SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT NO. 2021-P-0769

FAR NO._____

COMMONWEALTH

v.

MAURICE JOHNSON

ON APPEAL FROM A JUDGMENT OF CONVICTION
IN THE HAMPDEN SUPERIOR COURT

MAURICE JOHNSON'S APPLICATION FOR FURTHER APPELLATE REVIEW

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REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Mass. R. App. P. 27.1, Defendant-Appellant Maurice Johnson ("Mr. Johnson" or "Defendant") requests further appellate review ("FAR") of his convictions.

STATEMENT OF THE PRIOR PROCEEDINGS

On February 27, 2019 a Hampden County grand jury returned seven indictments against Mr. Johnson: assault to murder while armed (G.L. c. 265, § 18(b)); assault and battery with a firearm (G.L. c. 265, § 15E); armed carjacking (G.L. c. 265, § 21A); possession of a firearm during the commission of a felony (G.L. c. 265, § 18B); possession of a firearm (G.L. c. 269, § 10(a)); possession of a loaded firearm (G.L. c. 269, § 10(n)); and firearms violation following violent crime or serious drug offense (G.L. c. 269, § 10G).

Mr. Johnson was tried by a jury over five days in November 2019, Hon. Jane Mulqueen presiding. The judge denied his motion for a required finding of not guilty. The jury acquitted on the carjacking charge but convicted on the other charges. For purposes of the § 10G enhancement, the judge found that Mr. Johnson had one prior violent crime or serious drug conviction, rather than the two charged in the indictment. She sentenced Mr. Johnson to concurrent 10 to 12 year sentences on the charges for assault to

murder, assault and battery while armed, and the § 10G violation. On the § 18B conviction, she sentenced him to 4 to 5 years imprisonment, concurrent with the other charges. Finally, she sentenced him to a consecutive 2½ year sentence on the loaded firearm (G.L. c. 269, § 10(a) and (n)) convictions.

The Appeals Court affirmed the conviction in a published opinion dated January 19, 2023. Mr. Johnson did not move for reconsideration.

FACTS RELEVANT TO APPEAL

This case stems from an August 24, 2018 shooting in Springfield just outside a house under investigation for drug crimes, 114 Massachusetts Avenue. The incident was caught on a surveillance camera that the police had mounted outside the house.

At trial, both eyewitnesses to the shooting failed to identify Mr. Johnson as the shooter. The Commonwealth argued that they had previously identified Mr. Johnson as involved in the shooting but had been pressured into recanting.

The shooting victim, Dwayne Thomas, testified that he used to date Renae Fraser [2:15] and that on August 24, 2018 (when he was still dating her) he had received Facebook messages from someone saying to "leave his girl alone." [2:21]. Thomas made screenshots of these Facebook messages, which were sent by someone using the name "Dollaz." Thomas sent the

screenshot to his sister and she, in turn, forwarded them to the police. [2:27]. Over objection, these texts admitted into evidence at the trial. [2:22-24].

After receiving the texts, Thomas and Fraser went to a laundromat where Fraser pointed out a man aiming a phone at them, apparently taking photographs or making a video. [2:19]. After Thomas and Fraser later left the laundromat they stopped at a store so Thomas could wire money to Jamaica. [2:31]. Later, after leaving the store, Thomas was driving down Massachusetts Avenue when he apparently saw some acquaintances and stopped to talk with them. [2:31]. Fraser remained in the car while they talked. [2:33]. As he stood outside his car, Thomas noticed two men walking up the street. [2:33-34]. He recognized the one on the right as the man from the laundromat with the phone. [2:34]. The other man said "What's up" and started shooting. [2:36]. Thomas ran off but was struck in the arm, breaking a bone. [2:37]. He fled to his grandmother's house. [2:36].

When the police interviewed Thomas on August 27, 2018 and showed him a photo array he identified Johnson as the shooter. [2:42-43; EX 15-17]. At trial, Thomas testified that he originally chose three photos, but the detective said he could only pick one. [2:44-45, 86]. Thomas then chose the

photo that looked most like a man in a Facebook photo [2:86] even though the shooter was skinnier and looked like a "crack head." [2:72-73].

Detective Jose Canini, who administered the photo array, denied that Thomas set aside three photos or mentioned that his identification was based on a Facebook photo. [2:108-119]. Canini admitted that the identification process was not recorded. [2:120].

Renae Fraser, the other eyewitness to the shooting, testified that she had dated Mr. Johnson for a year or two starting in 2014 but by 2018 she was seeing Thomas. [3:12-13, 17]. She agreed with Thomas that on August 24, 2018 they'd been to laundromat, where they'd seen someone pointing a phone in their direction. [3:18-19]. She thought the man with the phone was a friend of Mr. Johnson's, Davis Charles. [3:20-21]. They subsequently left the laundromat and Thomas drove them to a store. Then, after leaving the store, Thomas drove them down Massachusetts Avenue, where he stopped the car to get out and talk with someone he saw that he knew. Fraser stayed inside the car and listened to music. [3:23-25]. Fraser characterized the stop on Massachusetts Avenue as "random." [3:148, 192].

A short time later, Fraser saw Thomas run off, which prompted her to exit the car. [3:26-27]. There were two males present and one got in the driver's side of Thomas' car and drove off, despite Fraser's effort to reach

through the passenger-side window and pull the key from the ignition. [3:39]. Fraser testified that she did not know who the man was who drove off in the car, but admitted that at a prior hearing she'd said he looked like Mr. Johnson. [3:40].

At trial, Fraser did not dispute that she had originally told the police that Mr. Johnson was involved in the shooting [3:124], but explained that she had not seen the shooter's face or heard his voice and had just assumed that Johnson was involved because of the texts Thomas had received that day. But by the time of trial she was not so confident that Mr. Johnson had shot Thomas. [3:175].

With regard to her memory, Fraser testified that as of the day of trial she was having trouble remembering some events on the day of the shooting and that she had been taking chemotherapy medicine since around January 2019. [3:86-88]. She agreed that she hadn't mentioned her medicine with the prosecutors and police when they met prior to trial – but she doesn't like talking about medical issues with strangers. [3:91-94].

With regard to suggestions that Mr. Johnson had pressured her to recant, Fraser agreed that Johnson did call her from jail, and she did visit him, but she testified that he never asked her to lie, nor did he threaten her,

give her money, or even discuss the substance of his case with her. [3:176-78].

Detective Joseph Brodeur testified that during the August 27, 2018 interview Fraser selected a photo from of Davis Charles from a photo array and identified him as one of the men involved in the shooting. [4:163-64]. Brodeur also described how Fraser identified a single photo of Mr. Johnson that he showed her. [4:165]. Fraser was cooperative at the interview whereas when she met with the prosecutors and police shortly before trial she was "shy" and "reclusive." [4:168]. At this pre-trial meeting Fraser never mentioned having health issues; on the other hand, Brodeur never asked about her health, just whether she had "problems" or was "on drugs." [4:169, 176-77].

Sonia Daley, one of the women Thomas stopped to speak with and a resident at 114 Massachusetts Avenue, testified that she saw the shooting but that she did not see the gunman's face. [2:92-99].

Shortly after the shooting, the police recovered one live round and one spent casing from near the scene of the crime. [4:195-98]. At trial, a firearms expert testified that live rounds can be ejected if there is a gun malfunction. [4:253]. No fingerprints were found on the live round and the

spent round was not examined because the police believed that heat from gunfire would have destroyed any prints. [4:151-57].

Police witnesses testified that Thomas' car was recovered from 27 Hayden Street in Springfield, which is close to the "Motorcycle Building" where Mr. Johnson was subsequently arrested. [4:18-22, 4:103-05]. No usable fingerprints were recovered from inside the car [4:37-40], though gunshot residue was found on the car interior. [4:38-40, 62-72]. The car was swabbed for DNA but no DNA analysis was performed. [3:41-42].

Detective James Crogan, who led the investigation [4:191-92], testified that after the shooting he learned a police surveillance camera had been aimed at 114 Massachusetts Avenue, as part of a drug investigation, and that he subsequently had video of the shooting recovered. [4:207].

STATEMENT OF ISSUES FOR WHICH FAR IS SOUGHT

1. Is possession of a firearm (G.L. c. 269, § 10(a)) a lesser included offense of use of a firearm while committing a felony (G.L. c. 265, § 18B)? [Reviewed for substantial risk of miscarriage of justice].

2. Where a defendant is convicted of possession of a firearm (G.L. c. 269, § 10(a)), may sentencing enhancements be imposed for ***both*** possession of a loaded firearm (G.L. c. 269, § 10(n)) and being an armed career criminal (G.L. c. 269, § 10G(a))? [Reviewed for substantial risk of miscarriage of justice].

3. Assuming the answer to #2 is "Yes," must the § 10(n) sentence be consecutive to the § 10G(a) sentence, as defense counsel conceded? [Reviewed for substantial risk of miscarriage of justice].

4. Where a party wishes to enter a purported communication into evidence, can its contents alone provide sufficient foundation that it is authentic? [Reviewed for prejudicial error].

5. Do various errors in the prosecutor's closing argument warrant a new trial? [Mixed review, for prejudicial error and substantial risk of a miscarriage of justice].

WHY FAR IS APPROPRIATE

I. The Appeals Court Erroneously Held That G.L. c. 269, § 10(a) Is Sometimes A Lesser Included Offense Of c. 265, § 18B And Sometimes A Separate Crime.

"[A] lesser included offense is one whose elements are a subset of the elements of the charged offense. Thus, a lesser included offense is one which is necessarily accomplished on commission of the greater crime." *Kelly*, 470 Mass. at 702-03 (citations and quotation marks omitted). As the trial judge correctly instructed the jury, the elements G.L. c. 269, § 10(a) are (i) possession of an item (ii) meeting the legal definition of firearm (iii) with knowledge of the possession. *See* Mass. Dist. Ct. Jury Instructions 7.6000. As the judge also correctly instructed the jury, the elements of G.L. c. 265, § 18B consist of these same three elements plus the commission (or attempted commission) of a felony at the time of the possession. In

other words, it is impossible to violate § 18B without also violating § 10(a). The latter is a quintessential lesser included offense.

The Commonwealth argued below that a § 10(a) violation requires proof of an additional element, that the gun possession be unlawful, *i.e.*, unlicensed. But this Court's precedents foreclose that argument. An uninterrupted line of cases from *Commonwealth v. Jones*, 372 Mass. 403, 406 (1977), to the present holds that lack of a gun license is an affirmative defense, not an element of the crime. This Court has never held that an affirmative defense is treated like the element of a crime for double jeopardy purposes, and its precedents appear to foreclose the possibility.[1]

The Appeals Court held that it need not engage in an elements-based analysis of whether § 10(a) was a lesser included offense of § 18B because it was "confident that the Legislature intended for separate punishments for the unlawful possession of a firearm and its use in the commission of a felony" given that "the language of § 18B

[1] For example, "[a]ssault and battery is a lesser included offense of murder in the second degree..." *Commonwealth v. Donovan*, 422 Mass. 349, 352 (1996). Yet duress is an affirmative defense to the former and not the latter. *See Commonwealth v. Vasquez*, 462 Mass. 827, 835-36 (2012).

itself" states that "punishment thereunder shall be 'in addition to the penalty' for the underlying felony, G. L. c. 265, § 18B...." But by this reasoning "the Commonwealth could charge a defendant under § 18B for possession of a firearm during the [felonious] unlawful possession of a firearm," and the Appeals Court agreed with Mr. Johnson that "the Legislature did not intend to authorize charging a defendant in that manner." So, the rationale for the decision below is inscrutable. The court apparently imposed an *ad hoc* rule that § 10(a) is a lesser included offense of § 18B if a defendant is not charged with other felonies, but ceases to be a lesser included offense if another felony is charged. This Court has never endorsed such an approach to double jeopardy, and there is no reason to think the Legislature contemplated this odd result, much less conclude that "its intent to do so is manifest." *Commonwealth v. Alvarez*, 413 Mass. 224, 232 (1992).

The logical consequence of the Appeals Court's holding that § 10(a) is not a lesser included offense of § 18B is that every simple gun possession case is also an § 18B case, with a five year mandatory minimum sentence. *See Commonwealth v. Rossetti*, 489 Mass. 589 (2022). While the Appeals Court's desire to avoid this consequence is understandable, its *ad hoc* construction of § 18B is bad law and

should not stand. The Court should clarify that § 10(a) is a lesser included offense of § 18B.

II. The Appeals Court Erroneously Held That Mr. Johnson's Conviction Under G. L. c. 269, § 10(n) "Did Not Operate As A Second Sentence Enhancement" Even Though It Is Settled Law That § 10(n) Is A Sentence Enhancement.

The punishment for the firearms charges was duplicative in another sense: The judge impermissibly imposed two sentencing enhancements on c. 269, § 10(a), in violation of this Court's holding in *Commonwealth v. Richardson*, 469 Mass. 248, 252 (2014). The Appeals Court's holding that the "defendant was not subject to two sentencing enhancements" is plainly false. In addition to the root crime, c. 269, § 10(a), Mr. Johnson was punished under c. 269, § 10(n) for having a loaded firearm. Section 10(n) is a sentencing enhancement to § 10(a), not a freestanding crime. *See Commonwealth v. Brown*, 479 Mass. 600, 604 (2018); *Commonwealth v. Taylor*, 486 Mass. 469, 474-76 (2020). Mr. Johnson was also punished under c. 269, § 10G(a) for having a prior violent crime or serious drug offense. Section 10G is also a sentencing enhancement to § 10(a). *See Richardson*, 469 Mass. at 252.

In *Richardson* this Court held that "unless the Legislature has explicitly declared its intent to permit multiple sentencing

enhancements, a defendant may be sentenced under only one sentencing enhancement statute." *Id*. at 249. Neither § 10(n) or § 10G(a) "explicitly declare" an intent to allow multiple sentencing enhancements. Nothing in this Court's *Taylor* decision, which the Appeals Court cited, suggests that § 10(n) is not a sentencing enhancement under *Richardson*, or that the statute allows for multiple sentencing enhancements. The Appeals Court's conclusion that Mr. Johnson's "conviction under G. L. c. 269, § 10(n), however, did not operate as second sentence enhancement" is simply wrong, and this Court should so clarify.

III. Even If § 10(n) And § 10G(a) Could Enhance The Same Sentence, There Is No Requirement That The 10(n) Sentence Be Consecutive To The 10G(a) Sentence, As Defense Counsel Unnecessarily Conceded To Judge Mulqueen. Resentencing Is Thus Appropriate.

Defense counsel made a misstatement at the sentencing hearing which may have led Judge Mulqueen to impose a consecutive sentence on the G.L. c. 269, § 10(n) counts which she would not have otherwise imposed. Counsel recommended:

> On Count 5, which is the unlawful possession of a loaded firearm, I'm not – I must admit I'm not entirely sure how the merger with Count 6 is going to work. But I envision that that would remain as a – as a sentence, and we're asking for the max two and a half years to the House of Corrections, *and it must be from and after the object [sic],*

> *which is Count 6*. We're asking for 18 months from and after Count 6, 18 months at the House of Corrections from and after Count 6.

[7:25 (emphasis added)]. Counsel's concession was unnecessary. Section 10(n) imposes "further punish[ment] by imprisonment in the house of correction for not more than 2½ years, which sentence shall begin from and after the expiration of the sentence *for the violation of paragraph (a) or paragraph (c)* (emphasis added)." In other words, there is no requirement that a § 10(n) sentence be imposed from and after the *§ 10G* sentence. The judge may have relied on the concession, so the case should be remanded for resentencing.[2]

IV. The Appeals Court Erroneously Held That Certain Purported Communications Are Self-Authenticating.

The Appeals Court's decision erroneously permits a party to authenticate a purported communication based solely on its contents. Here, the Commonwealth moved into evidence a text message sent from a Facebook account belonging to one "Dollaz." Having inexplicably failed to subpoena Facebook, there was no way for the prosecutor to tie Mr. Johnson to the "Dollaz" account. The lower courts erred in accepting the Commonwealth's argument that the

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[2] As seen from the Addendum, this issue was fully briefed below, but the Appeals Court opinion did not address it.

contents of the texts provided the necessary "confirming circumstances" to admit the printouts.

This Court has long recognized that a communication purporting to come from someone's account can be authenticated by confirming circumstances. In *Commonwealth v. Hartford*, 346 Mass. 482, 488 (1963), calls purportedly from the defendant had been traced to his telephone number and this Court found sufficient "confirming circumstances" that the defendant had made them based on their content them as well as his admission to making phone calls on the date in question. More recently, this Court has held that "confirming circumstances" can support an inference that a party sent an email, *Commonwealth v. Purdy*, 459 Mass. 442, 447-51 (2011), or text message. *Commonwealth v. Welch*, 487 Mass. 425, 440-42 (2021). In all these cases, though, the communication had been linked to the purported sender's telephone or email account.

Neither this Court nor the Appeals Court has ever held that emails or texts can be authenticated *solely* based on their contents, without evidence that they originated from the purported sender's account. The Appeals Court opinion cites *Commonwealth v. Oppenheim*, 86 Mass. App. Ct. 359 (2014), as precedent, but that case

does not say one way or the other whether the relevant instant messages had been linked to the defendant's account, only that the Commonwealth had not examined the *recipient's* computer. *Id*. at 363. There is no reason to doubt that the messages in *Oppenheim* had been linked to the defendant's account since it is routine pre-trial work to subpoena the service provider.

Even if, *arguendo*, self-authenticating communications could exist, the texts here would not qualify. They showed that Mr. Johnson had dated Fraser and was staying at the Motorcycle Building, but this was hardly information that others could now know. A photo of Mr. Johnson was found on the "Dollaz" Facebook page, it is true, but so was a photo of Davis Charles, who also lived at the Motorcycle Building, and photos of others may have been posted there too. Anyone can post anyone else's photo on social media.

The lower courts stretched the law to allow the texts into evidence after the Commonwealth neglected to subpoena Facebook. The "Dollaz" texts should have been excluded.

IV. Various Errors In The Prosecutor's Closing Argument Warrant A New Trial.

The prosecutor made several inappropriate statements during her closing argument, chief among them her claim, when discussing

witnesses, that "[t]hese people have to go back to these neighborhoods, they're scared." On appeal, the Commonwealth argued that this statement referred to one particular witness, Sonia Daley, but "these people" is obviously plural. And while Daley undoubtedly said she was nervous to be on the witness stand, what has such nervousness got to do with "these neighborhoods?" This was obviously more than a comment on witness demeanor.

The Appeals Court held that, at most, the jury would have understood "these people" to refer to Daley's neighbors. But why would the prosecutor be talking about these unknown neighbors during her closing argument when they played no role at trial? They did not testify, so they did not have to "go home." It is considerably more likely that the jury understood "these people," who have to "go home" to "these neighborhoods," as Fraser and Thomas, the Commonwealth's key witnesses. They were afraid, the prosecutor was suggesting, so they recanted. But there was no factual basis for her suggestion, so its inclusion in her closing argument constituted serious error. *See Commonwealth v. Silva-Santiago*, 453 Mass. 782, 805-810 (2009).

CONCLUSION

The Court should grant Mr. Johnson's case further appellate review.

Respectfully submitted,

Maurice Johnson,

By his attorney,

/s/ Christopher DeMayo

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CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE MASS. R. A. P. 16(K)

I, Christopher DeMayo, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs. In particular, the section Why FAR Is Appropriate is 1,922 words long.

/s/ Christopher DeMayo

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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify that on this date of February 3, 2023 I served Maurice Johnson's Application For Further Appellate Review on the Commonwealth by sending copies via efileMA to counsel of record, John Wendel, ADA.

/s/ Christopher DeMayo

_____

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ADDENDUM

21-P-769 Appeals Court

COMMONWEALTH vs. MAURICE JOHNSON.

No. 21-P-769.

Hampden. September 8, 2022. - January 19, 2023.

Present: Meade, Milkey, & Massing, JJ.

Firearms. Armed Assault with Intent to Murder. Assault and Battery. Evidence, Hearsay, Past recollection recorded, Identification, Authentication, Opinion, Argument by prosecutor. Practice, Criminal, Hearsay, Argument by prosecutor, Duplicative punishment, Lesser included offense, Sentence. Identification. Witness, Police officer.

Indictments found and returned in the Superior Court Department on February 27, 2019.

The cases were tried before Jane E. Mulqueen, J.

Christopher DeMayo for the defendant.
John A. Wendel, Assistant District Attorney (William T. Joyce, Assistant District Attorney, also present) for the Commonwealth.

MASSING, J. The defendant, Maurice Johnson, was captured on video surveillance footage shooting Dewayne Thomas (victim) in broad daylight on a residential street in Springfield. As

the victim ran away up the street, a woman emerged from the passenger's side of the car the victim had been leaning against. The woman was the defendant's ex-girlfriend, Renae Fraser. The defendant could not be identified from the surveillance footage alone, but three days later, both the victim and Fraser came forward to the police and, in videotaped interviews, identified him. After a jury trial, where the victim and Fraser were far less cooperative, the defendant was convicted of numerous crimes.[1]

Many of the defendant's arguments on appeal concern the evidence the Commonwealth used to compensate for the victim's and Fraser's recalcitrance at trial. The defendant claims that Fraser's videotaped interview, incriminating electronic communications the defendant sent to the victim prior to the shooting, and certain statements of the lead police investigator should not have been admitted. He also challenges several aspects of the prosecutor's closing argument. Finally, he contends that his convictions of and sentences for unlawful

[1] The defendant was found guilty of armed assault with intent to murder, G. L. c. 265, § 18 (b); assault and battery by discharging a firearm, G. L. c. 265, § 15E; possession of a firearm, rifle, or shotgun during the commission of a felony, G. L. c. 265, § 18B; unlawful possession of a loaded firearm, G. L. c. 269, § 10 (n); and unlawful possession of a firearm under G. L. c. 269, § 10 (a), as a prior offender with one predicate offense, G. L. c. 269, § 10G (a). The jury acquitted the defendant of armed carjacking, G. L. c. 265, § 21A.

possession of a firearm, unlawful possession of a loaded firearm, and possession of a firearm, rifle, or shotgun during the commission of a felony are duplicative. We affirm.[2]

Background. We summarize the evidence, reserving some details for later discussion. One afternoon in August 2018, the victim and Fraser, who were seeing each other at the time, were together at a laundromat in Springfield washing clothes. Fraser pointed out a man sitting in a car outside the laundromat holding his cell phone towards them and taking pictures or videotaping. Fraser, who had dated the defendant a few years earlier, recognized the man as the defendant's friend, Davis Charles.

The same day the victim received messages via the Facebook Messenger application on his cell phone from someone with the username "Dollaz." The sender identified himself as "Mo" and told the victim to come see him at the "Motorcycle Building" on State Street because "I gotta holla at u." Mo accused the victim of "fukkin wit Renae," to whom Mo referred as "my girl." Mo added, "We gotta problem now," and directed the victim to

[2] The defendant was at liberty on probation when he committed these crimes. His arrest for the shooting prompted the revocation of his probation, which the defendant challenges in a separate appeal. In a separate memorandum and order issued today, we dismiss that appeal.

"pull up" at "837 State Street." The victim thought the messages were "funny" at the time and went about his day.

After the victim and Fraser did some more errands, the victim was driving his car down a residential street when he decided to pull over to talk with a friend he saw standing on the sidewalk. The victim left the car; Fraser remained in the front passenger seat waiting for him. The victim returned to his car and was leaning against it using his cell phone when two men approached on foot. The victim recognized one of them as the man who had been taking pictures or videotaping him and Renae at the laundromat. The other man stepped off the sidewalk, said, "What's up," and started shooting at the victim, who turned to run away. One bullet pierced the victim's left arm from back to front, breaking a bone. The victim was able to run to his grandmother's house, which was nearby, and was taken to the hospital for treatment.

Fraser, still inside the vehicle, saw the victim run past her. She got out of the car and saw the defendant and Charles standing nearby. When the defendant entered the driver's side of the victim's car, Fraser reentered the passenger's side and tried to take the keys out of the ignition. Despite Fraser's efforts to stop him, the defendant was able to drive away, leaving Fraser and Charles behind. The Springfield police recovered the victim's vehicle the next day, parked across the

street from the former Indian Motorcycle Building at 837 State Street, the address given in the Facebook Messenger communications.

Three days after the shooting, the victim and Fraser went to the Springfield police station. There, Detective Jose Canini administered to the victim two photographic arrays. The victim selected the defendant's photograph with one hundred percent certainty and wrote on it, "This is the guy that shot me." During his ensuing interview with the lead investigator, Detective James Crogan, the victim confirmed his identification. During Fraser's interview, conducted by Detective Joseph Brodeur, she also identified the defendant as the shooter, and Charles as another person involved. The police arrested the defendant at Charles's apartment located at 837 State Street.

Discussion. 1. Evidentiary issues. a. Past recollection recorded and prior identification. At trial, Fraser testified about going to the laundromat with the victim, seeing Charles photograph or videotape them with his cell phone, remaining in the passenger seat of the victim's car when the victim got out to speak with some friends, and then seeing the victim run past the car. However, Fraser said she could not remember hearing shots fired, who fired them, or anything else that happened. Based on Fraser's claimed lack of memory, the Commonwealth sought to introduce her videotaped interview under the hearsay

exception for past recollection recorded. See Mass. G. Evid. § 803(5) (2022). Before ruling on the admissibility of the interview, the trial judge permitted the parties to conduct voir dire examination of Fraser, as well as Crogan and Brodeur. Based on the voir dire testimony, the trial judge found that the videotaped interview met the criteria for past recollection recorded.[3]

"A recording may be admissible under the hearsay exception for past recollection recorded if '(i) the witness has insufficient memory to testify fully and accurately, (ii) the witness had firsthand knowledge of the facts recorded, (iii) the witness can testify that the recorded statement was truthful

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[3] "So I do find . . . under past recollection recorded . . . that the witness has an insufficient memory to testify fully and accurately, that the witness had firsthand information of the facts that have been recorded in the prior statement, that the witness can testify that the recorded statement was truthful when made -- in fact, she did so testify -- and that the witness made or adopted the recordings -- recorded statement when the events were fresh in the witness's memory."

The judge also found that Fraser was "feigning this memory loss" and that the videotape was therefore also admissible substantively. See Commonwealth v. Sineiro, 432 Mass. 735, 741-742 (2000); Mass. G. Evid. § 801(d)(1)(A) & note. To date, prior inconsistent statements admitted for their truth have been limited to statements under oath: grand jury testimony, testimony from a prior trial, testimony at a probable cause hearing, and affidavits filed in connection with an application for an abuse prevention order under G. L. c. 209A. See Commonwealth v. Belmer, 78 Mass. App. Ct. 62, 64-65 (2010). Because we conclude that Fraser's unsworn statements in the videotape were admissible on other grounds, we need not consider this issue further.

when made, and (iv) the witness made or adopted the recorded statement when the events were fresh in the witness's memory.'" Commonwealth v. Da Lin Huang, 489 Mass. 162, 179 (2022), quoting Mass. G. Evid. § 803(5) (2021). The defendant challenges only the judge's conclusion that the first foundational element of this test was met, arguing that Fraser did in fact have sufficient recollection to testify fully and accurately, but that she was simply unwilling to do so.

The judge did not err in finding that Fraser's memory was insufficient. At trial, Fraser repeatedly professed a lack of memory, stating variously, "I don't remember," "I don't really remember," "I can't remember exactly," "Everything was a blur," and "It happened very fast." She was thus able to testify only partially, but not fully or accurately, about the shooting. See Commonwealth v. Nolan, 427 Mass. 541, 544 (1998) ("Although she testified on the stand to certain events of importance to the prosecutor's case, she confessed to a lack of recollection of other details. . . . A witness's inability to remember details of an event described in a statement can justify the discretionary admission of the statement if it otherwise meets the test for admissibility").

It is not the case that Fraser's "memory was fully 'revivable,' [but] inconsistent with her prior statement." Commonwealth v. Vuthy Seng, 456 Mass. 490, 501 (2010), quoting

Nolan, 427 Mass. at 543. Fraser insisted she could not remember the details of the shooting. Even if she was unwilling, rather than unable, to recall the details, see note 3, supra, the exception still applies. Fraser was able to, and did, "assert that the record correctly represented [her] knowledge and recollection at the time of making" (emphasis added). Commonwealth v. Greene, 9 Mass. App. Ct. 688, 690 (1980), quoting 3 Wigmore, Evidence § 746(2) (Chadbourn rev. ed. 1970). "It is exactly where, as here, the witness does not have a present memory and hence is currently unable or unwilling to adopt her prior statement as true, that prior written statements are admissible for their full probative value, in the discretion of the trial judge, as past recollection recorded." Greene, supra at 690–691. The judge did not abuse her discretion in admitting the videotaped interview of Fraser as past recollection recorded.

In addition, the most damaging aspect of the interview, from the defendant's point of view, was Fraser's identification of him as the assailant. As Fraser was subject to cross-examination, her statements naming the defendant as the culprit were independently admissible under the hearsay exception for extrajudicial identifications by a witness. See Commonwealth v. Cong Duc Le, 444 Mass. 431, 435-441 (2005); Mass. G. Evid.

§ 801(d)(1)(C).[4] Prior identification evidence is admissible substantively to address situations, as here, when subsequent events "may later cause a witness to claim an inability to make an identification at trial, or to disclaim ever having had any basis for the prior identifications." Cong Duc Le, supra at 441. Fraser's identification of the defendant was properly admitted under the hearsay exception for prior identification evidence as well as for past recollection recorded.

b. Authenticity of electronic communications. The Commonwealth asserted that the defendant wrote the Facebook messages the victim received from "Mo," using the "Dollaz" account, and that they established a motive for the shooting: the defendant had a "problem" with the victim and wanted to confront him because of his involvement with Fraser. The defendant argues that the judge erred in admitting the messages because they were not authenticated.

"Authentication is a preliminary determination of fact, which a judge must make prior to admitting evidence." Commonwealth v. Sargent, 98 Mass. App. Ct. 27, 30 n.4 (2020). See Mass. G. Evid. §§ 104(b), 901(a). The judge performs "a

[4] For the prior identification exception to the hearsay rule, the cross-examination requirement is satisfied if the witness takes the stand and is permitted to answer questions, Cong Duc Le, 444 Mass. at 436-438, 442, even if the witness "claims not to remember or disavows the prior identification," id. at 440.

gatekeeper role" to determine whether the jury "could find that the item in question is what its proponent claims it to be." Commonwealth v. Meola, 95 Mass. App. Ct. 303, 308 (2019). "In the case of a digital communication that is relevant only if authored by the defendant, a judge is required to determine whether there is sufficient evidence to persuade a reasonable trier of fact that it is more likely than not that the defendant was the author of the communication." Id. See Commonwealth v. Oppenheim, 86 Mass. App. Ct. 359, 366-367 (2014) (preponderance of evidence standard governs determination of authorship). Evidence that the communication came from an account in the name of the purported author is not enough, see Commonwealth v. Purdy, 459 Mass. 442, 450 (2011); Meola, supra at 314-315 -- nor is it required, see Oppenheim, supra at 361, 368. In assessing the authenticity of a communication, the judge may look to "confirming circumstances" that would allow a reasonable jury to conclude that the defendant was the source. Purdy, supra at 448-449, citing Commonwealth v. Hartford, 346 Mass. 482, 488 (1963). See Meola, supra at 311; Mass. G. Evid. § 901(b)(11).

The confirming circumstances were many. A photograph of the defendant associated with the "Dollaz" Facebook Messenger account was entered in evidence. The author of the messages identified himself as "Mo" and referred to Fraser, the defendant's ex-girlfriend, as "my girl." The author knew that

the victim was seeing Fraser; his friend and accomplice, Charles, had photographed the victim and Fraser doing laundry together that same day. The author provided the victim with an invitation to "pull up" at a specific address: the location of the former Indian Motorcycle Building in Springfield, now an apartment building. The victim's car was found parked across the street from the building the day after the shooting, and the defendant was arrested in Charles's apartment there a few days later. See Meola, 95 Mass. App. Ct. at 314 (sufficient confirming circumstances where communication came from Facebook account in defendant's name, with profile picture of his daughter, and revealed intimate and personal details known to defendant and few others); Oppenheim, 86 Mass. App. Ct. at 368 (instant message matched defendant's tone and referred to details of previous conversations between defendant and recipient). Because the confirming circumstances were sufficient for the jury to determine, by a preponderance of the evidence, that the defendant wrote the Facebook Messenger communications to the victim, the judge did not err in admitting them in evidence.[5]

[5] Contrary to the argument in the defendant's brief, the resolution of this issue is not remotely "governed" by Commonwealth v. Salyer, 84 Mass. App. Ct. 346 (2013). In Salyer, harassing messages received by the alleged victim over a social media platform were admitted de bene based on the Commonwealth's representation that later testimony would link

c. Officer's opinion of defendant's guilt. During direct examination, the Commonwealth asked Detective Crogan several questions regarding why the police investigation quickly focused on the defendant and Charles to the exclusion of other suspects. Crogan replied, without objection, that evidence discovered in the police investigation was consistent with the victim's and Fraser's accounts, giving the police confidence that they were investigating "the right individuals." The defendant argues for the first time on appeal that Crogan's testimony amounted to an improper opinion as to his guilt. See Commonwealth v. Hamilton, 459 Mass. 422, 439 (2011); Commonwealth v. Hesketh, 386 Mass. 153, 161-162 (1982). Police witnesses may, with caution, properly discuss steps taken in an investigation to corroborate witnesses' accounts. See Commonwealth v. Ahart, 464 Mass. 437, 442-443 (2013). Cf. Commonwealth v. Rosario, 430 Mass. 505, 509-510 (1999). Crogan's statement that the police had arrested "the right individuals," however, crossed the line into improper opinion evidence.[6] Because the defendant failed to preserve the

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the messages to the defendant. Id. at 350. We held that defense counsel provided ineffective assistance by failing to move to strike unauthenticated messages when the foundational evidence never materialized. Id. at 355-356.

[6] We are not persuaded by the Commonwealth's argument that Crogan's testimony was a proper response to a suggestion by the defense that the police investigation prematurely focused on the defendant to the exclusion of other suspects. The day before Crogan testified, the defendant requested a jury instruction

issue, we review the admission of Crogan's testimony only to determine if it created a substantial risk of a miscarriage of justice. See Commonwealth v. McCoy, 456 Mass. 838, 850 (2010).

"The substantial risk standard requires us to determine 'if we have a serious doubt whether the result of the trial might have been different had the error not been made.'" Commonwealth v. Azar, 435 Mass. 675, 687 (2002), S.C., 444 Mass. 72 (2005), quoting Commonwealth v. LeFave, 430 Mass. 169, 174 (1999). We entertain no such doubt. The evidence of the defendant's guilt was overwhelming. The Commonwealth produced a video recording of the shooting, two eyewitness identifications -- one by a witness who knew the defendant intimately -- and communications from the defendant dramatically demonstrating his motive and intent and leading the police to his whereabouts. Moreover, "[t]he detective's opinion was implicit in his decision to move forward with the investigation." Hamilton, 459 Mass. at 439. See Commonwealth v. Gallagher, 91 Mass. App. Ct. 385, 389 (2017) ("the prejudice flowing from this opinion would be relatively

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pursuant to Commonwealth v. Bowden, 379 Mass. 472 (1980), but the request was based on the Commonwealth's failure to obtain deoxyribonucleic acid evidence. The defense never argued that the investigation was flawed for failure to consider other suspects, and even if it had, the "right individuals" testimony would have gone too far. See Commonwealth v. Avila, 454 Mass. 744, 756 n.12 (2009) (stressing need for caution in permitting Commonwealth to rebut Bowden defense, as response may result in "impermissible expression of opinion of the defendant's guilt").

modest given what must have been obvious to the jury"). "In the circumstances, we conclude that the improper testimony would not have materially influenced the verdict." Hamilton, supra.

2. Prosecutor's closing argument. The defendant contends that various remarks in the Commonwealth's closing argument were improper. The defendant timely objected to all but one of the challenged arguments. We consider the prosecutor's remarks "in the context of the entire argument, and in light of the judge's instructions to the jury and the evidence at trial." Commonwealth v. Martinez, 476 Mass. 186, 200 (2017), quoting Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224, 231 (1992).

The defendant takes issue with the prosecutor's statement, "These people, they have to go home to these neighborhoods. They're scared." The defendant asserts that this argument had no basis in the evidence and suggested that the witnesses, including the victim and Fraser, were reluctant to identify the defendant because they feared retaliation. Prosecutors of course may not misstate the facts, but they may argue forcefully for a conviction based on the evidence and reasonable inferences favorable to the Commonwealth's case. See Martinez, 476 Mass. at 200; Commonwealth v. Donovan, 422 Mass. 349, 357 (1996); Commonwealth v. Kozec, 399 Mass. 514, 516 (1987).

In context, the prosecutor's challenged remark referred to just one peripheral witness and was grounded in the evidence.

Crogan, who responded to the crime scene, testified that the police were able to get "very, very little information" from the residents of the neighborhood where the shooting occurred because they "just would not talk."[7] Sonya Daley, who came forward later and was interviewed at the police station with her attorney present, testified that her reaction to the shooting was to "duck and run." On the witness stand, she was "so nervous" that she had difficulty speaking. It was in this context that the prosecutor argued, "[L]et's look at the testimony of Sonya Daley. She was there. She saw what had happened. She wouldn't even tell the police what she really saw until she sat down with her lawyer with the police. These people, they have to go home to these neighborhoods. They're scared." The prosecutor went on to summarize Daley's testimony.

The defendant contends that the prosecutor's argument here was similar to that disapproved in Commonwealth v. Silva-Santiago, 453 Mass. 782, 805-810 (2009), in which two companions of the murder victim, given an opportunity to identify the defendant at the crime scene, failed to do so. The prosecutor argued, with no basis in the evidence, that the two witnesses recognized the defendant but refrained from identifying him

[7] The defendant objected when Crogan said that there was a "no snitching atmosphere" at the scene. The judge heard the parties at sidebar but never expressly ruled on the objection.

because they were "too scared." Id. at 806. Unlike in Silva-Santiago, the evidence here supported the prosecutor's argument. Daley's actions during the shooting, her delay in coming forward, and her demeanor on the stand permitted the inference that she was in fact scared. The prosecutor's reference to "these people" was a poor choice of words, but if the jury interpreted the comment more broadly than intended, it was unlikely they would have understood the prosecutor to be referring to the victim or Fraser. In context, it is clear that the prosecutor was referring to Daley and to the other neighbors who declined to speak with the police.

The defendant argues for the first time on appeal that the prosecutor impermissibly vouched for the victim's credibility during her closing argument when she stated, "And we know that it was that defendant, because again, four days later when [the victim] had nothing to do but tell the truth -- he's still in pain with a broken arm, shot, through and through gunshot wound. He says . . . 'This is the guy that shot me.'" We review this unpreserved claim to determine whether any error created a substantial risk of a miscarriage of justice. See Commonwealth v. Alphas, 430 Mass. 8, 17 (1999).

The prosecutor's argument was a proper response to defense counsel's summation, in which he argued at length that the victim's prior identification was unreliable and that he was

being truthful on the witness stand when he refused to confirm it. A prosecutor may comment on "a witness's demeanor, motive for testifying, and believability, provided that such remarks are based on the evidence, or fair inferences drawn from it, and are not based on the prosecutor's personal beliefs." Commonwealth v. Freeman, 430 Mass. 111, 118-119 (1999). Moreover, "[w]here, as here, defense counsel in closing argument challenges the credibility of the [victim], it is proper for the prosecutor to invite the jury to consider whether the [victim] had a motive to lie and to identify evidence that demonstrates that the [victim's] testimony is reliable." Commonwealth v. Dirgo, 474 Mass. 1012, 1014 (2016). See Mass. G. Evid. § 1113 & note (discussing improper vouching). The prosecutor did not inject her personal belief or imply that she had any special knowledge outside the evidence to verify the victim's prior identification. See Commonwealth v. Grier, 490 Mass. 455, 470-471 (2022).

The defendant's remaining closing argument claims do not require extended discussion. The prosecutor's argument that the defendant got "very close" to the victim and was "right up on top of him" before shooting him "at close range" was a reasonable description of the video surveillance footage. Likewise, the prosecutor's summary of Fraser's recorded interview -- including Fraser's statement that "it was obvious"

that the defendant shot the victim -- was supported by the evidence.[8] In any event, the deliberating jurors were provided with the exhibits, which they could consider in light of the judge's instructions that the arguments of the attorneys were not evidence and that the jurors were to "follow their own recollection" of the evidence.

The defendant's claim of improper closing argument is not advanced by the fact that the prosecutor argued, without evidentiary support, that the police did not obtain deoxyribonucleic acid evidence because "[t]he technology doesn't exist." In response to the defendant's objection, the judge promptly supplied a specifically tailored curative instruction, informing the jury that this argument was "a misstatement by the Commonwealth" and directing them to disregard it. Even considering the defendant's closing argument claims collectively, see Commonwealth v. Loguidice, 420 Mass. 453, 454

[8] Fraser was asked during her interview whether she saw a gun in the defendant's hand. She responded, "That's not what I was looking for, but it's obvious." When the detective suggested that either the defendant or Charles could have had a gun, Fraser said, "Well, both hands were up and facing the direction that he was, that [the victim] . . ." (The surveillance footage shows only one man, the defendant, with both hands up in a shooting stance). The prosecutor summarized the above exchange as follows: "[The detective] asked her, you know, 'Who was shooting? Did you see who was shooting?' And she responded it was obvious. It was obvious that it was [the defendant] who was -- who shot [the victim]. He had his hands up."

(1995), there was no prejudicial error or any error creating a risk of a miscarriage of justice.

3. Claims of duplicative punishments. a. Defendant's sentences for firearm offenses. The jury found the defendant guilty of the crime of unlawful possession of a firearm in violation of G. L. c. 269, § 10 (a). At the subsequent jury-waived trial under the so-called armed career criminal act, G. L. c. 269, § 10G, the judge found that the defendant had one prior conviction for a "serious drug offense." See G. L. c. 269, § 10G (e) (defining term "serious drug offense").[9] Accordingly, the judge sentenced the defendant to an enhanced State prison term of from ten to twelve years for the § 10 (a) conviction. See G. L. c. 269, § 10G (a) ("Whoever, having been previously convicted of a violent crime or of a serious drug offense, both as defined herein, violates the provisions of paragraph [a], [c] or [h] of [§] 10 shall be punished by imprisonment in the state prison for not less than three years nor more than [fifteen] years"); Commonwealth v. Richardson, 469 Mass. 248, 252 (2014).

[9] The term "armed career criminal" is reserved for offenders with three qualifying prior convictions. See Commonwealth v. Richardson, 469 Mass. 248, 252 n.8 (2014); Commonwealth v. Anderson, 461 Mass. 616, 626 n.10, cert. denied, 568 U.S. 946 (2012). An offender with one prior conviction of a violent crime is a "prior violent offender." Richardson, supra. We refer to the defendant, with one prior conviction of a serious drug offense, as a "prior offender."

The § 10 (a) conviction also formed the foundation for the defendant's conviction of unlawful possession of a loaded firearm in violation of G. L. c. 269, § 10 (n). For this crime, the judge sentenced the defendant to a two and one-half year house of correction term, to be served from and after the ten to twelve year sentence for unlawful possession of a firearm as a prior offender. See G. L. c. 269, § 10 (n) ("Whoever violates paragraph [a] or paragraph [c] [of G. L. c. 269, § 10], by means of a loaded firearm, . . . shall be further punished by imprisonment in the house of correction for not more than [two and one-half] years, which sentence shall begin from and after the expiration of the sentence for the violation of paragraph [a] or paragraph [c]").

In addition, the jury found the defendant guilty of possession of a firearm, rifle, or shotgun during the commission of a felony, in violation of G. L. c. 265, § 18B. The § 18B indictment did not specify the underlying felony. The judge instructed the jury that the charges of (1) armed assault with intent to murder, (2) armed carjacking, and (3) assault and battery by discharge of a firearm all qualified as felonies. The jury convicted the defendant of the first and third of these felonies as well as possession of a firearm, rifle, or shotgun during their commission. The judge sentenced the defendant to a State prison term of from four to five years for the § 18B

conviction, to be served concurrently with the sentence for unlawful possession of a firearm as a prior offender.[10]

The defendant takes issue with several aspects of his sentence. First, he argues that the § 10 (a) conviction is a lesser included offense of the § 18B conviction and must be vacated as duplicative. It follows, he contends, that because § 10 (n) is not a freestanding crime, see Commonwealth v. Taylor, 486 Mass. 469, 474-475 (2020); Commonwealth v. Brown, 479 Mass. 600, 604 (2018), if the § 10 (a) conviction is vacated, the § 10 (n) conviction will lack a foundation and must also fall. Finally, he argues that the single § 10 (a) conviction cannot be the basis for two sentencing enhancements, § 10 (n) and § 10G (a). Because the defendant raises these issues for the first time on appeal, we review under the substantial risk of a miscarriage of justice standard. See Commonwealth v. Kelly, 470 Mass. 682, 699 (2015); Commonwealth v. Thomas, 401 Mass. 109, 119 (1987). See also Commonwealth v. Constantino, 443 Mass. 521, 526-527 (2005) (convicting defendant twice for same offense gave rise to substantial risk of miscarriage of justice).

[10] The judge also imposed State prison sentences of from ten to twelve years with respect to the convictions of armed assault and assault and battery, to be served concurrently with the sentences for the § 18B conviction and for unlawful possession as a prior offender.

b. Lesser included offense. The defendant argues that under the same elements test of Morey v. Commonwealth, 108 Mass. 433, 434 (1871), later adopted by the United States Supreme Court, see Blockburger v. United States, 284 U.S. 299, 304 (1932), because all of the elements present in § 10 (a) are included in § 18B, his conviction for the former must be vacated as duplicative of his conviction for the latter. The Commonwealth responds that § 10 (a) is not a lesser included offense because it requires unlawful possession of a firearm -- in this case, without a license, see G. L. c. 269, § 10 (a) (2)-(3) -- whereas the Commonwealth can obtain a conviction under § 18B even if the defendant legally possessed the firearm.

The Commonwealth's argument, however, potentially runs afoul of the well-established rules concerning the burden of proof under § 10 (a), whereby the absence of a license is not considered to be an element of the crime, but rather an affirmative defense.[11] See Commonwealth v. Gouse, 461 Mass. 787, 802-803 & n.17 (2012), and cases cited therein. Our case law does not address the treatment of affirmative defenses in the

[11] The Commonwealth is not required to prove the absence of a license as an element to obtain a conviction under § 10 (a), see Gouse, 461 Mass. at 802-803 & n.17 ; Commonwealth v. Young, 453 Mass. 707, 713 n.9 (2009), but if the defendant comes forward with evidence of licensure, the Commonwealth carries the ultimate burden of proving its absence beyond a reasonable doubt. Gouse, supra at 802.

Morey same elements analysis. The Federal circuit courts that have addressed the issue in the context of the Blockburger test are split on the issue. See United States v. Davenport, 519 F.3d 940, 945 (9th Cir. 2008) (affirmative defenses not considered elements for purpose of Blockburger analysis); Aparicio v. Artuz, 269 F.3d 78, 98 (2d Cir. 2001) (same); United States v. Franchi-Forlando, 838 F.2d 585, 591 (1st Cir. 1988) (affirmative defenses properly considered under Blockburger test). The United States Court of Appeals for the First Circuit, in permitting the consideration of affirmative defenses, observed that the Blockburger decision itself "found a difference between two similar statutes based on the fact that one of them contained an affirmative defense." Franchi-Forlando, supra. Ultimately, we need not resolve this issue.

Even if § 10 (a) were considered a lesser included offense of § 18B for the purpose of the Morey-Blockburger test, we would still conclude that the Legislature intended separate punishments for the two crimes. The same elements test is a rule of statutory construction. See Commonwealth v. Rodriguez, 476 Mass. 367, 371 (2017); Commonwealth v. Cabrera, 449 Mass. 825, 827 (2007). The Legislature is free to impose multiple punishments, so long as the intent to do so is manifest. See Commonwealth v. Alvarez, 413 Mass. 224, 232 (1992), overruled in part on other grounds by Commonwealth v. Kelly, 484 Mass. 53, 62

n.7 (2020) ("Where the Legislature has specifically authorized cumulative punishment under two statutes, even if the two statutes proscribe the same conduct under the Morey test, a court's job of statutory construction is terminated, and the intent of the Legislature is to be enforced").

We are confident that the Legislature intended for separate punishments for the unlawful possession of a firearm and its use in the commission of a felony. The language of § 18B itself states that punishment thereunder shall be "in addition to the penalty" for the underlying felony, G. L. c. 265, § 18B, even if the underlying felony includes the use of a firearm as an element.[12] See Commonwealth v. Thomas, 484 Mass. 1024, 1025-1026 (2020), overruled in part on other grounds by Commonwealth v. Rossetti, 489 Mass. 589, 613-614 (2022). The Legislature's intent in § 10 (a) was to address "[t]he menace of dangerousness posed to individuals and communities by the possession of illegal firearms." Vega v. Commonwealth, 490 Mass. 226, 233 (2022). The Legislature's intent in § 18B was to impose more severe, additional punishment commensurate with the additional

[12] A prior version of § 18B stated, "This section shall not apply in the case of any felony in which the offense consists in whole or in part of using a dangerous weapon." G. L. c. 265, § 18B, as amended by St. 1984, c. 189, § 162. The Legislature removed this language when it amended the statute in 1998. See St. 1998, c. 180, § 56; Commonwealth v. Thomas, 484 Mass. 1024, 1026 & n.7 (2020).

danger created by possessing a firearm (in the colloquial sense) during the commission of a serious crime.

The defendant argues that because § 10 (a) is itself a felony, the Commonwealth could charge a defendant under § 18B for possession of a firearm during the unlawful possession of a firearm, a patently absurd result. We agree that the Legislature did not intend to authorize charging a defendant in that manner. But that is not what happened here. The defendant was convicted under G. L. c. 265, § 18B, for possessing a firearm while he committed two felonies against a person. Moreover, his unlawful possession of a firearm under G. L. c. 269, § 10 (a), was a distinct offense subject to distinct punishment under a different regulatory scheme enacted for other purposes. See Commonwealth v. Porro, 458 Mass. 526, 534 (2010) (noting relevance, in application of Morey test, of "Legislature's statutory grouping" of offenses); Commonwealth v. Crocker, 384 Mass. 353, 361 (1981) (for purposes of discerning legislative intent, placement of crimes in different chapters of General Laws "further[s] distinct legislative policies"). The two sentences and convictions are not duplicative.[13]

[13] Deciding as we do that the defendant's § 10 (a) conviction survives, the foundation for his conviction and punishment under G. L. c. 269, § 10 (n), remains in place.

c. Multiple sentencing enhancements. The defendant argues that his sentences for unlawful possession of a firearm as a prior offender under § 10G (a) and for unlawful possession of a loaded firearm under § 10 (n) cannot both stand because they amount to two sentencing enhancements for a single violation of § 10 (a). See Richardson, 469 Mass. at 254 ("we will not presume, absent a clear statement, that the Legislature intended to impose multiple sentencing enhancements to a single underlying offense"). We disagree. The defendant was not subject to two sentencing enhancements, and he was sentenced in accordance with the Legislature's intent.

The defendant's sentence for unlawful possession as a prior offender under § 10G (a) was a traditional sentencing enhancement. That is, because of his prior conviction of one serious drug offense, his violation of § 10 (a), normally punishable by a maximum State prison sentence of five years, was instead punishable by a term of up to fifteen years. See G. L. c. 269, §§ 10 (a), 10G (a); Richardson, 469 Mass. at 252. His conviction under G. L. c. 269, § 10 (n), however, did not operate as second sentence enhancement. A violation of § 10 (n), while not a freestanding crime, "deviates from traditional sentencing enhancements." Taylor, 486 Mass. at 476. The statute does not increase the punishment for unlawful possession of a firearm based on a prior conviction; "instead of

leading to a single, longer sentence, the statute mandates two consecutive sentences." Id. See G. L. c. 269, § 10 (n) (violating § 10 [a] "by means of a loaded firearm . . . shall be further punished" by house of correction sentence, which "shall begin from and after the expiration of the sentence for the violation of paragraph [a]").

Thus, while the defendant's punishment for unlawful possession of a firearm under § 10 (a) was "enhanced" under § 10G (a) to a term of from ten to twelve years, he also received, in accordance with § 10 (n), "further" punishment for unlawful possession of a loaded firearm: a "from and after" house of correction sentence of two and one-half years. The defendant was properly sentenced in accordance with the legislative scheme.

Judgments affirmed.

THE COURT: -- stopping in front of it, but that does not connect him to drug activity, so I don't -- I think it was a comment on facts not in evidence. Do you want me to reiterate this instruction?

MS. VIVENZIO: Please.

THE COURT: Okay. All right.

(Sidebar concluded at 2:13 p.m.)

THE COURT: All right. Ladies and gentlemen, as I told you prior to beginning this phase, that there are certain types of arguments that are not allowed to be made by the attorneys. One of the examples, attorneys are not permitted to refer to facts that are not in evidence in this case. If, based on your memory and your understanding of the evidence, a lawyer does, you should disregard that comment.

Commonwealth, are you prepared to go forward with your closing at this time?

MS. VIVENZIO: I am. If I could just have a minute to get a couple of things in order.

(Pause)

CLOSING ARGUMENT ON BEHALF OF THE COMMONWEALTH

MS. VIVENZIO: Ladies and gentlemen, on August 24th, 2018, in the middle of the afternoon, this defendant, Maurice Johnson, shot Dwayne Thomas on Massachusetts Avenue right here in Springfield. Dwayne Thomas was with his girl, and he was not going to have it. He simply wasn't. In this case, we have

actual video of the incident, ladies and gentlemen. We can see the events as they transpire. You have seen the events as they transpire.

We're gonna pull this out a little bit so you can actually see it as we play it. You have the video in evidence. You'll have a laptop in the deliberation room. You can watch it. You can stop it. You can back it up. You can watch it again. I encourage you to, please, watch this video. Take your time with it.

You have seen, ladies and gentlemen, how very close this defendant got to Dwayne Thomas before he started shooting. You see he enters the screen, and he keeps approaching, and he keeps approaching, and he keeps approaching. And I'm gonna play it for you in a second, but it's not until he gets 'til right about here when he starts to diverge and starts to open fire on Dwayne Thomas. He gets right up on him, right up on him.

You see him entering the screen. Two men approaching, getting closer, and closer, and closer, and now he starts to sort of diverge here, and he gets closer, and that's when he pulls the gun out, ladies and gentlemen. You have that exhibit. See him pointing the gun right at Dwayne Thomas. He is right up on top of him, ladies and gentlemen. You can't get into the mind of another individual, but you can look at their actions, and that is intent to kill.

If he just wanted to scare him, he could have fired a house

away. He could have fired when he got to the next driveway. He could have fired when he got to the front gate. Anytime earlier, or he could have just pulled out the gun and waved it, but he didn't. He waited until he got right up on top of him, and that's when he shot at Dwayne Thomas, who turned and ran and fled for his life.

And we know he was struck at some point. We don't know exactly when, but we know he was hit, and we know he was shot at, at close range. That is intent to kill, and that, ladies and gentlemen, I would suggest to you is also uncontroverted evidence of assault and battery by means of a firearm.

Now the video evidence here is consistent with much of the witness's testimony, certainly not all of it, but much of it. Dwayne Thomas himself confirmed that two men, both were African American men, one was bigger than the other, that they walked up on him and that the smaller guy began shooting. He hadn't met the shooter before, which is consistent with what we know. He said he thought he recognized the bigger guy. The bigger guy who he identified he was with the shooter.

He just doesn't -- he doesn't write on here, "This is the guy from the laundromat." He doesn't. He wrote with his opposite, "He was with the shooter." And we know who this is. This is Davis Charles. We know who Davis Charles is. It's Maurice Johnson's good friend, and we know that from Renae Fraser who knows Maurice Johnson. And we know how certain he

was that identification. He was 100 percent sure.

He also told us and provided the evidence when this happened, not a year and a half later when maybe things might have changed for him. He told Detective Brodeur that -- Detective Crogan that he had received messages, threatening messages, beforehand, and we have them. Here they are. August 24th, 1:17 p.m., probably between the laundromat and Massachusetts Avenue, "Yo, aye, yo, hold up real quick. My name Moe." Short for Maurice? Sounds about right. "I'm on State Street at the Motorcycle Building. Come through. You was with my girl, right? You f'ing with Renae, right? We got a problem now." 837 State Street, the same location where Davis Charles lives. The same location where Maurice Johnson was arrested five days later.

And we heard Dwayne Thomas's testimony here in court. I mean, he tried to explain why he picked this individual out, but what we know is he told Detective Crogan that immediately afterwards, three days later, what he saw and what he did and what he thought. He told him as he got close, I'm trying to recognize, like, who is this guy.

So his attention was drawn to him. He was trying to recognize the guy. Something in his mind clicked, pay attention to this. "Because I see the Facebook, he's texting me, and it didn't look like the guy on Facebook. He looked skinner." The last thing he said was the guy on Facebook, and he looked

skinner. I suggest yeah. He does look skinnier than the defendant. It's an older picture. He does look skinner.

And you heard evidence that this was the picture connected with Maurice -- with Moe Dollaz's Facebook account. This is the picture. This is the person who was texting him. This was the person who was messaging him threatening messages an hour before he shot him. And we know that it was that defendant, because again, four days later when Dwayne Thomas had nothing to do but tell the truth -- he's still in pain with a broken arm, shot, through and through gunshot wound. He says -- he doesn't say, "This is the guy I recognize from Facebook." These are his words in his own hand. "This is the guy that shot me." These are his words, his very own description. He chose these words. He wrote these words. He meant these words, ladies and gentlemen, because this is the guy who shot him.

Now Your Honor will instruct you that you can believe -- you're the judges of the credibility of witnesses. You are. You can believe part of what a witness says, some of what a witness says, all of what a witness says, or none of it. You get to decide how much importance to give to that witness's testimony, and you get to draw from your own common sense and like experience. And I ask you to please do that. Common sense in this case is going to be crucial important. Please apply it to the evidence in this case.

And let's look at the testimony of Sonya Daley. She was

there. She saw what happened. She wouldn't even tell the police what she really saw until she sat down with her lawyer with the police. These people, they have to go home to these neighborhoods. They're scared. She told us that Dwayne Thomas pulled up, parked underneath the tree, that his grandmother lives around the corner, that when she was talking to him, she was out there going to pick up her grandchild from school or from the bus. It was about 2:30 in the afternoon. And she said that she saw two young, who she described as black men, walk up -- and she testified she heard two gunshots. All of that is consistent with the evidence, ladies and gentlemen.

She said that Dwayne Thomas took off, and he ran towards his grandmother's house on Dunmoreland Street, which is right around the corner from Westford Circle. Consistent again with the physical evidence, with the video evidence, and with the evidence that both Dwayne and Renae Fraser told the police in the immediate aftermath. And she also told us that the shooter took Dwayne's car. Consistent with the video evidence. Consistent with the physical evidence.

You heard expert testimony that semiautomatic weapons discharge casings when fired, and that most commonly they discharge some distance to the right of the weapon. Now I ask you again to compare the video evidence, where this individual is standing, right here, to where the physical evidence was collected from, and that's Exhibit 7, off and to the right.

You'll see two markers there, the live rounds and the discharged casing. Marker number one is the live round on the front of the driveway. What I suggest you can tell from this exhibit, from Exhibit 7, and from the -- the still image of the defendant holding the weapon -- you can watch the video as many times as you'd like -- is that that's a firearm, ladies and gentlemen. It's a small James Bond-like weapon. We know it's capable of discharging a bullet because it did. Dwayne Thomas got shot by the person who's holding that gun. We know it's smaller than 16 inches because 16 inches is long, and that is not 16 inches. And it's described as a small James Bond-like weapon. It's a firearm, ladies and gentlemen.

We don't have it here in the courtroom. Do I wish we did? But we don't. You heard the expert ballistician say that he analyzed that casing and that it had been discharged from a weapon, so we know it was -- we know it was fired. And you heard multiple witnesses talk about hearing gunshots. In fact, even Renae Fraser said it was obvious that there were gunshots. Sonya Daley said she heard two gunshots. Dwayne Thomas said he heard gunshots, and he was shot.

We also know that it was a firearm because of the gunshot primer residue in the car that was taken. And I -- it's important that it -- not only was it found in the car, but it was also found right near the gear shifter, where the right hand of the shooter would have touched first. That's where the

majority of the gunshot primer residue particles were found.

Now I'm gonna ask you to watch really closely what the defendant does next, okay? He shoots Dwayne Thomas, who runs off, cuts over towards the sidewalk, and then watch Dwayne -- watch the defendant go to the opposite side of the car and take aim again. He lines himself back up with Dwayne Thomas, and he takes aim again. That, ladies and gentlemen, is this defendant ensuring Dwayne Thomas cannot return, ensuring Dwayne Thomas has to abandon his vehicle.

There he goes. I don't know if you could see that, but he raises the weapon again. Cuts back over, and he raises that weapon again. At this point, he's making sure that Dwayne Thomas can't come back, ladies and gentlemen. And that's him deciding he's taking that car, too.

And let's look at what happened next. Now this is important. As you saw the car door was beginning to open after the first shot, as soon as Dwayne Thomas fled down the street, it's already starting to open, but watch what the defendant does now. He sort of backs up behind the car and crouches down to see what's happening, to see who's opening that car door. Peeking around, taking a look. Now they know each other. And watch what he does next. She starts right up the driveway, and he turns. And what is he doing there? Now he's still armed, and he turns towards her while she's up that driveway.

He's hiding behind the car still, but he turns towards

Renae Fraser, and this is when we know she recognizes him, ladies and gentleman. Now she's heard gunshots, as we know. Now she's a little confused about what's happening, but at this point, she's up towards the driveway. What does she do next, ladies and gentlemen? What does he do next? He makes a bolt towards that driver's side door, and so does she. She comes right back to that car. And watch, ladies and gentlemen. I suggest to you she gets right into that car. Here he goes. Making the bolt. Look at her come right back to that car. And now where is she, ladies and gentlemen?

She's inside of that car right now, and she's doing whatever she can to try to stop this carjacking from happening. But as you heard, she's not having any luck. She can't get the key out of the ignition without turning the car off. She's not able to accomplish it, but she tries. And look at how long she stays in that car. She testified here on the stand that she was in that car for three seconds. Ladies and gentlemen, play it. Watch the counter. It's a little messy to read. The counter is way up at the top, but right now we're at 14:33:28. She stays into that car -- she stays in that car and next to that car for 15, 16 seconds, at least. And I ask you to watch it. Take your time. Rewind it if you need to.

There she is. She pops back out. She's still there, still there. And look who's right behind her. Right exactly there. Immediately. It looks like she turns and sees him face to face.

Car backs up, she backs up with it. Car goes forward, she goes forward with it. And that's not enough, ladies and gentlemen. She don't give up yet. She chases that car down the street, and who's right there with her? Davis Charles the whole time, who she knows. She doesn't just chase the car for seconds. She goes two full houses up the street and completely out of view, ladies and gentlemen. All the way up the street, she chases it, ladies and gentlemen, 'til we can't even see her anymore.

Collectively, ladies and gentlemen, that is uncontroverted evidence of what happened. The Commonwealth burden of proof is beyond a reasonable doubt, and I welcome that burden. Beyond a reasonable doubt is not beyond all possible or speculative doubt. It's a reasonable doubt, ladies and gentlemen, and there is no reasonable doubt in this case. Everything in our lives is possible to some -- is subject to some possible or speculative doubt, but here, what we have is uncontroverted evidence of what happened and uncontroverted evidence, identification after identification after identification.

Now any suggestion that there's some script that the Commonwealth is putting before you is -- does not hold water because the fact of the matter is, ladies and gentlemen, the authors of those scripts are the people who were there that day, the people who came in and told detectives exactly what happened not knowing there was a video of it, and it all lined exactly up. It is their words, ladies and gentlemen, that I'm asking

you to believe. The testimony of Renae Fraser to Detective Brodeur.

He may have started with the identification of Maurice Johnson, ladies and gentlemen, but that's so we would know who she was talking about. And you heard her say she got out of the car and there were two boys. "Did you recognize the boys?" "Yes." "Do you know their names?" "Yes." "What are their names?" "Maurice and Davis." It may not have been easy for her, but she told him what happened. And you know who Maurice is. That's Maurice Johnson, this defendant sitting right there, ladies and gentlemen.

Now she didn't testify the same when she came in here, but we know that a lot has happened since then and now. We know that he called her well over a thousand times, almost 2,000 times. Think about that. Think about how many calls that is a day from May 31st to July 25th. That's a lot of phone calls over and over and over. "Take the money I gave you." What's that? She denied it on the stand. You heard her own -- you heard him say it to her in his own words. And you heard her tell Detective Brodeur. And you heard his testimony. He didn't even -- he wasn't part of the investigation. He didn't just come in on that money and fill in on this -- on this interview. He was getting up to speed as it ran along, so he asked her, you know, "Who was shooting? Did you see who was shooting?" And she responded it was obvious. It was obvious that it was

Maurice Johnson who was -- who shot Dwayne Thomas.

He had his hands up. This is what she told us, ladies and gentlemen. And then he took Dwayne Thomas's car, and he drove away. And he left it right on the other side of the Motorcycle Museum, where we know he hangs out because that's where he was arrested. He left the GSR in the gear shifter. He left it on the steering wheel.

You know, we don't have DNA. The technology doesn't exist. Do I wish it did? But that doesn't change it. It doesn't change the facts of this case. It doesn't change the evidence in this case, and it doesn't change the fact that this defendant is guilty beyond a reasonable doubt.

He possessed the firearm. He did so while he was committing a felony. He shot Dwayne Thomas. And Renae Fraser's own words at the close of the evidence, that's everything. This defendant opened fire on Dwayne Thomas at close range. He hit him. He hit him just -- just shy of center mass, ladies and gentlemen, on the back of his forearm. That, I submit, is assault with intent to murder -- armed assault with intent to murder. He shot him. He struck him with a bullet discharged from a firearm. That, I submit to you, is assault and battery by a firearm.

When he pulled the gun out and caused Dwayne Thomas to flee and went around the car, took aim again, he ensured Dwayne Thomas could not return. That, ladies and gentlemen, is intent

to steal that car. That is armed carjacking, and he continued that struggle preventing Renae from stopping him. She tried. She couldn't. He resisted, and he took that car. That, ladies and gentlemen, I submit is armed carjacking. And all this time, he had a firearm.

Ladies and gentlemen, I am gonna ask you to return a guilty verdict on all charges as charged. Thank you very much.

MR. RARING: May I be heard?

THE COURT: You may. I'll see counsel at sidebar.

(Sidebar commenced at 2:38 p.m.)

MR. RARING: So briefly I just wanted to say objection -- some objections to the Commonwealth. One is that we know he fired at close range. That's not in evidence. We don't know at what range it was fired.

THE COURT: What do you mean by that?

MR. RARING: Well we don't know at what point Dwayne -- we don't know at what point -- at what point in the scenario Dwayne is actually hit. There's not any evidence that supports that.

MS. VIVENZIO: The evidence was that he said he -- he began shooting, and that's why he ran.

THE COURT: And (indiscernible).

MR. RARING: The Commonwealth said that these people have to go home to these neighborhoods. They're scared. It's not in evidence, and it's inflammatory. She said it was obvious that it was Maurice Johnson. That it was in a statement of Renae's

shooting at issue.[7] The remedy is to remand the case for the trial judge to vacate one of the two sentencing enhancement counts. *Id*. at 256. Given the integrated structure of the sentence here, a full resentencing on all counts is appropriate. *See Harrison*, 100 Mass. App. Ct. 376 at 397.

Second, defense counsel made a misstatement at the sentencing hearing which may have led Judge Mulqueen to impose a consecutive sentence on the G.L. c. 269, § 10(a) and (n) counts which she would not have otherwise imposed. Counsel recommended:

> On Count 5, which is the unlawful possession of a loaded firearm, I'm not – I must admit I'm not entirely sure how the merger with Count 6 is going to work. But I envision that that would remain as a – as a sentence, and we're asking for the max two and a half years to the House of Corrections, *and it must be from and after the object [sic], which is Count 6*. We're asking for 18 months from and after Count 6, 18 months at the House of Corrections from and after Count 6.

[7:25 (emphasis added)]. Counsel's concession was unnecessary. Section 10(n) imposes "further punish[ment] by imprisonment in the

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[7] Different facts are required to establish the two enhancements since § 10(n) requires that the gun be loaded whereas § 10G requires a prior violent crime or serious drug offense. But this was true in *Richardson*, as well, which involved enhancements under § 10(d), requiring a prior firearm offense, and § 10G, which requires a prior violent crime or serious drug offense (but not necessarily one involving a firearm).

house of correction for not more than 2½ years, which sentence shall begin from and after the expiration of the sentence *for the violation of paragraph (a) or paragraph (c)* (emphasis added)." In other words, there is no requirement that a § 10(n) sentence be imposed from and after every other sentence, only from and after the § 10(a) component of the sentence.

It is unclear from the record whether the judge relied on defense counsel's concession when imposing the from-and-after portion of Mr. Johnson's sentence. While her sentence was lawful, the judge had already sentenced Mr. Johnson considerably above the guidelines on the lead charges, so the from-and-after component may have been based on a misunderstanding. In such cases of potential misunderstanding, this Court has erred on the side of resentencing. *See Harrison*, 100 Mass. App. Ct. at 397 ("[W]e cannot affirm a sentence where it is based on a misapprehension of the law."). Again, given the integrated structure of the sentence, a full resentencing is appropriate. *See id.* (where "error may have played a part in the judge's over-all concept in sentencing" vacatur of entire sentence appropriate).

defendant's contention that "there is no reason to think the Legislature intended [him] to suffer multiple sentence enhancements" is plainly false. (D.Br. 34); see G. L. c. 269, §§ 10(n), 10G; Taylor, 486 Mass. at 476 n.9; Thomas, 484 Mass. at 1026; Richardson, 469 Mass. at 253-254; Bynum, 429 Mass. at 709. Thus, the trial judge properly sentenced the defendant pursuant to both sections. See Taylor, 486 Mass. at 476 n.9; Thomas, 484 Mass. at 1026; Richardson, 469 Mass. at 253-254; Bynum, 429 Mass. at 709.

B. The trial judge properly ran the defendant's sentence pursuant to G. L. c. 269, § 10(n), from and after his sentence pursuant to G. L. c. 269, § 10G.

The defendant also argues that, even if he may be sentenced pursuant to both statutes, he is entitled to resentencing because his attorney improperly conceded that his sentence pursuant to § 10(n) must run from and after his sentence pursuant to § 10G. (D.Br. 35-36). The defendant argues that this concession may have caused the trial judge to misapprehend the full range of options available to her. (D.Br. 36). But in addition to properly sentencing the defendant pursuant to both statutes, as discussed supra, the trial judge also properly ran the defendant's sentence pursuant to G. L. c. 269, § 10(n), from and after his sentence pursuant to G. L. c. 269, § 10G. See G. L. c. 269, §§ 10(n), 10G.

The defendant's suggestion that his attorney erroneously conceded anything is itself in error.[12] (D.Br. 35-36); see G. L. c. 269, §§ 10(n), 10G. As discussed supra, a sentence imposed pursuant to § 10(n) must run from and after the sentence imposed for violating § 10(a). G. L. c. 269, § 10(n). As also discussed supra, the sentence the trial judge imposed in this case pursuant to § 10G is a sentence imposed for violating § 10(a). See G. L. c. 269, § 10G. Therefore, the concession that the sentence as to Count 5 was required to run from and after the sentence for Count 6 was entirely correct. See G. L. c. 269, §§ 10(n), 10G. To the extent it appears the defendant wishes to have a sentence for § 10(n) imposed from and after a sentence imposed pursuant to § 10(a) but not from and after a sentence imposed pursuant to § 10G, doing so is impossible, as he received only a single sentence pursuant to both § 10(a) and § 10G. See G. L. c. 269, §§ 10(a), 10(n), 10G.

[12] Indeed, trial counsel's only erroneous argument was that the five-year minimum sentence for a violation of § 18B was also effectively a maximum sentence. (Tr. VII:28). The sentence the motion judge imposed as to Count 4, of not less than four and not more than five years in prison, was apparently based on that argument and was illegally short, but the Commonwealth is not seeking resentencing as to that count at this time. See G. L. c. 265, § 18B (setting a minimum sentence of five years in prison for a violation); Commonwealth v. Rosetti, SJC-13036, slip op. at 9-11 (May 5, 2022)(holding that, where a statute sets a minimum sentence, any sentence of incarceration must impose that minimum sentence as the lower end of an otherwise indeterminate sentencing range); Commonwealth v. Selavka, 469 Mass 502, 508 (2014)(the Commonwealth may move to correct an illegal sentence within sixty days of imposition under Mass. R. Crim. P. 29). The time has long passed to correct the sentence.

In his brief, the defendant notes that a sentence pursuant to § 10(n) need not be "imposed from and after every other sentence, only from and after the § 10(a) component of the sentence." (D.Br. 36); see G. L. c. 269, § 10(n). This is certainly true, but it fails to clarify what portion of trial counsel's sentencing argument he views as an erroneous concession. See id. While the trial prosecutor requested a sentence that would have the practical effect of running the defendant's sentence as to Count 5 from and after all other sentences, and while the trial judge in fact imposed such a sentence, trial counsel argued for a sentence as to Count 5 that would run from and after the sentence as to Count 6 but effectively concurrent with the sentence as to Count 1. (Tr. VII:25). Thus, the sentence trial counsel requested would have run the sentence pursuant to § 10(n) "only from and after the § 10(a) component of the sentence," entirely consistent with the defendant's understanding of the law. (D.Br. 36); see G. L. c. 269, § 10(n). Therefore, the defendant fails to even allege an erroneous concession by trial counsel, much less one upon which the trial judge may have relied to the defendant's detriment, and he is therefore not entitled to resentencing. (D.Br. 36); see Commonwealth v. Harrison, 100 Mass. App. Ct. 376, 397 (2021).

Thomas was that § 18B "creates an independent crime punishable by a separate sentence," *id*. at 1026, whereas it is settled law that § 10(n) does not. *See Commonwealth v. Taylor*, 486 Mass. 469, 473 (2020)("We conclude that G. L. c. 269, § 10(n), is not a freestanding crime."). So the whole argument collapses. *Richardson*, 469 Mass. at 252-55, controls the outcome here and requires vacatur of either the § 10(n) or § 10G sentence.

Finally, the Commonwealth argues where c. 269, § 10(n) says that a "sentence shall begin from and after the expiration of the sentence for the violation of paragraph (a) or paragraph (c)," one should substitute "the sentence imposed pursuant to § 10G" for "the sentence for the violation of paragraph (a)" because a "sentence … imposed … pursuant to § 10G is a sentence imposed for violating § 10(a)." [Comm. Br. at 45]. But a sentence imposed pursuant to § 10G is not a sentence imposed for violating § 10(a). It is a sentence imposed for violating § 10(a) (or (c)) *and* having committed a prior violent crime or serious drug offense. So the Commonwealth's reading of § 10(n) is on its face incorrect, and foreclosed by the rule of lenity (since it stretches the statutory language to reach a harsher result). *See Commonwealth v. Montarvo*, 486 Mass. 535, 542-43

(2020). There is no requirement that a § 10(n) sentence run consecutive to anything except a § 10(a) sentence. If there is no § 10(a) sentence (because, *e.g.*, a § 10G sentence was imposed in lieu of one) then the § 10(n) sentence need not run from and after any other sentence. Here, Judge Mulqueen may have credited defense counsel's erroneous concession on this point[6] when she chose to make the § 10(n) sentence consecutive, therefore resentencing is appropriate.

[6] It is hard to make sense of the Commonwealth's claims that Mr. Johnson "fails to clarify what portion of trial counsel's sentencing argument he views as an erroneous concession," "fails to even allege an erroneous concession by trial counsel," and the like [Comm. Br. at 46] given that page 35 of the opening brief contains a block quote of the relevant portion of defense counsel's argument, with key language italicized.