire a single gunshot.

Additionally, when charged for the same conduct "AAWA [aggravated assault while armed] and ADW [assault with a deadly weapon] merge." *Nero v. United States*, 73 A.3d 153, 159 (D.C. 2013). "[A] single AAWA conviction" survives. *Id.* Similarly, "[b]ecause the elements of felony assault [also referred to as assault with significant bodily injury] are a subset of the elements of AAWA, the two merge into one conviction of AAWA." *Id.*[9]

[9] *See Colter v. United States*, 37 A.3d 282, 283 (D.C. 2012) ("assault with significant bodily injury" and "felony assault" are the same offense).

CONCLUSION

For the foregoing reasons, E.L.P.'s convictions should be reversed.

Date: February 6, 2024 (correcting Brief filed November 16, 2023)

Respectfully submitted,

/s/Matthew B. Kaplan

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CERTIFICATE OF SERVICE

I certify that the foregoing (including any appendix or other accompanying documents) was served by this court's electronic filing system, on the date indicated below, on all counsel who have registered for electronic filing, including Chrisellen R. Kolb, counsel for Appellee.

/s/Matthew B. Kaplan
Matthew B. Kaplan
Date: February 6, 2024, 2023

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

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

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
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(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use-disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

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/s/ Matthew B. Kaplan
Signature

23-CF-0344
Case Numbers(s)

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2/6/2024
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