DISTRICT OF COLUMBIA COURT OF APPEALS

No. 23-CF-514

TYREE BENSON,

Appellant,

v.

UNITED STATES of AMERICA

Appellee.

Appeal from the Superior Court
of the District of Columba
Criminal Division

OPENING BRIEF FOR APPELLANT

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CERTIFICATE OF COUNSEL

Appellant files this Certificate, listing the parties interested in this appeal, as required by D.C. App. R. 28(a).

The Honorable Erick Christian, Superior Court Trial Judge

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John Mannarino, Assistant United States Attorney

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STATEMENT OF THE ISSUES

1. Whether police officers lacked reasonable suspicion to seize Mr. Benson where he was not seen doing anything illegal and his flight was provoked by the officers' aggressive approach?

2. Whether officers lacked reasonable suspicion to frisk Mr. Benson for weapons where a gesture to his waistband and his initial flight with two arms swinging was insufficient to show that he was armed and dangerous?

3. Whether the statutes Mr. Benson is convicted of violating are unconstitutional under the Second Amendment?

STATEMENT OF JURISDICTION

This appeal is from a final judgment of the Superior Court of the District of Columbia. This Court has jurisdiction pursuant to D.C. Code § 11-721(a)(1).

STATEMENT OF THE CASE

On September 30, 2022, Mr. Benson was charged with: Count One—carrying a pistol without a license (outside home or place of business), in violation of D.C. Code §22-4504(a)(1)(2001 ed.); Count Two—possession of a large capacity ammunition feeding device, in violation of D.C. Code §7-2506.01(b) (2001 ed.); Count Three—possession of unregistered firearm, in violation of D.C. Code §7-2502.01(a)(2001 ed.); and Count Four—unlawful possession of ammunition, in violation of D.C. Code §7-2506.01(a)(3)(2001 ed.).

Following a motions hearing on April 11, 2023, Mr. Benson proceed to a bench trial on stipulated facts. The trial court found Mr. Benson guilty of all four counts in the indictment.

On June 9, 2023, the trial court sentenced Mr. Benson to concurrent suspended sentences as follows: Count One—12 months of incarceration, execution of sentence suspended as to all; Count Two—six months of incarceration, execution of sentence suspended as to all; Count Three—six months of incarceration, execution of sentence suspended as to all; Count Four—six months of incarceration, execution of sentence suspended as to all. The court imposed three years of supervised release, all suspended, and one year of supervised probation.

A timely notice of appeal was filed on June 19, 2023.

STATEMENT OF FACTS

Preliminary Hearing

At the preliminary hearing, Metropolitan Police Department (MPD) Officer Bryan Madera testified that he arrested Tyree Benson on October 8, 2022, at approximately 5:15 p.m. Tr. 10/26/22 p. 6-7. [1] Madera wished to make corrections to his Gerstein before adopting it. *Id.* at 7. The Gerstein stated that Benson ran down an alley with his left arm swinging freely and his right arm positioned to his front waistband. *Id.* at 8. Madera corrected this to say, "before he took an unprovoked flight,

[1] "Tr." denotes transcript, followed by the date of the proceeding and page number.

he grabbed his waistband, then turned to—towards the—alley, running down the alley with both his arms swinging freely." *Id.* at 8. Madera also corrected a name in the Gerstein to specify that Benson was the person transported to the police station. *Id.* at 9. After those corrections, Madera adopted the Gerstein, *id.* at 9, and the trial court found there was probable cause. *Id.* at 25.

Motions Hearing and Trial

On April 11, 2023, the trial court held a hearing on Benson's motion to suppress evidence. The court heard testimony from two MPD officers, and viewed excerpts of body worn camera videos.

Testimony of Officer Joshua Anderson

Officer Joshua Anderson testified that on the day[2] of his encounter with Mr. Benson, he was in uniform, riding as a passenger in an unmarked police vehicle in the 2900 block of R Street, SE. Tr. 4/11/23 p. 15. They were patrolling because in previous days, there had been reports of gunshot sounds in that area, though there had been no such reports that day. His vehicle followed behind Investigator Bryan Madera's unmarked vehicle. *Id.* at 15-16.

When his vehicle pulled up, Anderson saw Officers Marsh and Slabatoff running down an alley, and Anderson joined the chase on foot. *Id.* at 18. As Anderson entered

[2] The witnesses' attention were directed to September 8, 2022, Tr. 4/11/23 p. 15, 45, but it appears that the incident happened on October 8, 2022. Tr. 10/26.22 p. 6; Tr. 4/11/23 p. 56, 58.

the alley, he saw Benson go over an embankment into a backyard, and proceed around the corner to the front of the house. *Id.* at 18. Viewing from behind, approximately 40 feet away, Anderson saw Benson hold one of his hands to the front of his body for a few seconds while the other arm swung freely as he ran. *Id.* at 19-21, 39-40. Anderson said "waistband" to alert other officers to a potential firearm. *Id.* at 21. Anderson testified that, in his experience, many people conceal firearms in their waistband. *Id.* at 21022.

During the chase, Anderson briefly lost sight of Benson as Benson went around to the front of the building. *Id.* at 22. Anderson caught up to Benson at the 2800 block of Q Street, SE. *Id.* at 18. Benson slowed down, lowered himself to the ground, and was placed in handcuffs. *Id.* at 17, 23. Anderson conducted a protective pat down for officer safety in Benson's front waistband area where he believed there was a firearm, but did not find one. *Id.* at 23, 25. Then Benson said it was in his pant leg, so Anderson patted that area and felt what he believed to be a firearm. *Id.* at 35. As Benson was wearing pants with zippered legs, Anderson unzipped the lower right pant leg and recovered a 9mm Glock handgun with one round in the chamber and 30 rounds in the magazine. *Id.* at 25. Anderson testified, and his body worn camera video confirmed, that Benson was not wearing any gloves. *Id.* at 42.

Testimony of Investigator Bryan Madera

Investigator Bryan Madera testified that he was working in plain clothes in an unmarked vehicle in the 2900 block of R Street, SE. *Id.* at 45, 58. This area is known for firearms related offenses and is an area that they commonly patrol. *Id.* Madera could not recall how many police vehicles were on the scene, but there were at least two vehicles working as a unit. *Id.* at 55-56. While driving up a hill, there was a car facing the opposite direction on his left. The two police vehicles, both facing uphill, stopped across the yellow center line in the road. *Id.* at 56-57. Madera initially testified that an individual (Benson) wearing a mask and latex gloves was trying to get into the vehicle occupied by two people who were also wearing masks and latex gloves. *Id.* at 46, 50. The vehicle occupants were frantically moving, and Benson started frantically trying to open the car door. The driver looked up, saw the police vehicle, and sped off, leaving Benson. *Id.* at 46. Madera testified that Benson was wearing a hooded sweater, face mask, and latex gloves. *Id.* at 47.

Benson ran towards an alley with other officers chasing him. *Id.* at 47. Benson's hands were both moving freely until he reached the mouth of the alley. *Id.* at 57. Madera initially could not recall whether he viewed the next events from inside or outside his vehicle. After viewing the body worn camera video at his request, he testified that he came out of his vehicle but did not chase Benson. *Id.* at 53. From approximately 25 feet

away, Madera saw Benson adjust the front of his waistband while running downhill. *Id.* at 47-48.

Madera changed his testimony on a number of points after being impeached on cross examination. Madera reviewed a body-worn camera video of Benson running, and admitted that Benson was not wearing any gloves. *Id.* at 54. Nevertheless, he maintained the contradictory position that he did not recall seeing any individuals associated with the car who were not wearing latex gloves. *Id.* at 64. Madera explained that he was confused because latex gloves were found on Benson *after* he was stopped. *Id.* at 64-65.

Madera did not recall making corrections to the Gerstein during the preliminary hearing. *Id.* at 61. However, after viewing the preliminary hearing transcript, Madera acknowledged that he changed the Gerstein to say that Benson was "openly running with both hands, both arms swinging freely." *Id.* at 61-2. Madera was also unclear about whether or not he saw Benson adjust his waistband. He testified as follows:

MR. SHEFFERMAN:

Q Isn't it a fact that there was—at no time did you say at any part of the chase that you saw Mr. Benson holding—you know, not swinging his arms freely?

A Can you repeat that question one more time?

Q Was there any time when you said – earlier—

THE COURT: So isn't it correct that you never saw him adjust his waistband?

THE WITNESS: Correct.

Tr. 4/11/23 p. 62. However, on redirect examination, Madera said that Benson grabbed waistband before running. *Id.* at 63-64.

According to Madera, it was warmer than usual for October, and not cold. Tr. 4/11/23 p. 58. However, after viewing body worn camera video, Madera acknowledged that, while waiting for transport, Benson asked for someone to put his coat over his head. And an officer said it was definitely cold. *Id.* at 68.

Madera admitted several times during his testimony that he did not have a detailed independent memory of the events leading to Benson's arrest. He was unable to recall the number of police vehicles working together. *Id.* at 55-56. He could not recall whether or not he got out of his vehicle until he reviewed the body camera video. *Id.* at 53. Also, after viewing the video, Madera admitted that the blue car did not leave Benson behind. Rather, Benson ran and then the blue car left the scene. *Id.* at 55. Madera did not remember making corrections to the Gerstein at the preliminary hearing. *Id.* at 61. And he was unclear about whether he saw Benson adjust his waistband *before* he ran, *id.* at 63-64, or *while* he ran downhill. *Id.* at 47-48.

Trial Court's Ruling on the Motion to Suppress

The Superior Court denied Mr. Benson's motion to suppress evidence. The court made the following findings and conclusions:

> On October 8, 2022 at about 5:10 p.m., two unmarked police cars pulled into the 2900 Block of R Street Southeast and stopped parallel to and quite

near to a dark blue vehicle in which two persons were sitting in the driver and passenger seats. And one person was outside the automobile. The officers were patrolling this area because in recent days there had been gun shots in the area. The person outside the automobile was the Defendant, he was wearing a, what I would call a balaclava style mask with a full head covering with only the eyes exposed. The two persons inside the car also were wearing the same style of mask.

There was testimony that the persons inside the car had on gloves, but I am not relying on testimony about gloves to make my findings. The cars did not, and this is significant, block the blue vehicle's path. The two police cars were unmarked, as I've said. They stopped in the opposite lane of the street from where the blue car was parked. They were in the opposite direction. Their tires did cross the yellow line into the lane where the blue car stood. But did not block the automobile.

Inside the unmarked cars were a number of police officers, it appeared that at least three officers a piece were in the cars and all of them were in full uniform. It was a bright sunny day. It was daylight. And the fact that the cars carried numerous officers was unmistakably visible to the Defendant as he stood outside the blue vehicle. The cars were probably each a car's length away from the dark blue car.

No traffic was coming through the area at the time. I credit Officer Madera that at the time the persons inside the car were making frantic motions and that the Defendant attempted urgently to get into the car without success. The Defendant then fled running at full speed from the car and from the officers who are now outside the vehicles. At first his arms swung freely, this is visible on body worn camera depicting the initial portion of his flight.

Officer Madera gave testimony that at first he recalled that he—well Officer Madera testified that the Defendant clutched his waistband at or about the time he was initiating his flight. He testified at first that it was somewhat down the alley that when the Defendant adjusted his waistband

he was impeached with preliminary hearing testimony that this was – occurred just before he took off running. Either one of these moments unfortunately would not have been depicted on body worn camera and so the body worn camera does not assist in showing me when that gesture would have taken place. But I do credit officer Madera that the gesture occurred. He recalled it closer in time at his preliminary hearing that the time of that took place was before the Defendant took off. And where it occurred is immaterial, but I do credit that the gesture was observed.

The Defendant ran down an alley that was directly to the right of the navy blue automobile and was another route of escape from the opposite side of the street of the police cars. And ran extremely fast, well ahead of the police officers chasing him. Among the officers chasing him were Officer Anderson who arrived at the scene just after the Defendant's effort to get into the blue car at the beginning of his flight. As the Defendant took off the blue car also fled the scene.

Officer Anderson and at least one other officer chased the Defendant down an alley for a period of approximately 20 seconds. The Defendant ran over an embankment and between two buildings. Officer Anderson testified, and I credit, that as the Defendant from about 40 yards away from him was running between two buildings, his left arm was swinging freely—well the testimony was that one of his arms was swinging freely, he couldn't remember which [arm] it was, and that his other arm was bent at the elbow at a 45 angle or so, per demonstration, with his hand in front of him at his waistband. And that the hand that was bent in this matter was not moving. And that this was a set of motions that was consistent in his experience with persons running with a gun that had been in their waistband that was not holstered and they were trying to keep from adjusting or falling.

Officer Anderson described this set of motions. He demonstrated them illustrating that he could see the Defendant from the back. His body worn camera, Government's Exhibit 1, was played and fully corroborates his testimony. The distance is not close but the Defendant is fully visible in

the sunlight between two buildings. He is swinging his left hand, his right hand is at the angle described by the officer. And his hand is in front of his body at his waistband location.

At this time the officer is heard on body worn camera stating, "Waistband, waistband." He testified that this was his articulation that he had seen the position in which the Defendant ran and concluded that he had a gun in his waistband and was stating this for the benefit of others. The Defendant continued running for about another 20 seconds. The total flight was about 40 seconds. And in the 2800 block of R Street, Officer Anderson got close enough to the Defendant to shout, "Stop, stop."

The Defendant complied at this time. He got down on the ground. He was immediately handcuffed. Officers began patting him down. The Defendant stated at that time that his gun was beneath his pants at his ankle and officers found it there. A gun, that is. A loaded firearm there and seized it.

The first question that I need to answer here is when did the seizure occur. I do find that although the Defendant was chased, the flight was not provoked. In other words, that the two cars were near but not blocking him or his flight path. The officers approach was aggressive but not such that a reasonable person would have—would have believed he was unable to leave. And, in fact, the Defendant fled easily down an alley pathway that was at the other side of his car.

He chased—he was chased for about 40 seconds. And at one point he was at least 40 yards away. He did not submit during the entire period of the chase until he was closed in upon by Officer Anderson. And at that time when the Defendant submitted to the command that he stopped, I find he was seized but not before that time.

At that time the officers therefore were required to have reasonable suspicion in order to seize him. I do find that they did have reasonable suspicion at that time. I am informed by the holdings in two cases, one of

which—the *Pridgen* case, which is the case I was referring to before but couldn't remember the name of, is very much like this one. And that's P-R-I-D-G-E-N versus United States, 124 A.2d 297. In that case a person fled police after they approached him in two cars and said, hey, you've got a gun. He fled at full speed. The officer testifying saw that he was running in a manner essentially like this case, with one hand swinging freely and the other hand close at his waistband holding his side. And that the seizure after they caught him was ruled by the Court of Appeals in that case not to have been unlawful. And subsequent search was not unlawful because police had reasonable articulable suspicion that the appellant in that case was armed.

Here I find that the flight was an indication of consciousness of guilt in that the Defendant clearly saw the arrival of the police. Took off running in response to it, once he was unable to get himself into the car in a hurry. That although his arms swung freely at the beginning, he adjusted his waistband before taking off or about the time he took off. And that once he had really gotten some distance on the police but was still in full view, he was running in a manner described in Pridgen which [sic] one arm swinging freely, the other hand at his waistband area. Elbow bent at a 45 degree angle. That this was opposed inconsistent with free flight. Was not a natural pose while running. And that the officer testified credibly was a position he had observed in his own experience in persons fleeing with firearms.

Taking all of the facts and circumstances together, I do find that officers had reasonable articulable suspicion at the time they stopped the Defendant. I fully credit Officer Anderson to the extent that he actually articulated in a present sense impression at the time of his observation of the Defendant's position while running, "Waistband, waistband" that he certainly believed at that moment that the Defendant had a gun in his waistband. And I do find that taking together with all of the other facts and circumstances, his belief was reasonable at the time that the Defendant was seized.

> For all of these reason[s] I deny the motion to suppress the firearm and ammunition seized. To the extent there was a motion to suppress the statement the Defendant made before the gun was found, this statement was not the product of custodial interrogation. And at that time was not the product of any unlawful action by the police.

Tr. 4/11/23 p. 84-91. The trial court added that "this was an area that police were aware gunfire had been heard in—in the day or weeks prior and this is an additional factor." Tr. 4/11/23 p. 91.

Following the court's ruling, Mr. Benson proceed to trial by the court on stipulated facts. Tr. 4/11/23 p. 91-92. Benson stipulated that: on October 8, 2022, he possessed a firearm in a place other than his home, place of business, or premises controlled by him; the firearm had one round in the chamber and 30 rounds in the magazine; that the magazine had a capacity of 31 rounds; that he did not have a license to carry a pistol; and that he did not have a valid registration to possess a firearm or ammunition. Based on the stipulated facts, the court found Mr. Benson guilty of the four charges—carrying a pistol without a license, possession of a large capacity magazine, unregistered firearm, and unlawful possession of ammunition. Tr. 4/11/23 p.108.

Sentencing

Benson was sentenced to suspended sentences of 12 months for carrying a pistol without a license, and concurrent 6 month sentences for the three remaining counts (large capacity magazine, unregistered firearm, and unlawful possession of

ammunition). All terms of imprisonment were suspended. The court imposed a suspended three-year period of supervised release and placed Benson on supervised probation for one year. Tr. 6/9/23 p. 8-9.

SUMMARY OF ARGUMENT

Mr. Benson's convictions should be reversed for three reasons. First, the officers did not have reasonable suspicion that Benson was committing a crime to justify seizing him. That he was wearing a balaclava on a cold day and ran from officers does not constitute reasonable suspicion of criminal activity. Second, officers did not have reasonable suspicion that Benson was armed and dangerous to justify searching him for weapons. That he touched his waistband before or while he ran does not constitute reasonable suspicion that he is armed and dangerous. Third, the statutes under which Benson was convicted are unconstitutional under the Second Amendment. Accordingly, Benson's conviction should be reversed.

STANDARD OF REVIEW

On appeal, this Court "defer[s] to the trial court's findings of evidentiary fact unless clearly erroneous" and "view[s] those facts, and the reasonable inferences that stem from them, in the light most favorable to the government." *Miles v. United States*, 181 A.3d 633, 637 (D.C. 2018). "The trial court's application of the law to the facts, however, is reviewed de novo." *Blackmon v. United States*, 835 A.2d 1070, 1073 (D.C. 2003) (citing *White v. United States*, 763 A.2d 715, 719 (D.C. 2000)). Accordingly, whether

officers had reasonable suspicion to justify a stop is a question of law reviewed de novo. *See Miles*, 181 A.3d at 637; *Posey v. United States*, 201 A.3d 1198, 1201 (D.C. 2019).

ARGUMENT

I. Because Mr. Benson was unlawfully stopped and searched, any resulting statements and evidence should have been suppressed.

A. Protections under the Fourth Amendment

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A search conducted without a warrant is "per se unreasonable" under the Fourth Amendment, subject to "a few specific and well-established exceptions." *Basnueva v. United States*, 874 A.2d 363, 369 (D.C. 2005).

Three types of encounters between the police and citizens do not violate the Fourth Amendment:

> (1) consensual encounters, which do not require any level of suspicion prior to initiation; (2) *investigative detentions, which if nonconsensual, must be supported by a reasonable articulable suspicion of criminal activity prior to initiation*; and (3) arrests, which must be supported by probable cause prior to initiation. Both investigative detentions and arrests are seizures under the Fourth Amendment; mere consensual encounters are not.

Gordon v. United States, 120 A.3d 73, 78 (D.C. 2015) (emphasis added).

The "crucial test" for determining whether a person has been seized for Fourth Amendment purposes is "whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a

reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)) (additional citation omitted). A person is seized upon submission to or being subdued by police. *See Henson v. United States*, 55 A.3d 859, 864-65 (D.C. 2012); *Brendlin v. California*, 551 U.S. 249, 254 (2007) (stating that police may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission); *see also California v. Hodari D.*, 499 U.S. 621, 626 (1991) (stating that an arrest requires either physical force or submission to the assertion of authority).

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that an officer may conduct a brief investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. *Id.* at 30. Thus, investigative detentions are lawful only if "the detaining officers . . . have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). The officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch'" of criminal activity. *Terry*, 392 U.S. at 27.

Even a brief restraining stop of a person is an unreasonable seizure if it is conducted for investigatory purposes without a "reasonable suspicion supported by specific and articulable facts that the individual is involved in criminal activity." *Henson*, 55 A.3d at 867 (internal quotation marks and citations omitted). Furthermore, even if

the stop is reasonable, a protective frisk for weapons is still an unreasonable search if it is conducted without a reasonable articulable suspicion that the person is armed and dangerous. *See Golden v. United States*, 248 A.3d 925, 933-34 (D.C. 2021) (citing *Germany v. United States*, 984 A.2d 1217, 1222 (D.C. 2009)).

Various factors may be considered in deciding whether a *Terry* stop is justified, *see Bennett v. United States*, 26 A.3d 745, 753 (D.C. 2011), but no single factor is determinative. *See Umanzor v. United States*, 803 A.2d 983, 993 (D.C. 2002) (citing *In re D.A.D.*, 763 A.2d 1152, 1155 (D.C. 2000)). Rather, the court must consider the totality of the circumstances. *See United States v. Sokolow*, 490 U.S. 1, 8 (1989) (citing *Cortez*, 449 U.S. 411, 417 (1981)).

In *Illinois v. Wardlow*, 528 U.S. 119 (2000), the United States Supreme Court addressed the significance of being in a high crime area and an individual's evasive conduct for determining whether a *Terry* stop is justified. In *Wardlaw*, uniformed police were driving in a four-car caravan patrolling an area known for narcotics trafficking. One of the officers spotted William Wardlaw standing next to a building holding an opaque bag. *Id.* at 121-22. Wardlaw looked in the direction of the officers and fled. *Id.* at 122. The officer cornered him with his vehicle, exited, and stopped Wardlaw. *Id.* During a pat-down for weapons, the officer squeezed the opaque bag and felt a heavy, hard, object similar to the shape of a gun. The officer opened the bag, discovered a handgun with five rounds of ammunition, and arrested Wardlaw. *Id.*

The Supreme Court concluded that the officer was justified in suspecting that Wardlaw was involved in criminal activity and investigating further. 528 U.S. 125. A person's presence in a high crime area, standing alone, is not sufficient to support reasonable, particularized suspicion that the person is committing a crime, 528 U.S. at 122 (citing *Brown v. Texas*, 443 U.S. 47, 61 (1979)), but it is a relevant consideration. *Id.* (citing *Adams v. Williams*, 407 U.S. 143, 144 (1972)). Additionally, Wardlaw's unprovoked headlong flight was "not necessarily indicative of wrongdoing," but was "suggestive of such." *Wardlaw*, 528 U.S. 124. These are factors to consider, but are not dispositive. *See Pridgen v. United States*, 134 A.3d 297, 304 (D.C. 2016).

When officers obtain tangible evidence or statements as a result of an illegal stop or frisk, such evidence must be suppressed as "fruit of the poisonous tree." *See Wong Sun*, 371 U.S. 471, 485-86 (1963) (stating that evidence, whether verbal or tangible, discovered as a result of unlawful police action must generally be suppressed); *see also Wilson v. United States*, 102 A.3d 751, 753 (D.C. 2014).

B. Officers did not have reasonable suspicion to stop Benson.

The trial court found that the officers were patrolling the area because there were reports of gunshots in recent days. Tr. 4/11/23 p. 84. The two unmarked police cars stopped across the yellow center line facing a parked blue car, but did not block its path. *Id.* at 85. Benson, who was outside of the blue car, was wearing a balaclava style mask, as were the two occupants in the car. *Id.* at 84. The court did not find that any of

the three individuals were wearing gloves. *Id.* at 84. However, the court found that the persons inside the car were making frantic motions and Benson was urgently trying to get into the car. *Id.* at 84. Benson then ran full speed from the car and from the officers. *Id.* at 84.

The court acknowledged that Officer Madera gave conflicting testimony about when Benson clutched his waistband—testifying that it occurred while Benson was running downhill, *id.* at 47-48, then changing his testimony to say it occurred before he ran. *Id.* at 63-64. The court found that the gesture was observed at some point, but found it unnecessary to determine when it occurred. *Id.* at 86.

The court credited Officer Anderson's testimony that Benson ran with one arm swinging freely and the other bent at a 45-degree angle in front of his body at his waistband, which was consistent with his experience with persons running with a gun at the waistband. *Id.* at 87. Officer Anderson stated, "waistband, waistband," to the other officers. *Id.* at 88-89. Approximately 20 seconds later, Officer Anderson got close enough to Benson to shout "stop, stop." Benson got on the ground and was immediately handcuffed and patted down in the waistband area. *Id.* at 88. Benson then said that it was in his pants at his ankle and the officer removed a loaded firearm from the ankle area under Benson's pant leg. *Id.* at 88.

The trial court found that Benson's flight was not provoked. The court reasoned that Benson's path was not blocked by the police cars and the officers' approach was

aggressive, but not such that a reasonable person would have believed he was unable to leave. *Id.* at 88. The court found that Benson was not seized until he submitted to the command to stop. *Id.* at 89.

Relying on *Pridgen*, 134 A.3d 297, the court held that Benson's flight was an indication of consciousness of guilt because he ran after seeing police. *Id.* at 89-90. The court further found that Benson adjusted his waistband at some point and ran with one hand at his waistband area, consistent with Officer Anderson's testimony that it was a position consistent with a person fleeing with a firearm. *Id.* at 90. The court concluded that, under the totality of the circumstances, the officers had reasonable articulable suspicion to stop Benson at the time he was seized. *Id.* at 90.

A close reading *Pridgen*, however, shows that the trial court erred. In *Pridgen*, officers were patrolling an area known for people illegally carrying guns. 134 A.3d at 299 n.1. The officers drove unmarked cars and wore plain clothes with tactical vests marked "Police" across the chest. *Id.* at 299. An officer spotted Cian Pridgen, who stared at the officers and then continued at a quick place toward a nearby apartment building. *Id.* The officer shined his flashlight on Pridgen, leaned out of his vehicle, and shouted, "[H]ey, do you got a gun[?] [D][o you got a gun[?]" Pridgen began to run to the door of the apartment building. As he ran, he moved his right hand, but kept the palm of his left hand pressed against the left side of his jacket. *Id.*

The officers followed Pridgen on foot to the apartment building. After Pridgen entered the building, he dropped a cell phone, which he did not stop to retrieve, even after the building door locked behind him. Pridgen ran up the stairs to the door of an apartment unit, continuing to hold his left side. Through the glass front of the building, officers saw Pridgen moving his left hand all around his left jacket pocket as he struggled to get inside the apartment. *Id.* at 299. After someone let the officers into the building, the officers drew their guns and screamed at Pridgen to get on the ground, but he did not respond. The officers grabbed Pridgen, forced him to the ground. *Id.* at 299. As one officer reached under Pridgen's left side, which he kept pinned to the ground, the officer felt the handle of a gun. *Id.* During the struggle to handcuff Pridgen, his jacked flipped over, and officers saw a green weed substance through his right mesh pocket, and a handgun in the left mesh pocket. *Id.* at 299-300.

This Court held that Pridgen was seized when the officers grabbed him and took him to the ground. *Id.* at 300. This Court found significant that (1) Pridgen ran while holding his side; (2) officers saw Pridgen drop a cell phone and continue to run while holding his left pocket; and (3) Pridgen continued to move his hand around his left pocket even after officers wearing police vests shouted to him to stop and get on the ground. *Id.* at 303.

A critical fact was that, during the entire time Pridgen ran, he held his hand against his left side, which an officer testified was a posture he recognized as a way

individuals tend to run when they are carrying a firearm. *Id.* at 304. Nevertheless, this Court reasoned that running in that posture was not dispositive, because it was also consistent with innocent behavior—that of not wanting to drop a valuable item such as a cell phone. Accordingly, "the officers' articulable basis for suspicion that appellant was armed did not ripen into a reasonable suspicion that criminal activity was afoot until the officers saw appellant drop the cellphone, decline to stop and retrieve it even though the door was locked behind him, and continue to hold his side as he ran upstairs to the door of the apartment unit." *Id.* at 304.

An additional critical factor relevant to the search was that Pridgen continued to move his hand around his left pocket even after officers drew their weapons and ordered him to get on the ground, which gave the officers a reasonable basis to be concerned about their safety. *Id.* at 305. This Court concluded that, "in the totality of the circumstances, appellant's moving his hand around his left pocket gave the officers a reasonable basis to believe that he was armed and dangerous, and thus a reasonable basis for the investigatory seizure that led to discovery of the tangible items." *Id.* at 305.

In this case, the trial court found that Benson and the two individuals inside the blue car wore balaclavas; that the car occupants made frantic motions as Benson attempted to get into the car; and that Benson fled upon seeing the officers. In the beginning, Benson ran with both arms swinging freely, Tr. 4/11/23 p. 85, and then when Benson ran between two buildings, one arm was swinging freely, while the other

was bent at the elbow with his hand in front him. Tr. 4/11/23 p. 87. Officer Madera saw Benson clutch his waistband either before, or during the flight. Tr. 4/11/23 p. 86. When Officer Anderson shouted at Benson to stop, Benson complied by lowering himself to the ground. Tr. 4/11/23 p. 88.

This case is distinguishable from *Pridgen* in several important respects. First, Benson initially ran with both arms swinging, while in *Pridgen*, the defendant ran with his hand at his side the entire time. Second, Benson's posture while running did not necessarily indicate illegal activity. This Court acknowledged in *Pridgen* that a person running with one hand apparently holding something was consistent with a person who did not want to drop a valuable item, such as a cell phone. *Pridgen*, 134 A.3d at 304. Therefore, officers had no reasonable suspicion of criminal activity until Pridgen dropped his cell phone and declined to pick it up. *Id.* at 304. After dropping his cell phone, Pridgen's actions reasonably lead an officer to conclude that Pridgen was not safeguarding a valuable item, but that he was trying to keep officers from seeing contraband. *Id.* at 304. This critical component is missing from the instant case. Benson's actions were consistent with running while not wanting to lose a valuable item, such as his cell phone. Unlike in *Pridgen*, nothing occurred in this case to dispel that inference.

Third, Benson immediately complied with Officer Anderson's order to stop. In *Pridgen*, this Court found significant that, even though officers had their guns drawn and

told him to stop and get on the ground, Pridgen continued to move his hand around his pocket. This gave the officers a reasonable basis to worry that if Pridgen was unable to get into the apartment, he was going to turn on them with a gun. *Id.* at 305. Given the significant differences from the facts in *Pridgen*, the trial court erred in denying Benson's motion to suppress evidence.

Subsequent to *Pridgen*, this Court addressed the significance of flight from police in *Miles*, 181 A.3d 633. In that case, officers received an anonymous call that a black male with a blue army jacket was shooting a gun in the air in the 4500 block of Texas Avenue, SE. *Id.* at 635. An officer responding to the call saw Everett Miles, who appeared to be wearing an army-type camouflage jacket. *Id.* at 635. Another officer was walking behind Miles and pointing to him. *Id.* at 636. The officer drove onto the sidewalk where Miles was walking, slightly got out of the car, and asked Miles to stop. *Id.* Instead of stopping, Miles ran. *Id.* The officer pursued on foot, caught up to him, and grabbed Miles's waistband from his back. The officer felt a hard object and "called out gun" to the other officers. *Id.* Another officer then retrieved a gun from Miles's waistband. *Id.*

Addressing whether the police had reasonable suspicion to stop Miles, this Court analyzed whether Miles's flight sufficiently corroborated the tip so that police could reasonably suspect that Miles was carrying a gun. *Id.* at 639-41. This Court stated that flight can be a relevant factor, but does not imply consciousness of guilt in all cases. *Id.*

at 641. Rather, "[t]here are myriad reasons an innocent person might run away from the police." *Id.* "An individual may be motivated to avoid the police by a natural fear or dislike of authority, a distaste for police officers based upon past experience, an exaggerated fear of police brutality or harassment, a fear of being apprehended as the guilty party, or other legitimate personal reasons." *Id.* at 641 (quoting *In re D.J.*, 532 A.2d 138, 142 n.4 (D.C. 1987)).

This Court reasoned that Miles's flight was not unprovoked in the same way as in *Wardlaw* because the officer in *Miles* pulled his cruiser in front of Miles, blocking his path, and told him to "stop," which would be startling and possible frightening to many reasonable people. *Id.* at 643-44. This Court then concluded that police lacked reasonable suspicion to subject Miles to a *Terry* stop. *Id.* at 645-46. The same reasoning applies here.

In this case, there was even less reason to suspect Benton of involvement in criminal activity. There was no report of criminal activity at or immediately before the officers' arrival. Rather, there were three individuals wearing balaclavas on a cold day, not doing anything illegal. Nonetheless, the two police vehicles, with three officers in each, stopped abruptly across the center yellow line about one car length away from the blue car. A body worn camera video, captures the police cruisers coming to a screeching halt in front of the blue vehicle. Defense Exhibit 1. This aggressive approach by the officers would be startling and possibly frightening to a reasonable person.

Furthermore, there was nothing about the way Benson ran that gave the police reasonable suspicion that he was armed. The video shows Benson running with both arms swinging, which was not consistent with a person holding a gun. Defense Exhibit 1. And there was nothing illegal or unusual about wearing a balaclava on a cold day. In another video after Benson's arrest, Benson asks an officer to pull his hood up; and an officer is heard commenting that it was "definitely cold." Defense Exhibit 3,

The trial court found that police observed Benson make a hand gesture near his waistband at some point. However, this Court has stated that, "[t]here is nothing particularly suspicious about adjusting or manipulating one's waistband in itself, an action perfectly consistent with too many innocent explanations . . . For example . . . hiking up his pants, resetting his underwear, or adjusting his belt . . . " *Maye v. United States*, 260 A.3d 638, 645 (D.C. 2021) (citations and quotations omitted). "If the behavior of a suspect is capable of 'too many innocent explanations,' then the intrusion cannot be justified." *Duhart v. United States*, 589 A.2d 895, 899 (D.C. 1991) (citation omitted).

Furthermore, even unprovoked flight does not meet the requirement for particularized suspicion. In *Posey*, 201 A.3d 1198, officers received a lookout five to ten minutes after a robbery at gunpoint was reported. The first lookout was for a black man dressed in all black, and then there was a second lookout for a group of black males. Spotting a group of black males mostly dressed in black, an officer drove up within 15

feet of the group. At that time, one member of the group, Deandre Posey, took off running. Posey was apprehended and handcuffed because the lookout was for a robbery with a gun. Officer patted him down for safety and found a gun in Posey's waistband.

This Court held that, even with unprovoked flight, officers lacked particularized suspicion to justify a *Terry* stop. "[A] nondescript individual distinguishing himself from an equally nondescript crown by running away from officers unprovoked, does not, without more, provide a reasonable basis for suspecting that individual of being involved in criminal activity and subjecting him or her to an intrusive stop and police search." *Posey*, 201 A.3d at 1204.

C. Officers did not have reasonable suspicion to frisk Benson

It bears emphasizing that, even if, arguendo, officers had reasonable articulable suspicion that Benson was engaged in illegal conduct, which Benson does not concede, they nevertheless did not have reasonable suspicion that he was armed and dangerous to justify a search for weapons. This Court's reasoning in *Golden*, 248 A.3d 925, is instructive. In that case, on an evening in June, four officers from the Metropolitan Police Department's Gun Recovery Unit were patrolling in two police cars when they spotted Brandon Golden walking alone. One police car turned and stopped at the curb in front of Golden, and the second police car stopped in a perpendicular position to the first car. *Id.* at 931. Golden "froze," appearing "surprised" and "nervous." *Id.* at 932. Golden was wearing a short-sleeved polo shirt with a sweatshirt tied around his waist.

Id. at 932. One of the officers testified that he found the sweatshirt strange because it was a warm evening in June. *Id.* at 932. The officer saw "a bulging object" on Golden's right hip under his polo shirt, but the officer could not see it well because of the sweatshirt. *Id.* at 932.

The officer, who remained in the car, asked Golden whether he had any weapons on him. Golden responded that he did not. *Id.* at 932. The officer then asked, "can you just show me your waistband[?]" *Id.* at 932. Golden, who was holding a cigar in his right hand, used his left hand to pull up the middle and left side of his shirt. *Id.* at 932. The officer suspected that Golden was trying to avoid raising the right side of his shirt where the bulge was. *Id.* at 932. The officer said, "I can't see your waistband because of the sweatshirt." *Id.* Golden then removed the sweatshirt and displayed it. In doing so, Golden blocked the officer's view of the bulge. *Id.* The officer believed Golden "either was confused or trying to be evasive" and suspected that the bulging object was a handgun. *Id.* at 932. The officer exited the car, walked up to Golden, and said, "I can't see your waistband now because you're showing me the sweatshirt. What do you have?" *Id.* at 932. The officer frisked the bulge and felt what he deemed to be a revolver. *Id.* at 932.

This Court held that the officer unconstitutionally seized Golden by subjecting him to accusatory questioning and asking him to expose his waistband without a reasonable basis to suspect him of criminal activity. *Id.* at 936. This Court further held

that, even if Golden was not seized until he was frisked, the search was unconstitutional because the officer lacked reasonable suspicion that Golden was armed. *Id.* at 941. This Court rejected the government's argument that reasonable suspicion was established by the bulge on Golden's right hip; it's partial concealment by the sweatshirt; Golden's failure to provide an innocent explanation and possibly evasive actions; and Golden's apparent nervousness. *Id.* at 941-42. This Court concluded that, under the totality of the circumstances, the officer "did not have objectively reasonable grounds to suspect Mr. Golden of being armed and dangerous—the grounds necessary to justify frisking him." *Id.* at 946.

As explained previously, the factors relied upon by the trial court do not support reasonable suspicion of criminal activity, and even less so that Benson was armed and dangerous. The officers were not investigating a particular report of a crime. There was only testimony that there had been a report of gunshot sounds in the area a day or more previously. But there was no evidence that Benson was in any way involved.

Benson's flight also did not give rise to reasonable suspicion that he was armed. It is not surprising that Benson wanted to leave when six officers in two police cars aggressively approached and abruptly stopped in front of him. The trial court found that Benson touched his waistband either before or during his flight, and initially he ran with both arms swinging, but later ran with one arm in front of his body. Benson's

actions are consistent with too many innocent explanations to give rise to reasonable suspicion of being armed. *See Maye*, 260 A.3d at 645; *Duhart*, 589 A.2d at 899.

The officer in this case did not see a gun or even a bulge at the waistband suggesting a gun. Touching the waistband is perfectly consistent with innocent behavior such as adjusting a belt. And running while holding one hand in front of one's body is consistent with safeguarding a valuable item, such as a cell phone.

Moreover, Benson initially ran with both arms swinging, which is not consistent with holding a gun. And even when he ran with one arm in front of his body, the officer could not see what Benson was doing with that arm. "[A] protective frisk or pat down for weapons in the course of a reasonable stop is still an unreasonable search if it is conducted without 'a reasonable articulable suspicion that the person [the police] have detained is armed and dangerous.'" *Golden*, 248 A.3d at 933-34 (quoting *Henson v. United States*, 55 A.3 859, 867 (D.C. 2012)). Benson's statement and seizure of the gun were the product of an illegal search and should have been suppressed.

II. Mr. Benson's convictions were obtained in violation of the Second Amendment.

The Second Amendment commands that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held "on the basis of both text and history" that the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation." *Id.* at 592, 595. In *New York State Rifle & Pistol*

Association v. Bruen, 142 S. Ct. 2111 (2022), the Supreme Court held that the Second Amendment right to possess and carry a firearm for self-protection extends outside the home, and that "may-issue" licensing schemes that grant officials "discretion to deny licenses [to carry pistols in public] based on a perceived lack of need or suitability" are unconstitutional. *Id.* at 2123, 2156. In addition, *Bruen* mandated a stringent "text-and-history standard" for analyzing Second Amendment challenges, *id.* at 2138.

In *Bruen*, the Court considered New York's requirement to show "proper cause" before an applicant could obtain an unrestricted license to carry a firearm outside a home or place of business. New York courts interpreted "proper cause" to require a showing of special need. *Id.* at 2123. The Court noted that 43 states were "shall issue" jurisdictions that did not give the licensing authority the discretion to deny a permit once threshold requirements were met. New York was among six states and the District of Columbia to have "may issue" licensing laws giving authorities the discretion to deny licenses even when the applicant satisfied the statutory criteria. *Id.* at 2123-24.

The Court in *Bruen* rejected the two-step analysis employed by many courts of appeal in Second Amendment cases.[3] Instead, the Court made clear this standard:

[3] Under the two-step process, first, the government may justify its regulation by establishing that the law regulates activity falling outside the scope of the right as it was originally understood. *Bruen*, 142 S.Ct. at 2126. If the regulated activity falls within the scope of the right, then the analysis proceeds to a second step, whereby the court analyzed how close the law comes to the core of the Second Amendment right, and the severity of the law's burden on that right, to determine the level of scrutiny to apply.

> When the Second Amendment's plain test 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."

Id. at 2129-30 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n.10 (1961)). Because constitutional rights "are enshrined with the scope they were understood to have when the people adopted them," *id.* at 2136 (quoting *Heller*, 554 U.S. at 634-35), the government must prove that the challenged statute is consistent with "the public understanding of the right [to keep and bear arms] when the Bill of Rights was adopted in 1791," *id.* at 2137.

Not only must the historical precedent identified by the government be contemporaneous with the adoption of the Second Amendment, but any such precedent must be "a well-established and representative historical analogue" to the modern-day statute at issue. *Id.* at 2133 (emphasis omitted). While the historical analogue need not be a "historical twin," it must "impose a comparable burden on the right of armed self-defense," and it must also be "comparably justified." *Id.*; *see also id.* at 2131.

Prior to trial, Mr. Benson filed a motion to dismiss the indictment, arguing that the District of Columbia's firearms-related laws were unconstitutional under the Second Amendment after the U.S. Supreme Court's decision in *Bruen*. The trial court denied the motion, stating:

> I'm going to rule with great brevity and no scholarship whatsoever Bruen did not invalidate our gun laws. Bruen Specifically addressed a law in New York that is no longer our law because of the Whren decision in the circuit. Bruen did not say or suggest that licensing requirements in the District of Columbia are a violation of the Second Amendment. Did not say or suggest that the limitations on magazine capacity are a violation of the Second Amendment. And D.C. Court of Appeals president has expressly upheld the constitutionality of the statutes at issue in this case. For all of these reasons I deny the motion to dismiss on Second Amendment grounds so that the Bruen motion is denied.

Tr. 4/11/23 p. 12.[4] The trial court failed to consider *Bruen*'s holding that, when the government seeks to regulate the possession and carrying of firearms, it bears the heavy burden of proving that its regulations are justified by "distinctly similar" historical analogues that were well-established, representative, and enforced at the time the Second Amendment was adopted. *Bruen*, 142 S.Ct. at 2131, 2133.

Mr. Benson's charges for possession of unregistered firearm, unlawful possession of ammunition, and carrying a pistol without a license, rest on the District of Columbia's unconstitutional requirement that all firearms be registered by their owners. To obtain a registration certificate for a firearm, a person must satisfy a lengthy list of requirements and provide detailed information to police. *See* D.C. Code §7-2302.03(a) (2001 ed.). Without a registration certificate, no ordinary person may possess

[4] In *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. 2017), this Court permanently enjoined D.C. Code provisions limiting licenses for concealed carry of handguns to those showing a "good reason to fear injury to his or her person or property or has any other proper reason for carrying a pistol . . . " D.C. Code §22-4506. *Wren*, 864 F.3d at 655. To satisfy the "good reason" criteria, applicants had to show a "special need for self-protection." *Id.*

a firearm or ammunition, D.C. Code §§7-2502.01(a), 7-2506.01(a)(3), or obtain a license to carry a pistol in public, D.C. Code §7-2509.02. This statutory scheme cannot survive constitutional scrutiny under *Bruen* because the government cannot meet its burden to prove that the District of Columbia's firearm registration requirement is "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S.Ct. at 2126. As then-Judge (now-Justice) Kavanaugh explained in his dissenting opinion in *Heller v. District of Columbia*, 670 F .3d 1244 (D.C. Cir. 2011) ("*Heller II*"), "D.C.'s law requiring registration of all lawfully possessed guns in D.C. is not part of the tradition of gun regulation in the United States" and "even today remains highly unusual." *Id.* at 1270, 1294 (Kavanaugh, J., dissenting). "D.C.'s registration requirement is therefore unconstitutional" under the Supreme Court's "history- and tradition-based test" *Id.* at 1270.

Additionally, the District's licensing regime is unconstitutional because it grants the Chief of Police "discretion to deny licenses based on perceived lack of . . . suitability" and therefore is the type of "may-issue" licensing regime that *Bruen* held unconstitutional. *Bruen*, 142 S.Ct. at 2156. Unlike the "narrow, objective, definite standards" that characterize "shall-issue" licensing regimes, the "suitability requirements" promulgated and enforced by the MPD are characteristic of unconstitutional "may-issue" regimes because they require the licensing official to

engage in "the appraisal of facts, the exercise of judgment, and the formation of an opinion." *Bruen*, 142 S.Ct at 2138 n.9 (internal citation and quotation marks omitted).

Because D.C. Code §22-4506(a) states that the Chief of Police "may" issue, and not "shall" issue, a license "if it appears" that the applicant is "a suitable person," the Chief retains discretion to deny a license even if the applicant satisfied the vague and subjective suitability requirements. Such a discretionary licensing scheme has no historical precedent and suffers from the same constitutional flaws as the "may-issue" licensing regime struck down in *Bruen*.

Additionally, the District's total ban on ammunition feeding devices with a capacity of more than 10 rounds under D.C. Code §7-2506.01(b), is also unconstitutional after *Bruen*. The statute precludes all people from possessing an entire class of "arms"—conduct presumptively protected by the plain text of the Second Amendment. Although there is a historical tradition of prohibiting the carrying of "dangerous and unusual weapons," "the second Amendment protects the possession and use of weapons that are 'in common use at the time.'" *Bruen*, 142 S.Ct. at 2128 (quoting *Heller*, 554 U.S. at 627). Because magazines capable of holding more than 10 rounds of ammunition are "in common use today for self-defense," *Bruen*, 142 S.Ct. at 2134 (quotation marks omitted), and standard issue with the most popular handguns used for self-defense by law enforcement and civilians alike, their total prohibition violates the Second Amendment.

In *Heller II*, the D.C. Circuit upheld D.C. Code§ 7-2506.0l(b) under the then-prevalent "two-step approach," 670 F .3d at 1252, 1262. However, this decision is neither binding nor instructive after *Bruen*. As the D.C. Court of Appeals has repeatedly recognized, D.C. Circuit decisions applying the Second Amendment are not binding on the District's Article I courts. *See Dubose v. United States*, 213 A.3d 599, 604 (D.C. 2019) ("We are not bound by [the D.C. Circuit's decision in] *Wrenn*, and the fact that a constitutional issue is presented here does not compel us to give greater weight to the circuit court's opinion." (quotation omitted)); *Hooks v. United States*, 191 A.3d 1141, 1144 n.3 (D.C. 2018) (same). In any case, *Heller II* has been abrogated by *Bruen* and is no longer good law. In *Heller II*, the D.C. Circuit assumed that D.C. Code§ 7-2506.0l(b) impinged upon a right protected by the Second Amendment but held it was nonetheless constitutional because it survived intermediate scrutiny under the second step of the "two-step" analysis, id at 1261-62, that *Bruen* explicitly rejected as "one step too many," 142 S. Ct. at 2127.

Because the statutes under which Benson was convicted are unconstitutional, his convictions and sentences should be reversed.

CONCLUSION

The trial court erred in denying Mr. Benson's motion to suppress evidence because officers lacked particularized suspicion to stop Mr. Benson and, further, lacked particularized suspicion that he was armed and dangerous to justify a search. Because the stipulated facts leading to Mr. Benson's convictions were conditioned on the admission of illegally obtained evidence, his convictions must be reversed. Furthermore, the statutes Mr. Benson was convicted of violating are unconstitutional under the Second Amendment. For this additional reason, Mr. Benson's convictions should be reversed.

Respectfully submitted,

S/ *Sicilia C. Englert*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of December, 2023, this filing was served on the Respondent via this Court's e-filing system for which the Respondent's Attorney of Record has registered and thereby consented to electronic services.

S/ *Sicilia C. Englert*

Sicilia C. Englert

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;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(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 or under evaluation for substance-use-disorder services.

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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G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

S/ Sicilia Englert

Signature

23-CF-514

Case Number(s)

Sicilia Englert

Name

12/29/2023

Date

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