COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

FRANKLIN COUNTY

FAR-

APPEALS COURT
2019-P-0019

COMMONWEALTH

V.

JOSHUA DAVOREN

ON APPEAL FROM
CONVICTIONS AND SENTENCE IN THE
FRANKLIN SUPERIOR COURT

DEFENDANT'S APPLICATION FOR FURTHER APPELLATE REVIEW

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I. REQUEST FOR FURTHER APPELLATE REVIEW

Defendant Joshua Davoren applies pursuant to Mass. R. A. P. 27.1 for further appellate review of his convictions of unlawful possession of a shotgun and ammunition under G. L. c. 269, § 10(h)(1) and of the sentence enhancement imposed under G. L. c. 269, § 10G(a). Mr. Davoren was convicted for safely exercising his core, Second Amendment right under a statute that criminalizes constitutionally-protected conduct and promotes racial inequality. The statute is facially unconstitutional, and Mr. Davoren's convictions cannot stand.

The core right protected by the Second Amendment is the right to keep and bear arms in one's own home for personal protection. *District of Columbia v. Heller,* 554 U.S. 570, 595 (2008). Mr. Davoren was convicted for doing just that. Under § 10(h)(1), *no one* in Massachusetts – including every responsible, law-abiding citizen with an FID card – has the "right" to keep a shotgun, rifle, or handgun in their home. This is because one remains subject to prosecution and conviction merely by knowingly possessing the gun. *Commonwealth v. Powell*, 459 Mass. 572, 582 (2011). Contrary to the Appeals Court's view, "compliance with

the requirement to obtain an FID card" *does not confer* the right to possess "a shotgun in one's home" (*Memo*, n.1); it confers only the fettered "right" to raise an affirmative defense if prosecuted. *Commonwealth v. Parzick*, 64 Mass. App. Ct. 846, 852 (2005). Law enforcement is entitled to prosecute anyone in possession, and a jury can reject an affirmative defense.[1]

The problem with this interpretation of § 10(h) is not *just* that it renders the exercise of the core, 2nd Amendment right, even by law-abiding citizens, a crime; or that it violates due process by imposing a presumption of guilt upon even those with FID cards. The deeper, hidden problem is that the statute, in operation, is fundamentally racist. Because *everyone's* possession is unlawful, law enforcement has total discretion against whom to enforce the law. Massachusetts' draconian gun laws are enforced primarily against Blacks. See "Racial Disparities in the

[1]Prosecutors may be unlikely to prosecute those with FID cards, but this is an exercise of prosecutorial discretion, not observance of an *enforceable*, constitutional right. Cf. *New York State Rifle & Pistol Association, Inc. v. New York*, 140 S.Ct. 1525, 1526-1527 (2020) (although government's 2nd Amendment violation was remedied before oral argument, remanding to lower court on question of damages).

Massachusetts Criminal Justice System," Elizabeth Bishop et. al, CRIMINAL JUSTICE POLICY PROGRAM, Harvard Law School (September 2020)(hereinafter "*Racial Disparities*").

Over 70% of defendants charged with carrying an unlicensed firearm are Black or Latinx (*Racial Disparities*, 50). Black defendants account for 72% of those charged with a second offense. *Id.* at 42. Blacks comprise 6.5% of the state population but in 2010 accounted for 51.4% of defendants convicted of a firearm offense carrying a mandatory minimum sentence. *Id.* at 13, 50. In 2012, Blacks comprised 16.4% of all defendants but 46.6% of those convicted of a firearm offense. *Id.* at 50. 47.2% of defendants sentenced under G. L. c. 269, § 10G on the basis of one prior conviction of a violent crime/serious drug offense are Black, only 24.5% are white. *Id.* at 43.

There is no evidence that Massachusetts' exceptionally punitive gun laws serve any public safety interest.[2] *Id.* at 51-52, n. 76. Just the opposite.

[2]Stating that punitive gun laws "promot[e] the health, safety, and welfare of the law-abiding public," does not make it so. *Memo*, at 4 n.3. Neither the Commonwealth nor the Appeals Court offered evidence to support such assertions. And, non-FID cardholders are members of the public whose health, safety and welfare matters. Years of incarceration for exercising a core, constitutional

"Merely possessing a firearm – albeit without authorization – is not necessarily dangerous…[but] the punishment if found guilty is often severe and non-discretionary." *Id.* at 48. Black defendants charged with a firearm offense "are more likely to be convicted and sentenced to incarceration and they also receive substantially longer incarceration sentences than similarly situated White defendants." *Id.* at 44. The direct and collateral consequences of those convictions harm defendants, their families, and their communities, adding to the many harms caused by systemic racism.[3]

Research demonstrating the effects of implicit bias substantiates the foregoing findings. Implicit bias against Blacks undoubtedly contributes to the stark disparity in gun law enforcement. Blacks are more likely than Whites to be perceived as dangerous, *id.* at 51-52, n.76, and are disproportionately stopped, arrested, held

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right to protect one's self and home does not serve the safety of this public.

[3]A recent example of the harm disproportionately inflicted upon communities of color by irrationally punitive gun laws: pretrial detainees charged with unlicensed gun possession are, like alleged murderers and rapists, not entitled to a rebuttable presumption of release in order to escape the increased risk posed by COVID-19 in jails. *CPCS v. Chief Justice of the Trial Court*, 484 Mass. 431, 454 (2020).

pretrial, and charged with violent crimes.[4] *Id.* at 18-25. Criminalizing all possession by all persons while leaving law enforcement with absolute discretion to decide who should be prosecuted may serve political ends, but it does not serve public safety. Driving poses a greater threat to public safety than gun violence, yet this Court recently revised its jurisprudence to ameliorate the consequences of selective enforcement in the context of motor vehicle stops.[5] See *Commonwealth v. Long*, 485 Mass. 711, 712-713, 736 (2020)("it is the unanimous view of this court that the prohibition against racial profiling must be given teeth.")(Gants, J., concurring).

In light of this newly available data, this Court should revisit its decisions in *Powell*, *supra,* and progeny. A conviction for possession of an unregistered gun, in Massachusetts, carries a lifetime of collateral consequences, not least of which is the permanent loss of the right to protect one's self and one's family at

[4]See Elizabeth Hinton, LeShae Henderson, Cindy Reed, "An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System." VERA INSTITUTE OF JUSTICE (May 2018).

[5]See CDC National Vital Statistics Reports, Vol. 68, No. 9 (June 24, 2019), Table 7 (showing that in 2017 motor vehicle accidents caused slightly more deaths per capita than all firearm related deaths).

home.[6] For these reasons, Davoren asks this Court to examine on further appellate review whether an interpretation of G. L. c. 269, § 10(h)(1) that undermines public safety and leaves the door of selective enforcement wide open is narrowly tailored to serve a compelling state interest.

II. STATEMENT OF PRIOR PROCEEDINGS

On May 15, 2015, Davoren was indicted for eight offenses: 1) possession of a shotgun without an FID card and 2) possession of ammunition without an FID card, both under G. L. c. 269, § 10(h)(1); and both enhanced under G. L. c. 269, § 10G(b) with prior district court convictions of assault and battery ("A&B) and assault with a dangerous weapon ("ADW); 3) Possession with intent to distribute ("PWID") Class A, G. L. c. 94C, § 32(a); 4) PWID/cocaine, G. L. c. 94C, § 32A(c); 5) PWID/Class B, G. L. c. 94C, § 32A(a); 6) PWID/Class B, G. L. c. 94C, § 32A(a); 7) PWID/Class B, G. L. c. 94C, § 32A(a); and 8) Possession of a Firearm during commission of a felony, G. L. c. 265, § 18B.[7] RA/28-37. Before

[6]The trial prosecutor argued in closing that if the defendant felt unsafe at home, "[h]e could have moved." T2/63. But buying a home in a gated community is hardly an option for an indigent defendant.

[7]References to the three volumes of trial transcript appear as: T1/page #; T2/page #; T3/page #; to the

trial, the Commonwealth reduced all the PWID charges to simple possession and nolle prossed Counts 5, 7, and 8. T1/3-4. Davoren pled guilty to simple possession charges on Counts 3, 4, and 6. T1/35.

Trial on Counts 1 and 2 occurred on June 4, 5, and 6, 2018 (Ford, J.). Davoren was convicted on both counts. The same jury tried the sentence-enhancements under §10G(b). Davoren was convicted of having previously been convicted of one violent crime. RA/24. He was sentenced to 4.5 – 7 years, concurrent, on Counts 1 and 2. RA/24.

A timely notice of appeal was filed on June 13, 2018. RA/438. The case was docketed in the Appeals Court on January 8, 2019. Oral argument before Justices Meade, Sullivan, and Sacks was held on October 14, 2020. On November 16, 2020, the panel issued a Memorandum and Order Pursuant to Rule 23.0 ("*Memo*") affirming the convictions.

III. STATEMENT OF RELEVANT FACTS

Trial. Sergeant Michael Baker testified that on March 26, 2015 he possessed a warrant to search Davoren's home for a shotgun. T1/99, 101-102. At 5:06

Addendum of Davoren's brief as A/page #, and to the Record Appendix of his brief as RA/page #.

a.m., fourteen officers went to Davoren's home. T1/104. No one knocked. A "breacher" used a ram to "open the door." T1/104. Baker entered carrying an M4 Colt-Commando assault rifle. T1/104. At least four others had such weapons. T1/109. Upon entry, Baker observed Davoren lying in bed. T1/105. His hands were up. T1/105. The shotgun was "next to his right thigh." T1/105. Davoren was compliant with the officers. T1/105-106, 110-111. The shotgun contained five shotgun shells. T1/138; T2/6, 28-29. No other ammunition was found. T2/9. When asked why he had the shotgun, Davoren, "stated that he had been robbed, and he had it for protection." T2/16. Police found approximately $18,800 in the house. T2/16. The money was old, dating from the 1980s. T2/18. There was no factual dispute at trial that Davoren had found the money in his basement. T2/45-46.

At the close of the Commonwealth's case in chief and the close of all evidence, the defense moved for a required finding of not guilty under the 2nd and 14th Amendments, citing *Heller* and *McDonald*. T2/39-40; A/43-46. The motions were denied. T2/41. The jury found Davoren guilty of both counts. T2/92.

Sentence Enhancement Trial. The sentence enhancements were tried before the same jury. The

parties disagreed on what the Commonwealth had to prove, what evidence was admissible, and what jury instructions were required.[8]

The alleged prior convictions for "violent crimes" were a 2011 Assault & Battey ("A&B") and a 2009 Assault with a Dangerous Weapon ("ADW"), both involving pleas in Orange District Court. RA/29. Before trial, Davoren moved to voir dire two prosecutors on the Commonwealth's witness list to determine whether they were competent to testify from personal knowledge. T2/98-99; RA/402. The motion was denied. RA/23, 24.

Davoren contested both that the conduct underlying either prior offense involved violence and that he admitted at the plea committing a "violent" crime involving the use, attempted use, or threatened use of physical force against another. Identity was not in dispute. The Commonwealth called the prosecutors who handled the pleas.

ADW. Former prosecutor Jeffrey Bengsten handled

[8]This Court's decision in *Wentworth* had not been decided at the time of trial. *Commonwealth v. Wentworth*, 482 Mass. 664 (2019). Davoren did *not* press on appeal trial counsel's arguments that the Supreme Court's version of the "modified categorical approach," under the federal ACCA was controlling. See *Memo*, at 5-6. Neither party's proposed interpretation of § 10G was adopted in *Wentworth*, as discussed *infra*.

Davoren's ADW plea. T3/24. Bengsten testified that unidentified "reporting parties" told police that "Davoren got in his vehicle, backed up and sort of revved the engine, and sped away, causing [the victim] to jump out of the way." T3/26. Davoren's hearsay objection was overruled. T3/27. On cross, Bengsten admitted that, according to the police report, Davoren denied driving at or near the victim and that Bengsten arrived at his version of the facts by interpreting the police report. T3/39-40. Bengsten never spoke to Davoren and his basis of knowledge was reading the police report. T3/39. The Commonwealth did not call anyone who witnessed the alleged offense, nor submit a transcript of the plea colloquy, nor elicit evidence of what Davoren said at the plea colloquy.

Davoren testified that he had intentionally revved his engine to scare someone as he left a parking lot and his attorney told him, "since I admitted to scaring him by revving my engine that I was automatically guilty. So my attorney told me I had to plead guilty and that is what I did." T3/75. Davoren denied driving at the victim, denied committing a violent crime, and denied that he intended to admit committing a violent crime. T3/75-76. Davoren was not informed by anyone that his

admitted conduct would qualify as a "violent crime" for which he could later be punished. T3/75-76.

During Davoren's cross-examination, when Davoren agreed that he had intended to scare the victim by revving his engine, ADA Bucci informed the jury: "That is by its very definition an assault by means of a dangerous weapon." T3/80. Counsel's objection was overruled. T3/80.

A&B. Former prosecutor Beth Lux testified that she handled Davoren's A&B plea. Lux described Davoren's conduct in detail, even though she wasn't there and did not recall speaking to any witnesses. T3/48-49. She testified over objection that an argument "erupted" between Davoren and his mother. Davoren "went after his mother. She was forced to the floor, and he took the phone away from her." T3/48. On cross, Lux admitted that, according to the police report, Davoren's mother *fell* when Davoren grabbed her, and there was nothing in the report about how forceful the grabbing had been. T3/56-57. However, Lux concluded that Davoren's grabbing was "forceful" because his mother "showed up at the police station barefoot." T3/57. Lux told the jury that Davoren's denial was irrelevant: "the defendant's story is not relevant in a plea." T3/58. On cross, Lux

conceded that she did not know "what type of assault and battery he was pleading to." T3/55.

Davoren testified that he was held for five months pretrial. His attorney never explained the elements of A&B to him, but told him if he pled guilty he could be released that day, so he pled. T3/77-78. On the day of the incident, he grabbed his mother by the shoulder, but he did not grab her hard, he did not push her, and he did not make her fall. T3/78-80.

Davoren's mother testified that her son had touched her arm and, contradicting the prosecutor's testimony, Davoren did not throw her to the ground. T3/68. On cross, over objection, she read her police statement into evidence. T3/69. It included allegations that Davoren "became violent" by yelling at her, that he "ripped the phone out of the wall," and that "He had a hold of my shoulder, and I fell down." T3/69-70. On redirect, she explained that when she gave her statement, she was upset, the officers helped her write it, and the officers wanted her to include allegations of violence. T3/71.

Trial counsel moved for required findings of not guilty at the close of the Commonwealth's case, at the close of evidence, and in a post-verdict motion pursuant

to Mass. R. Crim. P. 25(b). RA/419-433. The motion raised multiple grounds, all of which were denied.[9]

As to ADW, the judge instructed:

> "Now, the crime of assault with a dangerous weapon, of course, is different in that that crime by its nature involves the use, attempted use or threatened use of physical force with a dangerous weapon against the person of another."

T3/99-101. During deliberations, the jury first asked:

> "we are seeking clarification as to whether or not we are to decide if he was rightly convicted of violent crimes (or just convicted)."

T3/107(emphasis in original). Over defense objection the judge instructed that they should only consider whether the defendant was "convicted of violent crimes." T3/108. Next, the jury asked:

> "are we just deliberating on the idea of Joshua having been convicted of the crime or the idea of them being violent?"

T3/109. The court answered, "both"; but over objection

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[9]Those grounds were: the underlying shotgun possession conviction was invalid, a 10-year mandatory sentence for a misdemeanor shotgun-possession offense is constitutionally cruel and unusual, use of the defendant's prior pleas from seven and nine years earlier to impose the sentence violates due process, neither alleged predicate is a "violent crime" under the categorical approach, the Commonwealth failed to prove either predicate involved substantial physical force against another and that either offense is punishable by a term exceeding one year, the witnesses were not competent to testify where their "entire testimony was based upon a review of the police reports." RA/435, RA/424-428, 433-437.

further instructed:

> "assault with a dangerous weapon, the Commonwealth claims, falls under the definition of a crime that has as an element the use, attempted use or threated use of physical force."

T3/111-113, 113. On both counts (possession of a shotgun and ammunition) the jury found Davoren guilty of the lesser-included offense of having one prior conviction for a violent crime. T3/116.

The Appeals Court rejected Davoren's 2nd Amendment claims under this Court's precedents in *Powell*, *supra*; *Commonwealth v. Loadholt*, 460 Mass. 723 (2011), and *Commonwealth v. Harris*, 481 Mass. 767 (2019). *Memo*, 1-4.[10] In holding the trial was fair despite, inter alia, the admission of hearsay, the panel did not apply *Wentworth,* 482 Mass. at 676 (same procedural protections apply at 10G trial). The panel held instead that the Commonwealth's burden was to prove the facts it had recited earlier at the prior plea colloquies. *Memo*, 11.

[10]Contrary to the panel's assertion, Davoren's 2nd Amendment facial challenge was *not* raised for the first time on appeal. *Memo*, 1. It was raised in a motion for required finding, but concededly not in a pretrial motion to dismiss. See T2/40-41 ("This is a 10H case…I don't think that this has been something that's been examined at the federal level. I don't think that the Massachusetts statute, regarding 10H, Residential Possession of a Firearm, has been examined as to whether or not that is constitutionally valid.")

IV. POINTS UPON WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. Whether Davoren's convictions for possession of a shotgun and ammunition at home under G. L. c. 269, § 10(h)(1) violate the Second Amendment where: (i) the statute is facially invalid; (ii) the statute is unconstitutional as applied to Davoren; and (iii) application of the doctrine of non-justiciability to Davoren's as-applied claim is unconstitutional.

2. Whether the G. L. c. 269, § 10G jury trial was conducted in violation of governing evidentiary and constitutional rules, and the resulting sentence was imposed in violation of Due Process and the 2nd and 8th Amendments.

3. Whether the motion judge erred in denying Davoren's motions to suppress, for a *Franks/Amral* hearing, and for the identity of the confidential informant, where the affidavit in support of the search warrant failed to demonstrate the veracity of the purported confidential informant, and Davoren made a substantial preliminary showing that the purported informant was fabricated by police.

V. ARGUMENT

A. G. L. c. 269, § 10(h)(1) is facially invalid because it renders the exercise of the core, Second Amendment right a crime, even when exercised by law-abiding citizens.

The Second Amendment protects the right to keep arms. *District of Columbia v. Heller,* 554 U.S. 570, 595 (2008). At its core, it protects "the inherent right of self-defense" in one's home. *Id.* at 628. It applies to the states via the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Shotguns are in the category of protected arms. See *Heller v. District of Columbia*, 670 F.3d 1244, 1259-1260 n.9 (D.C. Cir. 2011). Davoren was convicted for exercising this right.

Section 10(h)(1) states:

> "Whoever owns, possesses or transfers a...shotgun or ammunition without complying with the provisions of section 129C of chapter 140 shall be punished by imprisonment…for not more than 2 years."

Section 129C of chapter 140 states:

> "[n]o person...shall own or possess any...shotgun or ammunition unless he has been issued a firearm identification card by the licensing authority pursuant to the provisions of [G. L. c. 140, § 129B]."

G. L. c. 140, § 129C.[11] The area covered by § 10(h)(1) is

[11]The licensing authority may issue an FID card if the individual completes the application, is not a prohibited person, and is a suitable person. G. L. c. 140, § 129B.

one's home or business. *Commonwealth v. Powell*, 459 Mass. 572, 587 (2011). While § 10(h)(1)'s text suggests it prohibits possession *without an FID card*, lack of an FID card is not an element:

> "[T]he Commonwealth does not need to present evidence to show that the defendant did not have a license or FID card because the burden is on the defendant, under G.L. c. 278, § 7, to come forward with such evidence."

Powell, 459 Mass. at 582. Proof the defendant knowingly possessed the gun is all that is required to prosecute. *Id. at 587.* Consequently, even compliance with FID registration requirements does not confer the Second Amendment right to possess a shotgun at home; it confers the limited "right" to assert an affirmative defense if prosecuted. *Id*. Law enforcement remains free to prosecute anyone exercising the core right, and a jury is free to reject the defense.

The statute is facially invalid because there are no circumstances in which a Massachusetts resident maintains a core, unfettered right to possess a shotgun at home. To escape conviction under § 10(h)(1), even a defendant with an FID card "must produce evidence that will exculpate him," and hope the jury believes it. Com. Br., 26; see *Memo*, 15 n.8. Requiring a defendant to present evidence of innocence imposes an

unconstitutional presumption of guilt upon *everyone* who exercises this core right. The Supreme Court reversed a defendant's conviction under a statute that operated similarly. See *Haynes v. United States*, 390 U.S. 85, 95 (1969)(reversing defendant's conviction for possession of *unregistered* firearm where, under the statute, "possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury."). The D.C. Court of Appeals deemed a similar law unconstitutional, explaining:

> "Where the Constitution—in this case, the Second Amendment—imposes substantive limits on what conduct may be defined as a crime, a legislature may not circumvent those limits by enacting a statute that presumes criminality from constitutionally-protected conduct and puts the burden of persuasion on the accused to prove facts necessary to establish innocence."

Herrington v. United States, 6 A.3d 1237, 1244 (D.C. App. 2010). Compare *Commonwealth v. Gouse*, 461 Mass. 787, 802 (2012)(presumption of guilt did not violate 2nd Amendment where defendant's possession occurred *away from home*).

Even if the Commonwealth *were* required to prove lack of an FID card, this would not save § 10(h)(1) from invalidity. The Commonwealth made no effort to show that

predicating the right to keep arms at home upon compliance with G. L. c. 140, § 129C satisfies heightened scrutiny.[12] "[S]ome sort of showing must be made to support the adoption of a new categorical limit on the Second Amendment right." *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011). A categorical ban on shotgun-possession at home by persons deemed statutorily ineligible, including anyone police *rationally* deem unsuitable by a preponderance of the evidence, fails heightened scrutiny. See G. L. c. 140, § 129B(d); *Chief of Police of Taunton v. Caras*, 95 Mass. App. Ct. 182, 185-186 (2019)(police chief may deny firearm license for any "reasonable ground" and burden is on applicant to prove decision was "arbitrary or capricious.") (citation omitted). This standard violates the 2nd Amendment. *Heller*, 554 U.S. at 628 n. 27.

> "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."

Binderup v. Atty. Gen. of United States, 836 F.3d 336,

[12]See *Heller v. District of Columbia,* 801 F.3d 264, 273 (D.C. Cir. 2015)("Registration requirement for long guns lacks [the] historical pedigree" of registration requirement for handguns, and is not presumptively constitutional).

351 (3rd Cir. 2016)(holding petitioners prior convictions were not serious enough to strip them of Second Amendment rights).

"A statute which, under the pretence of regulating, amounts to a destruction of the right...would be clearly unconstitutional." *Heller*, 554 U.S. at 629 (citation omitted). Accordingly, § 10(h)(1)'s categorical criminalization of possession of a shotgun, rifle, or handgun at home under the pretense of a licensing regulation is "clearly unconstitutional." *Id.* at 629, 626-627 & n.26.

II. It remains unclear to the lower courts what the Commonwealth is required to prove at a § 10G trial, what jury instructions are required, and whether "violent crime" is a question of fact or law. Here, the § 10G proceeding was improperly conducted as if it were a hearing being held to reconstruct a defendant's challenged guilty plea, rather than a jury trial where the Commonwealth had the burden to prove the defendant's prior offense, as committed, was a violent crime. This Court's guidance is needed to resolve this confusion.

At a § 10G jury trial, the Commonwealth must prove the defendant was "previously convicted," G. L. c. 269, § 10G, of a "crime…that: (i) has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another." G. L. c. 140, § 121. When a crime does *not* have such an element because a defendant can be convicted of the prior crime

without such proof, it remains unclear what the Commonwealth must prove and how the jury should be instructed. As Davoren's jury asked, "are we just deliberating on the idea of Joshua having been convicted of the crime or the idea of them being violent?"

To begin with a comparison, G. L. c. 276, § 58A(1) allows the pretrial detention of anyone charged "for a felony offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person of another." This text is interpreted by examining only the elements of the subject offense, "independent of the particular facts" giving rise to the charge.

> "The statute's plain language directs courts to focus on whether a felony offense…has as *an element of the offense* the use, attempted use, or threatened use of physical force against the person of another" or "*by its nature* involves a substantial risk that physical force against the person of another may result" (emphasis added). § 58A (1). These statutory alternatives demonstrate that the predicate offense inquiry focuses on the elements of the crime, rather than the particular facts underlying a complaint or indictment."

Commonwealth v. Young, 453 Mass. 707, 712 (2009). The same "plain language" appears in the first definition of "violent crime" set forth in § 10G, which defines a violent crime as "any crime…that: (i) *has as an element* the use, attempted use or threatened use of physical

force or a deadly weapon against the person of another….or (iv) *otherwise involves conduct* that presents a serious risk of physical injury to another." G. L. c. 140, § 121 (emphasis added).

Although the language of each statute's "force clause…is straightforward," *Scione v. Commonwealth*, 481 Mass. 225, 228 (2019), the same plain language means something different under each statute. Davoren's panel correctly noted that under § 10G's force clause, "there is more to the analysis than a review of the elements," *Memo*, 7. Accord *Wentworth,* 482 Mass. at 672 (prior crime can be a violent crime under the force clause, "even if the elements of the crime alone do not show that it was violent.")

Because *Wentworth*'s interpretation of the force clause departs from the plain language of the statute, it remains unclear what the Commonwealth must prove to establish a prior offense satisfies the definition of "violent crime," under the force clause G. L. c. 140, § 121, and how the jury should be instructed. Contrary to the position endorsed by the Appeals Court, see *Memo* at 6 n.4., the meaning of § 10G's force clause cannot fluctuate; proof an offense is a "violent crime" cannot be a question of law when a categorical approach would

aid the Commonwealth and a question of fact when it would not. That would render the force clause unconstitutionally vague and unfair. See *United States v. Davis*, 139 S.Ct. 2319, 2328 (2019)("a single use of a statutory phrase must have a fixed meaning.")(citation omitted).

Accordingly, and relying on *Wentworth*, Davoren maintained on appeal that the Commonwealth must prove Davoren's *conduct* involved the use of physical force against another. See *Wentworth* ("the jury must conclude beyond a reasonable doubt that the conviction involved violence."); accord *Rivera* (under force clause, the Commonwealth must prove prior crime, "as [the defendant] *committed it*" was a violent crime.)(emphasis added). Instead of presenting admissible evidence of Davoren's conduct, the Commonwealth called the Commonwealth -- the two prosecutors who handled his pleas. A prosecutor's testimony that the allegations against the defendant are true (especially when the accusers are unidentified), is not competent evidence of Davoren's conduct, nor is it "evidence that would have been admissible at the original trial of the alleged predicate offense." *Wentworth*, *supra*, at 675, n.8.

The Supreme Court rejected a similar proceeding in

Descamps, and the constitutional problems forecast by *Descamps* were realized here. *Descamps v. United States*, 570 U.S. 254, 269-272 (2013)(describing inequities that arise when sentence is enhanced "based on [defendant's] supposed acquiescence to a prosecutorial statement.")

First, the admission of totem-pole hearsay allegations made by unidentified accusers and presented through the prosecutors' testimony violated, *inter alia*, the Confrontation clause, hearsay rules, and the requirement that witnesses testify from personal knowledge.

Second, the admission of "legally extraneous" facts recited by prosecutors at the prior pleas and treating Davoren's generic plea as an admission to those legally extraneous facts violated due process. The only admissions that qualify as *intelligent and voluntary* during a plea colloquy are "those constituting elements of the offense – as distinct from amplifying but legally extraneous circumstances." *Wentworth*, 482 Mass. at 676, citing *Descamps*, *supra* at 269-270. One who pleads to a generic A&B, for example, has not voluntarily admitted those legally extraneous facts.[13]

[13]Disturbingly, the prosecutors had to speculate as to what facts they recited in court nearly a decade earlier

Third, the trial judge's instruction that ADW is a violent crime "by its nature" directed a verdict against Davoren as to this alleged "violent crime." The court may not direct a verdict on any essential element or that increases punishment. *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979). This was error because, as *Wentworth* explained, whether an offense satisfies the definition of "violent crime" is a *question of fact*, not a question of elements. *Wentworth*, 482 Mass. at 672. *Wentworth* rejected an interpretation of § 10G that would allow "a judge, not a jury, [to] determin[e] whether a defendant's prior offenses are considered predicate" offenses. *Id.* at 675. The trial judge did exactly that when he instructed the jury that ADW was a violent crime by definition.

Given the harsh sentence imposed for exercising a constitutional right, under a sentencing statute that continues to generate confusion, this Court should clarify what must be proven at a § 10G trial under the force clause and provide appropriate jury instructions.

T3/37-38, 49-52 57 ("I do not have an independent memory as I sit here, no." - speculations offered to justify up to two decades of prison.

Respectfully Submitted,
Joshua Davoren,
By his attorney,

/s/ Jessica LaClair
_____
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Mass. R. App. P. 16(k) Certificate Of Compliance

I, Jessica L. LaClair, hereby certify that this application complies with the following rules of court that pertain to the filing of briefs and applications for further appellate review: Mass. R. A. P. 16, 18, 20 21, and 27.1 This application was prepared using a 12-point, monospaced font (Courier New) and the Argument section consists of 10 pages.

/s/ Jessica LaClair
_____
Jessica L. LaClair

CERTIFICATE OF SERVICE

I, Jessica LaClair, counsel for the defendant, hereby certify that on Dec. 4, 2020, I served the defendant's brief and appendix in the above-captioned matter by email upon:

ADA Bethany Lynch
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/s/ Jessica LaClair
_____
Jessica L. LaClair

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-19

COMMONWEALTH

vs.

JOSHUA DAVOREN.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial, the defendant was convicted of possession of a firearm without a firearms identification card (FID), and possession of ammunition without an FID card. In a separate jury trial, the defendant was convicted of being a felon in possession of a firearm after having been previously convicted of a violent crime. On appeal, he makes a variety of claims that are without merit; we affirm his convictions.

1. Constitutional challenges. The defendant claims for the first time on appeal that G. L. c. 269, § 10 (h) (1) is both facially invalid and invalid as applied to him. We disagree. Putting aside the standard of review, the Supreme Judicial Court has already determined that the statute is not facially invalid. See Commonwealth v. Loadholt, 460 Mass. 723, 724-727 (2011) (facial challenge to licensing scheme). In any event, the

defendant has failed to "establish that no set of circumstances exist[] under which the [statute] would be valid" (quotation and citation omitted). Chief of Police of Worcester v. Holden, 470 Mass. 845, 860 (2015).[1] Nothing has changed since Loadholt to breathe new life into this claim.[2]

The defendant's as-applied challenge is similarly without merit because there is no evidence that the defendant applied for an FID card and was rejected. "[T]hose who do not apply for a Massachusetts firearm license are not entitled to assert as-applied challenges to the licensing laws because they cannot demonstrate that they sought, and were denied, a Massachusetts firearm license." Commonwealth v. Harris, 481 Mass. 767, 771 n.5 (2019). In any event, based on his criminal record, which includes several felony convictions, the defendant is statutorily prohibited from obtaining an FID card. See G. L. c. 140, § 129B (1) (i).

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[1] Because compliance with the requirement to obtain an FID card allows possession of a shotgun inside one's home, so long as the individual is not statutorily precluded from obtaining a license and is otherwise suitable, see G. L. c. 140, § 129B, a set of circumstances clearly does exist that allows the exercise of the right to bear arms under the Second Amendment to the United States Constitution. See G. L. c. 140, § 129C.

[2] The Supreme Judicial Court has also rejected the defendant's claim that it is unconstitutional to place the burden on the defendant to present an FID card, rather than on the Commonwealth to prove its absence. Commonwealth v. Powell, 459 Mass. 572, 582 (2011), cert. denied, 565 U.S. 1262 (2012).

The defendant's final constitutional challenge to his convictions under G. L. c. 269, §§ 10 (h) and 10G, raised for the first time on appeal, involves claims that the sentencing structure set forth by the Legislature for graduated mandatory minimum sentences under the armed career criminal act (ACCA) violated the Second, Eighth and Fourteenth Amendments to the United States Constitution. The defendant claims that because G. L. c. 269, § 10 (h), is a misdemeanor, with a maximum sentence of two years to the house of correction, his sentence under G. L. c. 269, § 10G, to more than two years constitutes cruel and unusual punishment and denies him due process. We disagree.

The defendant's claim is based on a misunderstanding of the statutory scheme. Although G. L. c. 269, § 10G, does not create a freestanding crime, it enhances the punishment sentence for the underlying crime. Commonwealth v. Richardson, 469 Mass. 248, 252 (2014). The defendant's prior convictions of having committed a violent offense did not automatically enhance his sentence. Rather, the defendant had a separate jury trial on the ACCA enhancement charges, and the Commonwealth was required to prove beyond a reasonable doubt that the previous crimes of which the defendant was convicted were violent crimes. See Commonwealth v. Wentworth, 482 Mass. 664, 675-676 (2019). The Legislature's choice to criminalize habitually violent offenders

with enhanced sentences, with the benefit of a trial with the full panoply of constitutional protections, is not cruel and unusual punishment that "shocks the conscience and offends fundamental notions of human dignity" (citation omitted). Commonwealth v. Dunn, 43 Mass. App. Ct. 58, 63 (1997).[3]

2. The sentence enhancement trial. The defendant also claims that G. L. c. 269, § 10G, was vague as applied in his case because he did not know what facts establish a violation, the evidence was insufficient, and that the trial was unfair because constitutional and evidentiary rules were not observed. We find no merit to these claims.

"The ACCA provides a staircase of mandatory minimum and maximum enhanced punishments for certain weapons-related offenses if a defendant has been previously convicted of a 'violent crime' or a serious drug offense." Wentworth, 482 Mass

[3] The defendant also erroneously claims that the failure to inform him at the plea hearings for what later became his predicate offenses here, that those convictions could enhance his sentence should he commit a future crime as he did here, renders G. L. c. 269, § 10G, vague as applied here. See Commonwealth v. Shindell, 63 Mass. App. Ct. 503, 504-506 (2005) (absent requirement by statute or rule, judge not required to advise defendant of collateral consequences of guilty plea). Also, the defendant, in conclusory fashion, claims that because G. L. c. 269, § 10G, "punishes" Second Amendment activity, it must be narrowly tailored. However, enhancing the punishment for felons who have a record of committing violent offenses, who choose to commit additional firearms offenses, furthers a compelling and legitimate government interest of promoting the health, safety, and welfare of the law-abiding public.

at 670. Pursuant to the ACCA, the Commonwealth was required to prove that the defendant "having been previously convicted of two violent crimes . . . arising from separate incidences, violate[d] the provisions of" G. L. c. 269, § 10 (h). G. L. c. 269, § 10G (b). Pursuant to G. L. c. 140, § 121, a "violent crime" is defined, as relevant here, as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another." G. L. c. 140, § 121. See G. L. c. 269, § 10G.

At trial, the defendant urged the trial judge to adopt the "categorical approach" set out in Mathis v. United States, 136 S. Ct. 2243, 2248 (2016), which looks merely at the elements of the offense and not the underlying conduct, to determine if the predicate offense qualified as a violent crime. In the circumstances of this case, the judge properly rejected this and applied a "modified categorical approach" from Commonwealth v. Eberhart, 461 Mass. 809, 817 (2012). See Wentworth, 482 Mass. at 671-676 (rejecting Mathis categorical approach). Under this approach, the jury at an ACCA enhancement trial were permitted to consider additional evidence to determine whether a predicate conviction is a "violent crime" under the "force" clause. Id. at 672. Ultimately, the question for the jury to resolve is not whether the defendant is guilty of the predicate offenses, but

rather is whether the previous crime for which the defendant was convicted was a "violent" crime under the ACCA.

The defendant's predicate offenses in this case were assault by means of a dangerous weapon (ADW) and assault and battery (A&B). The defendant claims the statute does not apply to him because when he violated G. L. c. 269, § 10 (h), he had not been "previously convicted" of two crimes that had, as an element, the use of physical force. This, he claims, is because ADW and A&B may be committed without the use of violent force.[4] See Eberhart, 461 Mass. at 818-820 (A&B may be committed without proof of physical force). However, this is just a restatement of the defendant's request at trial for the judge to employ a categorical approach, which is without merit. See Commonwealth v. Mora, 477 Mass. 399, 406-408 (2017) (where predicate offense may be committed without use of violence, Commonwealth must prove conviction and surrounding circumstances of offense).

[4] As far as being violent by category, ADW and A&B do not stand on the same footing. While A&B may not be categorically violent, ADW involves the use of a dangerous weapon. "It is undisputed that, if committed by an adult, an assault and battery by means of a dangerous weapon would be punishable by imprisonment for a term exceeding one year and thus would constitute a violent crime under the Massachusetts ACCA." Commonwealth v. Rezendes, 88 Mass. App. Ct. 369, 372 (2015). It follows that if assault and battery by means of a dangerous weapon constitutes a violent crime due to the use of dangerous weapon, the same holds true for ADW. See Commonwealth v. Widener, 91 Mass. App. Ct. 696, 703 (2017). To the extent there remains any doubt, that doubt was resolved through the application of the modified categorical approach.

Furthermore, contrary to the defendant's claim, it was not premature to conclude the predicate offenses were violent crimes because the jury in this case had not yet so determined. But this is exactly what the jury in the ACCA trial had to determine, i.e., whether the prior conviction "has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another." G. L. c. 140, § 121. If the defendant was correct, no crime that did not have a physical force component as an element could ever serve as a predicate offense. But again, despite the defendant's protest, there is more to the analysis than a review of the elements. As the Supreme Judicial Court has clarified the operation of this statute in Eberhart, Mora, and Wentworth, the defendant's vagueness challenge is without merit. See Commonwealth v. Crawford, 430 Mass. 683, 689 (2000).

Applying the "modified categorical approach," the judge conducted a trial that provided the jury an opportunity to evaluate the circumstances underlying the convictions to determine if they qualified as violent. A review of the evidence lays to rest the defendant's claim that the parties did not understand what the Commonwealth had to prove, or for that matter, whether the Commonwealth carried its burden.

When evaluating sufficiency, the evidence must be viewed in the light most favorable to the Commonwealth with specific

reference to the substantive elements of the offense. See Jackson v. Virginia, 443 U.S. 307, 324 n.16 (1979); Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979). In this case, under the "force" clause of G. L. c. 140, § 121, the Commonwealth was required to prove that the defendant's convictions involved the attempted, threatened, or actual use of physical force or a deadly weapon.

Under the modified categorical approach, the evidence was more than sufficient to demonstrate that his conviction for ADW was a violent one under the force clause. The defendant, after an argument, revved his engine and attempted or threatened to run over the victim with a motor vehicle. The defendant's action required the victim to jump out of the way to avoid being struck. That evidence alone provided the jury with sufficient proof to show the use of force constituting a violent crime. While the defendant objected on hearsay grounds to the content of victim's conversation with the police, the sufficiency of the evidence under Latimore, 378 Mass. at 677-678, "is to be measured upon that which was admitted in evidence without regard to the propriety of the admission." Commonwealth v. Sepheus, 468 Mass. 160, 164 (2014), quoting Commonwealth v. Farnsworth, 76 Mass. App. Ct. 87, 98 (2010).

Relative to the defendant's conviction for A&B on his mother, the evidence in the light most favorable to the

Commonwealth was sufficient to establish that it was one of violence under the force clause.[5] During an argument with his mother, the defendant put his hands on her, attempted to grab her by her throat, forced her to the ground, and "grabbed" her phone out of her hand when she tried to call 911. The jury were entitled to conclude that the defendant used, attempted to use, or threatened to use physical force against his mother. See G. L. c. 140, § 121. See also G. L. c. 269, § 10G. In these circumstances, the defendant's A&B conviction constituted a violent crime. See Eberhart, 461 Mass. at 818-820.[6]

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[5] At trial, the prosecutor requested that the jury be provided with a special verdict slip to indicate which predicate it had relied on if they chose to convict the defendant of only one prior violent crime. Defense counsel claimed it was not necessary, and the judge did not provide one. Because the evidence was sufficient as to both predicate offenses, the general verdict was proper. See Commonwealth v. Plunkett, 422 Mass. 634, 639 (1996).

[6] For the first time at a posttrial hearing on the defendant's motion filed pursuant to Mass. R. Crim. P. 25 (b) (2), as amended, 420 Mass. 1502 (1995), the defendant claimed that the Commonwealth failed to present evidence that either of the predicate crimes were "punishable by imprisonment for a term exceeding one year." G. L. c. 140, § 121. However, how a crime is punishable is a question of law upon which the jury could have been instructed, and not a question of fact for the jury to decide. See G. L. c. 233, § 70 (court may take judicial notice of statutes). Had the defendant raised this issue at the appropriate time, the judge would have instructed the jury that, as a matter of law, which the jurors were bound to accept, both A&B and ADW are punishable by imprisonment of a term exceeding one year. See G. L. c. 265, §§ 13A and 15B. The absence of this added instruction did not create a substantial risk of a miscarriage of justice.

Finally, the defendant claims that his sentence enhancement trial was unfair because constitutional and evidentiary rules were not observed. In particular, the defendant claims that the witnesses did not testify from personal knowledge, hearsay was improperly admitted, the defendant's right to confrontation was denied, and the defendant's "involuntary statements" were improperly admitted. Putting aside whether these claims were properly preserved, they lack merit.

Although the "trial judge may admit any evidence that would have been admissible at the original trial of the alleged predicate offense" at the sentence enhancement trial, the Supreme Judicial Court has emphasized that, "the Commonwealth need not retry the prior conviction." See Eberhart, 461 Mass. at 816, quoting Commonwealth v. Colon, 81 Mass. App. Ct. 8, 16 n.8 (2011).

During the sentence enhancement trial, the Commonwealth introduced evidence of the defendant's convictions for ADW and A&B through certified conviction documents, the testimony of the arresting officers, and the testimony of the guilty plea prosecutors. The defendant objected on hearsay (not constitutional) grounds to the testimony of both the officers and the prosecutors, as to the facts underlying the offenses, to which the defendant pleaded guilty after a full colloquy, during which he heard a recitation of the facts of the charges. While

neither the arresting officers nor the prosecutors were eyewitnesses to the offenses, they all had personal knowledge of the defendant to establish his identity. Moreover, the prosecutors had personal knowledge of the facts presented in court when the defendant pleaded guilty to A&B and ADW. This recitation of the Commonwealth's evidence provided the factual basis for the defendant's guilty pleas and his resulting convictions. The jury were entitled to credit that evidence.

In addition, pursuant to Mass. G. Evid. § 803(22)(C) and (D) (2019), a guilty plea is admissible where "the evidence is admitted to prove any fact essential to the judgment;" and where it constitutes a prior judgment "against the defendant." Id. See Commonwealth v. Palermo, 482 Mass. 620, 625 (2019) (guilty plea of codefendant was not admissible substantively against defendant). The Commonwealth was required to establish that the defendant was previously convicted of a violent offense, but it was not required to prove the facts of the underlying conviction beyond a reasonable doubt to the sentence enhancement jury. Colon, 81 Mass. App. Ct. at 16 n.8. The jury were only required to consider whether the defendant was previously convicted, and whether those convictions constituted "violent crimes" under the statute. See Eberhart, 461 Mass. at 816-817, citing United States v. Harris, 964 F.2d 1234, 1236 (1st Cir. 1992), overruled on other grounds, Shepard v. United States, 544 U.S. 13 (2005).

Also, the defendant cross-examined each Commonwealth witness and testified himself. Therefore, he was not denied the right to confrontation.

The defendant also claims, for the first time on appeal, that his admission to the facts at his guilty pleas was involuntary and should not have been admitted. Relying on Descamps v. United States, 570 U.S. 254, 270 (2013), the defendant claims his statements made during the plea colloquy were knowing and voluntary only as to the elements of the offenses. In particular, he claims he had little incentive to contest facts that did not constitute elements of the crimes. We disagree.

For some of the same reasons that Mathis, 136 S.Ct. at 2251, does not control the operation of our ACCA statute, see Wentworth, 482 Mass. at 671-676, Descamps, 570 U.S. at 270, does not control the instant circumstances either. Of primary concern to the Supreme Court in Descamps was that constitutionally inappropriate judicial fact finding was required when reviewing the circumstances underlying a guilty plea. Id. at 269-270. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Here, there was no judicial fact finding as the defendant had the benefit of a jury trial on the issues related to sentence enhancement. See Wentworth, supra at 675.

Furthermore, before a guilty plea or an admission to sufficient facts is accepted, a judge must conduct a colloquy with the defendant to determine whether the plea is voluntary and intelligent. See Boykin v. Alabama, 395 U.S. 238, 242-243 (1969); Commonwealth v. Foster, 368 Mass. 100, 105-107 (1975); Commonwealth v. Haskell, 76 Mass. App. Ct. 284, 289 (2010). If a defendant received a constitutionally inadequate plea colloquy, he would be entitled to withdraw that plea. The record before us reveals no such request has been made. Consequently, there has been no judicial determination that the defendant's guilty pleas to A&B or ADW were in any way infirm.

Moreover, a defendant's guilty plea is more than a mere admission. See Brady v. United States, 397 U.S. 742, 748 (1970). See also Boykin, 395 U.S. at 242 n.4 ("A plea of guilty is more than a voluntary confession made in open court. It also serves as a stipulation that no proof by the prosecution need be advanced . . . . It supplies both evidence and verdict, ending controversy" [citation omitted]). Here, even if Descamps applied, the conduct underlying the defendant's pleas, described by the witnesses, was necessary for the admission to meet the elements of the crimes, see Commonwealth v. Hart, 467 Mass. 322, 325 (2014), but it also provided the factual basis necessary for the modified categorical approach.

Finally, and also for the first time on appeal, the defendant claims errors in the judge's jury instructions. First, the defendant challenges the instruction on ADW where the judge instructed the jury that, due to the use of a dangerous weapon in the commission of the assault, the crime, by its nature, involved the use, attempted use or threatened use of physical force with a dangerous weapon against the person of another.[7] This was a correct statement of the law. In Commonwealth v. Rezendes, 88 Mass. App. Ct. 369, 372 (2015), we held that assault and battery by means of a dangerous weapon committed by an adult, due to the employment of the dangerous weapon, is a "violent crime" under G. L. c. 140, § 121. ADW is a lesser included offense, but still requires the use of a dangerous weapon, which also makes it a violent crime. There was no error, and thus, no risk that justice miscarried.

The defendant also challenges so much of the instruction as defining a "violent crime" as one that is "capable of causing

[7] The defendant claims that he objected to this instruction at the charge conference, by stating he did not believe it was a correct statement of the law. However, after the judge finished his instructions, the defendant stated that he was satisfied with the judge's instructions. To the extent the defendant did not agree with how the judge answered a later jury question on the matter, that did not preserve the issue. See Commonwealth v. Coutu, 88 Mass. App. Ct. 686, 692 (2015) ("We have a contemporaneous objection rule, not a retroactive objection rule"). At bottom, the standard of review does not affect the outcome here.

pain or injury," rather than instructing the jury that the crime must be "likely to cause harm." However, the defendant himself requested the "capable of causing" language, which the trial judge agreed to give to the jury. This is the exact language defining the element of physical force required for an offense to be "violent" as set out in Colon, 81 Mass. App. Ct. at 19. There was no error, and thus, no risk that justice miscarried.[8]

3. The motions to suppress, to disclose the informant's identity, and for a Franks hearing. The defendant also makes a variety of claims related the validity of the search warrant, that the confidential informant's (CI's) identity should have been disclosed, and that the affidavit supporting the search warrant contained material misrepresentations, which necessitated a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978).

A. The motion to suppress. The defendant claims that the judge should have allowed the motion to suppress because the

[8] Prior to trial, the Commonwealth moved in limine to admit certified records from the Department of Criminal Justice Information Systems as a business record to show that the defendant did not possess an FID card. The defendant claims the judge abused his discretion by admitting the records. We need not address this claim because even if the judge abused his discretion in admitting the records, there would be no prejudice to the defendant because the Commonwealth did not have a burden to prove the absence of an FID card. Rather, possession of an FID card is an affirmative defense. See Powell, 459 Mass. at 582.

search warrant was not supported by probable cause. In particular, he claims that the police failed to properly supervise the controlled buys conducted by the CI, and thereby invalidated the buys as information supporting probable cause. We disagree.

In general, any deficiency in the Aguilar-Spinelli[9] requirements of basis of knowledge and veracity can be remedied by a "controlled buy." That "buy" supplements or supplies the information required by either or both prongs of the test. See Commonwealth v. Warren, 418 Mass. 86, 89 (1994); Commonwealth v. Luna, 410 Mass. 131, 134 (1991). To provide that relief, the controlled buy must be properly supervised. See Commonwealth v. Desper, 419 Mass. 163, 166-168 (1994).[10]

The defendant is correct that the affidavit does not delineate the Desper components for all the controlled buys. However, the affidavit did satisfy these requirements in at

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[9] See Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

[10] In Desper, 419 Mass. at 168, the Supreme Judicial Court set forth the minimum essential components of a controlled buy: "(1) a police officer meets the informant at a location other than the location where [it is] suspected that criminal activity is occurring; (2) the officer searches the informant to ensure the informant has no drugs on his person and (usually) furnishes the informant with money to purchase drugs; (3) the officer escorts or follows the informant to the premises where it is alleged illegal activity is occurring, and watches the informant enter and leave those premises; and (4) the informant turns over to the officer the substance the informant has purchased from the residents of the premises under surveillance."

least one of the controlled purchases. Although the affidavit did not repeat every step taken before, during, and after the remaining three controlled purchases, it was reasonable to infer, from the entire affidavit, that the affiant described the entire "controlled buy" procedure in detail relative to the first purchase in paragraph 18, and then used the shorthand "controlled purchase" to describe the steps taken in the subsequent purchases. The affidavit did not contain any evidence that the controlled purchase deviated from the steps described in paragraph 18. The inference that each controlled purchase satisfied the Desper requirements, and was thus reliable, was a reasonable one. See Commonwealth v. Cavitt, 460 Mass. 617, 626 (2011).

Even if the affidavit was lacking in detail relative to three of the purchases, the first purchase on March 6, 2015, explicitly satisfied Desper, and evidence of one controlled purchase at the location, in addition to the other information provided by the CI, was more than adequate to establish probable cause to believe that the defendant sold narcotics from 21 Hamlet Street, and that evidence of that crime could be found there.

Here, the CI's basis of knowledge was apparent from the affidavit. The CI had recently purchased narcotics (over thirty times in the two months preceding the search warrant

application) from the defendant at the defendant's home. This direct receipt of information satisfies the basis of knowledge test. See Commonwealth v. Allen, 406 Mass. 575, 578 (1990), citing Commonwealth v. Parapar, 404 Mass. 319, 322 (1989). "First-hand receipt of information through personal observation satisfies the basis of knowledge prong of Aguilar-Spinelli." Allen, supra.[11]

The CI's tip also satisfied the veracity requirement. The affiant's past experiences with the CI demonstrated that the CI had provided reliable and accurate information in the past leading to narcotics indictments. This fairly implies that the CI's information led to the seizure of narcotics, which establishes the CI's veracity. See Commonwealth v. Mendes, 463 Mass. 353, 365-366 (2012); Commonwealth v. Perez-Baez, 410 Mass. 43, 45-56 (1991).[12] To the extent there are any weaknesses, the explicitly supervised controlled buy made up for any deficiencies. Warren, 418 Mass. at 89. The motion to suppress was properly denied.

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[11] The CI also provided the name, description, and cellular telephone number of the homeowner at 21 Hamlet Street. This information was sufficient, even without corroboration, to further establish the CI's basis of knowledge. See Commonwealth v. Alfonso A., 438 Mass. 372, 374 (2003).

[12] The CI was also known to the affiant for seven years, which weighs in favor of the CI's reliability. See Alfonso A., 438 Mass. at 375.

B. Informant's identity. The defendant claims that he was entitled to the disclosure of the CI's identity because all the charges depended on the validity of the warrant, which depended on the existence and veracity of the CI. We disagree.

The informant's privilege has long been recognized in the Commonwealth. See Commonwealth v. Madigan, 449 Mass. 702, 705-706 (2007); Commonwealth v. Amral, 407 Mass. 511, 516 (1990). "In order to obtain the identity of a confidential informant, the burden is on a defendant to demonstrate that an exception to the privilege ought apply, that is, that the disclosure would provide him with 'material evidence needed . . . for a fair presentation of his case to the jury.'" Commonwealth v. Shaughessy, 455 Mass. 346, 353-354 (2009), quoting Commonwealth v. Lugo, 406 Mass. 565, 574 (1990).

In this case, the CI did not participate in or witness the events underlying the firearms charges against the defendant, but merely provided evidence to support the issuance of the search warrant. In that posture, the defendant has not made any showing tipping the balance in favor of disclosure. See Commonwealth v. Figueroa, 74 Mass. App. Ct. 784, 791 (2009) (disclosure not required where government's case did not depend "on proof that the defendant was involved in any particular transactions, including the controlled purchases; CI was patently not a percipient witness to the incidents" [quotation

omitted]). The motion to disclose the CI's identity was properly denied.

C. The Franks hearing. The defendant claims the judge erred in denying him a Franks hearing based on his allegation that the affiant fabricated the CI out of whole cloth, and thus intentionally or recklessly made false statements in the search warrant affidavit material to the determination of probable cause such that, without the misrepresentations, probable cause was lacking. We disagree.

A defendant is entitled to a Franks hearing only if he makes two "substantial preliminary showing[s]." Commonwealth v. Long, 454 Mass. 542, 552 (2009), S.C., 476 Mass. 526 (2017), quoting Franks, 438 U.S. at 155. First, the defendant must demonstrate that the affiant included "a false statement knowingly and intentionally, or with reckless disregard for the truth," or intentionally or recklessly omitted material in the search warrant affidavit. Franks, supra at 155-156. Second, the defendant must show that "the allegedly false statement is necessary to the finding of probable cause," id. at 156, or that the inclusion of the omitted information would have negated the magistrate's probable cause finding. See Commonwealth v. Corriveau, 396 Mass. 319, 334-335 (1985).

A negligent misrepresentation by the affiant would not warrant a Franks hearing. See Commonwealth v. Nine Hundred &

Ninety-Two Dollars, 383 Mass. 764, 767 (1981). Thus, a defendant is not entitled to relief simply because a police officer made a mistake about some of the facts set forth in an affidavit, but must demonstrate, by a preponderance of the evidence, that the statement was intentionally or recklessly false. Corriveau, 396 Mass. at 334. See Commonwealth v. Alvarez, 422 Mass. 198, 208 (1996).

Here, the motion judge afforded the defendant the benefit of an Amral-type preliminary hearing as to numerous perceived inconsistencies in the affidavit. See Amral, 407 Mass. at 522-523. In light of that hearing, the judge determined the defendant was not entitled to a Franks hearing because he did not establish the requisite "substantial preliminary showing that the affiant made a false statement knowingly and intentionally or with reckless disregard for the truth." Commonwealth v. Douzanis, 384 Mass. 434, 437 (1981).

The defendant challenged several discrepancies between the search warrant affidavit and police reports, and asserted the narcotics recovered following the controlled purchases did not, in fact, exist. The motion judge viewed the narcotics in camera, and satisfied himself that the narcotics existed, which dispensed with the defendant's allegation that the CI, and thus the controlled purchases described in the affidavit, were wholly fictional. Also, at the hearing, the police officer adequately

explained each discrepancy the defendant claimed.[13] Accordingly, the motion judge implicitly rejected the defendant's claim that the controlled purchases, and thus the CI, were fabricated due to the omissions in repeating the descriptions of the steps taken in conducting the purchase. The motion judge's denial of the Franks hearing was not an abuse of discretion.

Judgments affirmed.

By the Court (Meade, Sullivan & Sacks, JJ.[14]),

Joseph F. Stanton

Clerk

Entered: November 16, 2020.

[13] This included explanations as to who conducted the field tests on the narcotics that resulted from the controlled purchases, and the confusion as to why the narcotics recovered after the controlled purchases appeared to be "out of order," as to when they were logged into evidence.

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