COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

HAMPDEN, SS. SJC No. 10461

COMMONWEALTH

V.

JASON LOADHOLT

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

SUPPLEMENTAL BRIEF AND APPENDIX FOR THE COMMONWEALTH

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II. **WHETHER THE STATUTORY PRESUMPTION SET OUT IN G.L. c.278, §7, AS APPLIED TO G.L. c.269, §10(h), DID NOT CREATE AN UNCONSTITUTIONAL PRESUMPTION SINCE ABSENCE OF A LICENSE IS NOT AN ELEMENT OF THE CRIME AND, AS A RESULT, THE COMMONWEALTH ADDUCED SUFFICIENT EVIDENCE OF THE CHARGE AGAINST THE DEFENDANT?**

STATEMENT OF THE CASE

The Commonwealth is not dissatisfied with the defendant's Statement of the Case, but reiterates that the instant appeal is limited to the consideration of the defendant's convictions on indictment numbers 06-679-2 and 06-679-3 charging that he possessed ammunition without a firearms identification card, in violation of G.L. c.269, §10(h)(1). The defendant's conviction for possession of a firearm without a firearm identification card ("FID"), in violation of G.L. c.269, §10(h), was reversed based on Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2532 (2009) on March 31, 2010, see Commonwealth v. Loadholt, 456 Mass. 411, 434 (2010). The defendant filed a writ of

certiorari to the Supreme Court of the United States, appealing the ammunition convictions (C.A./10-22). The Supreme Court remanded the case to this Court for further consideration in light of McDonald v. Chicago, --- U.S. ---, 130 S.Ct. 3020 (2010) (C.A./23). See Loadholt v. Massachusetts, 131 S.Ct. 459 (2010).

STATEMENT OF THE FACTS

The Commonwealth's Case:

On or about April 25, 2006, troopers from the Massachusetts State Police and officers from the Springfield Police Department approached the apartment building at 149 Allen Street in Springfield (Tr.I/132,204).[1] The officers had reason to believe that the defendant, Jason Loadholt, was at that address in Apartment A, and were attempting to arrest him (Tr.I/132). The building at 149 Allen Street was a multi-family apartment complex in a residential area (Tr.I/133).

Sergeant Sullivan, Troopers O'Toole and Devlin, and Officer Leonard entered the building into a common

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[1] The citations used in this brief are as follows: the trial transcript, which consists of three volumes, dated February 20, 21 and 22, 2007, is cited as (Tr.vol./page); the defendant's brief is cited as (Def.Br./page); and the Commonwealth's appendix is cited as (C.A./page).

hallway (Tr.I/134). The group of officers approached the front door of Apartment A, while Officers Croteau and Ingham approached the rear door (Tr.I/134,205). As they approached the front door, the men could hear music, and more than one voice in conversation (Tr.I/135,205). Trooper O'Toole knocked on the front door of the apartment and announced, "Police Department" (Tr.I/136,205). He noted that, after his knock, the music was turned down or off, and a female voice asked, "Who?" (Tr.I/136,205). Trooper O'Toole repeated that it was the police, but no one opened the door (Tr.I/136,206). Instead, he heard the sounds of running, scampering, or scuffling inside the apartment (Tr.I/136,205).

Upon hearing what sounded like several people running inside the apartment, Trooper O'Toole radioed to the officers at the back door to notify them of his observations (Tr.I/137,138). One of the officers at the back door responded that he observed a pair of men's sneakers outside the back door (Tr.I/138). Trooper O'Toole continued to knock and announce the presence of the police, to no avail (Tr.I/139).

After approximately three to four minutes, during

which time Trooper O'Toole knocked and announced the police presence continuously, a female finally opened the front door of the apartment (Tr.I/139,140,206). The woman was later identified as Lawanda Hill (Tr.I/140). She did not allow the police inside the apartment, but stood in the door and asked what they wanted (Tr.I/104,206). She was carrying a young child, who was later identified as her two-and-one-half year old son, Zierre (Tr.I/140,206).

Trooper O'Toole told Ms. Hill that the police were at the apartment to arrest Jason Loadholt (Tr.I/140,206). Ms. Hill stated that she was alone in the apartment with her child and Mr. Loadholt was not present (Tr.I/140). She was extremely nervous during this exchange, and Trooper O'Toole noted that she was evasive, shaking, trembling, and pacing, she did not make eye contact, and she continuously looked back into the apartment (Tr.I/141,207). She repeatedly denied that Mr. Loadholt was in the apartment (Tr.I/141). Trooper O'Toole asked Ms. Hill if the officers could enter the apartment and look for Mr. Loadholt (Tr.I/142). Ms. Hill consented to the entry of the officers, but asked if when they entered, she

could leave with her child (Tr.I/142). Trooper O'Toole asked Ms. Hill to remain in the apartment because he wanted to speak to her (Tr.I/143,202).

Once inside the apartment, Trooper O'Toole entered the living room while Sergeant Sullivan and Officer Leonard entered what appeared to be a child's bedroom (Tr.I/145). After looking under the bed and around the room, the officers approached the closed closet door (Tr.I/210). Sergeant Sullivan opened the closet door and found the defendant hiding inside (Tr.I/146,210-212). Sergeant Sullivan yelled for the defendant to put his hands where the officers could see them, and to exit the closet (Tr.I/146,210). Officer Leonard physically pulled the defendant out of the closet, and he and Trooper O'Toole placed the defendant on his stomach on the floor (Tr.I/148,211).

For the safety of the officers, Trooper O'Toole conducted a pat frisk of the defendant, and located a live .380 caliber hollow point bullet in his left front pants pocket (Tr.I/148,150,212,213). Trooper O'Toole immediately informed the other officers of the presence of the ammunition, and, in order to protect the safety of both the officers and of Ms. Hill and

her child, Sergeant Sullivan asked the defendant where the gun was located (Tr.I/152-153,213). As Trooper O'Toole continued to pat-frisk him to find the gun, the defendant responded that it was not on his person, but was in the closet of the other bedroom (Tr.I/153,213). Sergeant Sullivan and Officer Leonard approached the second bedroom and, after ensuring that no other individuals were present in that room, opened the closet (Tr.I/153,214). Sergeant Sullivan located a .380 caliber semi-automatic handgun on the shelf in the closet (Tr.I/153,214-217). A further examination of the handgun revealed that its attached magazine contained three live rounds of .380 caliber hollow-point ammunition which were the same as the round recovered from the defendant's pocket (Tr.I/219; Tr.II/7,9). The gun was later determined to be operable and to meet the definition of a firearm pursuant to Massachusetts law (Tr.I/222).

While Sergeant Sullivan and Officer Leonard located the firearm, Trooper O'Toole remained with the defendant (Tr.I/153). The defendant stated that the gun was his and that he did not want Ms. Hill to "get into trouble" (Tr.I/154-155). Trooper O'Toole then

told the defendant to stop talking, and advised him of his Miranda rights (Tr.I/155). The defendant agreed to speak to Trooper O'Toole and repeated that the gun was his, that he had hidden it in the closet, and that Ms. Hill did not know that it was in the apartment (Tr.I/156). The defendant was then taken out of the apartment and to a waiting police cruiser (Tr.I/156; Tr.II/43).

After the defendant was removed from the apartment, Trooper O'Toole spoke to Ms. Hill, told her that a gun and ammunition had been found, and requested her consent to search the rest of the apartment for her safety, as well as that of her son (Tr.I/157; Tr.II/16). In the presence of her mother, Ms. Hill signed the consent to search form allowing the officers to search the rest of the apartment (Tr.I/159; Tr.II/17). In a bureau in the same bedroom where the gun was recovered, officers found a box of live .380 caliber ammunition (Tr.I/160; Tr.II/17).

The Defendant's Case:

The Commonwealth is not dissatisfied with the defendant's statement of the evidence that he presented at the trial, but reiterates that the

defendant alone testified that he was an overnight guest in the apartment two or three times a week for approximately one month, and he did not testify that the apartment was his home (Def.Br./5).

ARGUMENT

I. G.L. c.269, §10(h)(1) PROPERLY REQUIRES A LICENSE TO POSSESS AMMUNITION, AND DOES NOT VIOLATE THE SECOND AMENDMENT TO THE UNITED STATES CONSTITUTION, AND THE DEFENDANT CANNOT CHALLENGE HIS CONVICTION FOR ILLEGALLY POSSESSING AMMUNITION WHERE HE DID NOT ASSERT OR MAKE ANY SHOWING AT TRIAL THAT HE APPLIED FOR A LICENSE TO POSSESS SUCH AMMUNTION AND WAS DENIED.

In his current appeal, the defendant challenges the constitutionality of the Massachusetts firearms statutes, which led to his conviction for possession of ammunition without an FID card (Def.Br./5-21). See G.L. c.269, §10(h); G.L. c.140, §131. The defendant asserts that the Massachusetts firearm statutes unconstitutionally limit the ability of a person to possess ammunition by requiring a license or permit (Def.Br./5-21). The defendant bases his constitutional claim on two recent Supreme Court cases: District of Columbia v. Heller, 128 S.Ct. 2783 (2008)("Heller"), which recognized an individual's right to bear arms -- apart from in a militia -- in the home for the purpose of self-defense based upon

the Second Amendment to the United States Constitution; and McDonald v. City of Chicago, 130 S.Ct. 3020 (2010)("McDonald"), which incorporated the individual's right recognized in Heller to the states through the Due Process clause of the Fourteenth Amendment. The defendant seeks to expand Heller and McDonald to create an unfettered right to possess ammunition in one's home or in public without any licensing limitations. The defendant's claim must fail.

As an initial matter, in the defendant's first appeal to this Court, he challenged his conviction for possession of a firearm, and, in light of Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), and its progeny, see Commonwealth v. Muniz, 456 Mass. 166 (2010), Commonwealth v. Vasquez, 456 Mass. 350 (2010), his conviction was vacated and a new trial was ordered. Commonwealth v. Loadholt, 456 Mass. 411 (2010).[2] The defendant's instant appeal is limited to

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[2] In the defendant's petition for certiorari, he makes reference to the firearms charges, as well as the ammunition charges, and challenges the constitutionality of both, despite the fact that the defendant successfully challenged his firearm conviction under Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), and its progeny (C.A./9-22). The

whether the McDonald case has any impact on the defendant's remaining convictions for the possession of ammunition without an FID card, in violation of G.L. c.269, §10(h).

The defendant's claims rely on Heller and McDonald, and the incorporation of the Second Amendment through the Fourteenth Amendment. In both Heller and McDonald, the Supreme Court deemed specific, local regulations or ordinances unconstitutional, since their application created an absolute ban, within a specific geographic area, on the legal possession of firearms in one's home for the purpose of self-defense.[3] The challenged Massachusetts statutes differ greatly and are not unconstitutional.

Supreme Court's order vacated the judgment of this Court, presumably as to the affirmation of the defendant's remaining convictions, and ordered further consideration in light of McDonald v. City of Chicago, --- U.S. ---, 130 S.Ct. 3020 (2010)(C.A./23). If the Supreme Court intended to remand the firearms charge as well as the ammunition charge for reconsideration, the firearms charge did not violate the defendant's Second Amendment rights, as set forth in Commonwealth v. Powell, 459 Mass. 572, 584-590 (2011).

[3] In District of Columbia v. Heller, 128 S.Ct. 2783 (2008), the Supreme Court addressed a District of Columbia regulatory scheme that regulated the carrying, licensing, and storage of firearms within the District. See D.C. Code §§7-2501.01(12), 7-

A. <u>Because the defendant did not challenge the constitutionality of the statutes in the lower court, he fails to present an adequate record for this Court's review; this Court should decline to address the issue</u>.

Because the defendant did not raise any constitutional challenge in the trial court, and raised the issue for the first time in his appellate brief in his first direct appeal, this Court should not address the defendant's claim. See Commonwealth v. Dockham, 405 Mass. 618, 632 (1989)(where defendant failed to challenge the constitutionality of a statute either prior to or during trial, this Court refused to address his claim). Pursuant to G.L. c.277, §47A and Mass. R. Crim. P. 13(c), any challenge to the validity of a statute should be raised pretrial in order to be adequately addressed by the trial judge and to create a proper appellate record. In fact, at his trial, the defendant's theory of the case was that he did not need any license or FID card since the ammunition did not belong to him and he did not live in the apartment

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2502.01(a), 7-2502.02(a)(4), 22-4504(a), 22-4506, and 7-2507.02. In McDonald v. City of Chicago, 130 S.Ct. 3020 (2010), the Supreme Court addressed two municipal codes that precluded the possession of firearms within Chicago and Oak Park, Illinois. See Chicago, Ill. Municipal Code §8-20-040(a)(2009) and Oak Park, Ill. Municipal Code §§27-2-1(2007) and 27-1-1 (2009).

where it was found (Tr.II/50,57,67-76). See Loadholt, 456 Mass. at 433. At no point did the defendant claim that he had the constitutional right to possess ammunition in the apartment or that he was denied a lawful license. "From an early day it has been an established principle in this Commonwealth that only persons who have themselves suffered, or who are in danger of suffering, legal harm can compel the courts to assume the difficult and delicate duty of passing upon the validity of the acts of a coordinate branch of government." Kaplan v. Bowker, 333 Mass. 455, 459 (1955). "Only one whose rights are impaired by a statute can raise the question of its constitutionality, and he can object to the statute only as applied to him." Commonwealth v. Gordon, 354 Mass. 722, 725 (1968). The Massachusetts licensing scheme, unless void on its face -- which the defendant does not claim -- imposes a legal harm only upon one who applies for a lawful license and is denied. Gordon, 354 Mass at 725. "Instead of applying for an FID card, the defendant chose to violate the law. In these circumstances, ... he may not challenge his conviction under G.L. c.269 §10(h)(1)." Commonwealth

v. Powell, 459 Mass. 572, 589-590 (2011). See Commonwealth v. Wallace, 460 Mass. 118, 122-123 (2011)(defendant cannot challenge the constitutionality of his conviction for unlawfully carrying a firearm in violation of G.L. c.269, §10(a) where the defendant failed to make a showing that he applied for a license and was denied).

Furthermore, the defendant did not claim at any point prior to his current appeal that the Second Amendment applied equally to ammunition and to firearms, or that the statute requiring licenses was unconstitutional. The defendant did not raise his new-found constitutional claim in his motion for a required finding of not guilty pursuant to Mass. R. Crim. P. 25. See Commonwealth v. Oakes, 407 Mass. 92, 94-95 (1990)(failure to raise "as applied" challenge to statute's constitutionality should be done in a motion for required finding). The defendant also chose not to pursue a motion for a new trial pursuant to Mass. R. Crim. P. 30(b), wherein both the defendant and the Commonwealth would have been afforded the opportunity to bring forth evidence as to the propriety of the firearms statutes regarding licenses

to possess ammunition, the reasoning and goals of the legislators in drafting the statutes, expert testimony relative to the statistical involvement of individuals in violent, firearms-related incidents, and whether this particular defendant was qualified to obtain a license or FID card to carry or possess ammunition.

Although this Court may choose to consider constitutional challenges not raised in the trial court, it does so only rarely any only in "response to a serious and obvious error creating a substantial risk of a miscarriage of justice." Oakes, 407 Mass. at 94-95. Such is not the case here, where the defendant has not demonstrated an obvious constitutional violation. The burden to raise the challenge to the validity of the statute rests with the defendant. There is no evidence in the record before this Court that the defendant attempted to obtain an FID card and was denied, or that he was qualified to apply for an FID card, or that he challenged the constitutionality of the firearms statutes' licensing provisions as applied to the possession of ammunition. See Powell, 459 Mass. at 582.

Successful constitutional challenges are difficult to mount because "[e]very rational presumption is indulged in favor of the validity of an act of the General Court." Campbell v. Boston, 290 Mass. 427, 429 (1935). "[The parties challenging the statute] carry a heavy burden in seeking to overcome the statute's presumption of constitutionality." American Mfrs. Mut. Ins. Co. v. Commissioner of Ins., 374 Mass. 181, 190 (1978). See, e.g., St. Germaine v. Pendergast, 416 Mass. 698, 703 (1993)("A statute is presumed to be constitutional, and the challenging party must demonstrate beyond a reasonable doubt that there are no conceivable grounds supporting its validity[,] .... a heavy burden ... [in the context of which] every rational presumption in favor of the statute's validity is made."(internal citation omitted)); Dupont v. Chief of Police of Pepperell, 57 Mass. App. Ct. 690, 693 (2003). The defendant chose to foreclose the Commonwealth's ability to present evidence in support of the validity of the ammunition statutes and pursued his constitutional claim based on the limited record developed below. Because the defendant failed to develop an adequate record for

appellate review, this Court should not address his claim that he was unconstitutionally denied the opportunity to exercise a fundamental right.

While it is true that, "in a prosecution for violation of a licensing statute which is unconstitutional on its face, the issue of its validity is presented even in the absence of an application for a license[,]" the Massachusetts licensing statute is not unconstitutional on its face. Gordon, 354 Mass. at 725. Contrast Commonwealth v. Carpenter, 325 Mass. 519, 521 (1950)(statute unconstitutionally void on its face for vagueness), and Alegata v. Commonwealth, 353 Mass. 287 (1967) (same). The defendant does not raise any claim that the statutes he challenges were vague or overbroad (Def.Br./5-21). Thus, the defendant's failure to challenge the constitutionality of the statute prior to his trial, or through a motion for a new trial, denied this Court an adequate record to review this case. Based on the paucity of the record before it, this Court should not consider the defendant's constitutional challenge.

B. If the Court chooses to address the constitutionality of the Massachusetts firearms

statutes as they apply to ammunition after Heller and McDonald, the statutes should be upheld.

To the extent that this Court chooses to address the defendant's claim, Heller and McDonald do not call the constitutionality of the Massachusetts firearms statutes, as applied to ammunition, into question. In Heller, the Supreme Court held that the Second Amendment created an individual right allowing a licensed gun owner to bear arms in his home for the purpose of self-defense. Heller, 128 S.Ct. at 2799, 2821-2822. Heller left open the issue of whether that individual right was limited to the federal government, or whether it applied to the states. Heller, 128 S.Ct. at 2813 n.23. McDonald answered that question in the affirmative and held that the individual right to possess firearms set out in Heller[4]

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[4] In McDonald, the Supreme Court clearly stated its understanding of the exact nature of the individual right it recognized when it stated, "in Heller, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense." McDonald, 130 S.Ct. at 3050. Any attempt by the defendant to extend the Second Amendment right that the Supreme Court addressed to other purposes and outside the home are without foundation in the Supreme Court cases. A review of the cases decided after Heller and McDonald demonstrates that the right recognized by the Supreme Court was limited to the right to possess a firearm inside one's home for self-defense. See e.g., United States v. Chester, 628 F.3d

was incorporated into the due process clause of the Fourteenth Amendment and applied to the states. McDonald, 130 S.Ct. at 3050. Neither case, however, absolutely precluded the states from regulating the licensing or possession of firearms, and neither addressed the issue of whether the protections afforded in the Second Amendment extend to ammunition.

While Massachusetts statutes do not allow a person to carry a firearm or ammunition outside his or her home or business without a license, see, e.g., c.269, §10(a), the Supreme Court has not recognized the right to carry a firearm in public as a "core right" guaranteed by the Constitution. In fact, the Court differentiated between the fundamental right to

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673, 676 (4th Cir. 2010); United States v. Skoien, 614 F.3d 638, 639-640 (7th Cir. 2010); United States v. Marzzarella, 614 F.3d 85, 92 (3rd Cir. 2010); United States v. Rene E., 583 F.3d 8, 12-13 (1st Cir. 2009); GeorgiaCarry.org, Inc. v. Georgia, 2011 WL 240108 *6 (M.D. Ga. January 24, 2011); United States v. Huet, 2010 WL 4853847 *9-11 (W.D. Pa. November 22,2010); Yohe v. Marshall, 2010 WL 4027797 *2-3 (D. Mass. October 14, 2010); Ezell v. City of Chicago, 2010 WL 3998104 *8 (N.D. Ill. October 12, 2010); Wilson v. Cook County, 2011 WL 488753 *1 (Ill. App. 1 Dist. February 9, 2011); People v. Dawson, 403 Ill. App. 3d 499, 505 (Ill. App. 1 Dist. 2010). At least one case specifically declined to extend the Second Amendment to the right to possess firearms in public. See Peruta v. City of San Diego, 2010 WL 5137137 *1 (S.D. Cal. 2010).

possess a firearm inside one's home for self-defense and the need to regulate the possession and carrying of a firearm on a public street or in public areas. Heller, 128 S.Ct. at 2816. The Court implicitly approved the regulation of the carrying of a firearm outside the home, due to the particular dangers posed to the public. Heller, 128 S.Ct. at 2816. The Heller and McDonald cases do not suggest any constitutional flaw in licensing and registration requirements; in fact, the relief ordered in Heller directed that he be permitted to register his handgun and that the District issue a license to carry the handgun in his home. Heller, 128 S.Ct. at 2822.

The defendant's claims that all Massachusetts statutes that require individuals to obtain licenses or and FID card in order to lawfully possess ammunition are unconstitutional in light of Heller and McDonald must also fail. The Supreme Court recognized that some regulation of firearms was lawful under the Second Amendment -- but precluded any absolute ban on one's possession of a firearm in one's own home for

the purpose of self-defense.[5] In McDonald, the Supreme Court stated that:

> It is important to keep in mind that Heller, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose...." We made it clear in Heller that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of firearms." ... We repeat those assurances here.

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[5] The defendant claims that his testimony that he occasionally stayed overnight in Miss Hill's apartment in connection with their romantic relationship made the apartment his "home" for the purposes of the Second Amendment, and afforded him the right to possess ammunition there for the purpose of self-defense (Def.Br./8-9). This claim, however, must fail, since neither Heller nor McDonald created a right to possess a firearm in a location apart from one's own home and in a location where one is a guest. The evidence at trial did not support the claim that the defendant lived in the apartment where he was found, and, in fact, in order to undermine the Commonwealth's constructive possession theory, the defendant denied that he lived there (Tr.II/50,57,67-76). Instead, he claimed that the ammunition at issue belonged to the apartment's residents and not to him (Tr.II/50,57,67-76). The defendant's attempt to have it both ways -- to assert that he resided at the apartment to support his Second Amendment argument under Heller and McDonald, after expressly disavowing that he lived there to support the defense theory that he did not constructively possess the ammunition -- must be rejected. The defendant cannot change tactics on appeal. See Commonwealth v. Merola, 405 Mass. 529, 539 (1989).

> ...[I]ncorporation does not imperil every law regulating firearms.

McDonald, 130 S.Ct. at 3047, quoting Heller, 128 S.Ct. at 2816-2817 (emphasis added). The regulations enumerated in Heller and adopted in McDonald are presumed to be lawful, and were included as examples. Heller, 128 S.Ct. at 2817 n.26. The Supreme Court went on to say that "[o]ur list [of presumptively lawful regulations on the possession of firearms] does not purport to be exhaustive." Heller, 128 S.Ct. at 2817 n.26.

The defendant seeks to expand Heller and McDonald -- which explicitly limited their rulings to the right to bear arms in one's home and for the purpose of self-defense -- to allow all individuals to carry firearms and ammunition anywhere, without any limitation of any kind (Def.Br./9-11). The defendant's argument implies that, in order to defend oneself, a person has the absolute right to carry a firearm and ammunition "anywhere a person happens to be" (Def.Br./11). Heller and McDonald explicitly rejected this argument and have acknowledged that the right conferred under the Second Amendment is not absolute, and only a total ban on the possession of

firearms was deemed unconstitutional. McDonald, 130 S.Ct. at 3047; Heller, 128 S.Ct. at 2817 & n.26.

The Massachusetts firearms statutes do not create a complete prohibition on the possession of a lawful firearm or ammunition in the home, as did the regulations that the Court struck down in Heller and McDonald.[6] Nothing in the Massachusetts statutes expressly or implicitly bans the possession of firearms or ammunition for all people. Under G.L. c. 140, §129B, qualified persons over the age of eighteen, or any qualified person over the age of fifteen who has his parent's permission, may apply to obtain an FID. Because an FID card allows the holder to legally possess a firearm and ammunition inside his own home or place of business, see G.L. c. 140, §129C, carrying a firearm or ammunition inside one's home or residence is not a criminal offense if the individual has a valid FID card. Commonwealth v. Seay, 376 Mass. 735, 742 (1978). Thus, any qualified person over the age of fifteen has the opportunity to legally possess a firearm inside his home for the purposes of self-defense. The Massachusetts statutes do not completely

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[6] See footnote 3.

prohibit people from legally possessing a firearm or ammunition inside their homes for the purpose of self-defense. Neither Heller nor McDonald indicated that the Second Amendment requires more.

The issue of whether ammunition is constitutionally protected, along with arms, as set out in the Second Amendment, has yet to be directly addressed by the Supreme Court, or by this Court. In Herrington v. United States, the District Court for the District of Columbia held that a total ban on ammunition would, in effect, render the right to possess a firearm useless since it would deny an individual the ability to use the weapon as it was intended. Herrington v. United States, 6 A.3d 1237, 1243 (DC 2010). In Commonwealth v. McCollum, the defendant raised the issue of the application of the Second Amendment to ammunition, and the Appeals Court stated:

> Assuming without deciding that Heller and McDonald apply to ammunition, an issue we need not reach, the Second Amendment does not protect the defendant in this case because the Commonwealth established at trial that [the apartment where the defendant was arrested] was not the defendant's home. Moreover, Heller and McDonald both expressly affirm the Commonwealth's right to regulate in this area with, inter alia, appropriate licensing requirements. See Heller,

> [128 S.Ct.] at 626-628 & n.26; McDonald, [130 S.Ct.] at 3047. The defendant's criminal history precluded his compliance with the Commonwealth's valid licensing requirements. See G.L. c.140, §131(d)(1). Accordingly, Heller and McDonald provide no basis for concluding that the defendant was unconstitutionally convicted of possession of ammunition without and FID card.

McCollum, 79 Mass. App. Ct. 239, 258 (2011).[7] The defendant's case is in exactly the same posture, as he was arrested in an apartment belonging to a girlfriend (Tr.I/140,146,148,157,159,210-212). The defendant was also previously convicted of armed robbery (Tr.II/60), which would have precluded him from complying with the licensing statute, see G.L. c.140, §131(d)(1), and placed him in one of the classifications -- convicted felons -- that the Supreme Court specifically stated could be precluded from gun ownership. See McDonald, 130 S.Ct. at 3047; Heller, 128 S.Ct. at 2816-2817.

Furthermore, regardless of whether the ruling in Heller and McDonald apply to ammunition, in the instant case, there was no absolute ban as was deemed unconstitutional in those cases. Thus, even if

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[7] On June 13, 2011, the defendant, McCollum, applied for further appellate review in his case, and his application is currently pending (FAR-19935). In addition, on July 19, 2011, McCollum filed a motion for a rehearing in the Appeals Court, which was denied on July 22, 2011 (2007-P-1881).

ammunition is afforded the same protection as firearms under the recent Supreme Court cases, the defendant was not precluded from lawfully possessing ammunition had he chosen to seek the appropriate licenses. Since under Massachusetts law there is no absolute preclusion to the possession of ammunition, the statutes do not run afoul of the doctrine set out in Heller and McDonald, and the defendant's constitutional rights were not violated.

II. THE STATUTORY PRESUMPTION SET OUT IN G.L. c.278, §7, AS APPLIED TO G.L. c.269, §10(h), DID NOT CREATE AN UNCONSTITUTIONAL PRESUMPTION SINCE ABSENCE OF A LICENSE IS NOT AN ELEMENT OF THE CRIME.

The defendant's claim -- that his conviction without proof that he did not possess a firearms identification card based on the statutory presumption set out in G.L. c.278, §7 was unconstitutional and violated his right to due process under the Fifth and Fourteenth amendments to the United States Constitution -- is without merit and must be rejected. As an initial matter, this issue is not properly before the Court because the defendant did not raise it at trial, in his direct appeal, or in his writ of certiorari to the Supreme Court (C.A./9-22).

Furthermore, the Supreme Court remanded the case to this Court for reconsideration of the case in light of McDonald v. Chicago, --- U.S. ---, 130 S.Ct. 3020 (2010), and did not invite this Court to consider new and unrelated issues dealing with the burden of proof and presumptions attendant to the state's licensing statutes (C.A./9-22). The defendant already has had a direct appeal in which he did not raise the claim he asserts here. Consequently, his substantive claims regarding the presumption set forth in G.L. c.278, §7 are waived, since waiver occurs when a litigant fails to raise at trial or on appeal a claim that he could have raised. See, e.g., Commonwealth v. Mahar, 442 Mass. 11, 13 n. 4 (2004); Commonwealth v. Randolph, 438 Mass. 290, 293 (2002); Commonwealth v. Terzian, 61 Mass. App. Ct. 739, 746 n. 9 (2004). As a result, this issue is not properly before this Court, and should not be considered.

To the extent this Court wishes to address this issue, the issue that the defendant raised in his supplemental brief was recently and clearly addressed in Powell, 459 Mass. at 582. In Powell, the defendant raised the identical claim that the defendant raises

in the instant case, albeit in the area of possession of a firearm, and not ammunition. Powell, 459 Mass. at 582. This Court soundly rejected the defendant's claim in Powell, and stated:

> The defendant argues that the Commonwealth presented insufficient evidence of possession of an unlicensed firearm because there was no evidence that he lacked a firearms license. He contends that, consequently, his conviction violates the due process clause of the Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. We repeatedly have held that in prosecutions under G.L. c.269, §10(a) and (h), the 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,[1] to come forward with such evidence. Commonwealth v. Colon, 449 Mass. 207, 225-226 (2007), quoting Commonwealth v. Tuitt, 393 Mass. 801, 810 (1985), and Commonwealth v. Jones, 372 Mass. 403, 406 (1977). In Commonwealth v. Jones, supra, we explained that the absence of a license is not "an element of the crime," as that phrase is commonly used. We went on to conclude that G.L. c.278, §7, did not create an unconstitutional presumption because it did not shift to the defendant the burden of proof on an element of the crime. Id. at 409. We have refused to revisit these conclusions, see Commonwealth v. Colon, supra, and find no reason to do so now.

Powell, 459 Mass. at 582. The reasoning equally applies here.

Furthermore, contrary to the defendant's claims, neither Heller nor McDonald ruled that the states lack the authority to require licensing for firearms or

ammunition. In fact, both expressly affirm the right of the states to regulate the possession of firearms with licensing requirements. See McDonald, 130 S.Ct at 3047; Heller, 128 S.Ct. at 2816-2818. The Commonwealth adduced evidence that the defendant actually possessed ammunition in his pants pocket, and that he admitted that there was an additional quantity of ammunition in a second bedroom (Tr.I/148,150,160,212,213,217; Tr.II/7,9,17). The defendant did not provide any proof that he possessed a firearms identification card that would have allowed him to lawfully possess the ammunition. As a result, the Commonwealth adduced sufficient evidence to support each element of the offenses charged under G.L. c.269, §10(h)(1), and the defendant's constitutional right to due process of law was not violated.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests this Honorable Court to affirm the defendant's convictions for indictment numbers 06-679-2 and 06-679-3, alleging possession of ammunition in violation of G.L. c.269, §10(h)(1).

Respectfully submitted,

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